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Country report

Gender equality

Austria

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Country report

Gender equality

How are EU rules transposed into national law?

Austria

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Reporting period 1 January 2022 – 1 January 2023

2023 Directorate-General for Justice and Consumers

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1 Introduction

1.1 Basic structure of the national legal system

Austria is a federal republic. Its legislation is based on the constitutional principles of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*)[1] and additional constitutional legislation which can be found in a variety of legal sources. Apart from this, there are state constitutional acts for the nine Austrian states (*Bundesländer*). State constitutional law may not contradict federal constitutional law. On a non-constitutional level, however, there is no hierarchy between state and federal law.

Constitutional changes usually require a two-thirds majority of votes in the national/state parliament(s) (*Nationalrat/Landtage*). For changes to non-constitutional law, a simple majority will generally suffice.

The federal constitution determines how the competence for legislation is split between the federal and the state level (Articles 10 to 15 of the Federal Constitutional Act). Non-discrimination and equal treatment legislation can be found in both federal and state law. For instance, the competence for legislating labour law and federal civil service statutes lies with the federal level, while legislation concerning state civil servants and contractual employees, including equal treatment rules, lies with the state level.

Administration is the responsibility of federal or state authorities, according to organisational rules laid out by Articles 7 and 101 to 104 of the Federal Constitutional Act.

The Austrian court system is organised according to both regional and subject matter jurisdiction. Civil and criminal cases are decided within the federal court system with the Supreme Court (*Oberster Gerichtshof, OGH*) as the final instance of jurisdiction. Depending on the subject matter, either general courts or specialised courts (labour court, commercial court, etc.) have competence to hear a case. Within the general court system, original jurisdiction usually lies with district courts (*Bezirksgerichte*). However, there are some exceptions, such as certain claims valued at over EUR 15 000, claims regarding data protection, and others; they usually fall under the jurisdiction of regional courts (*Landesgerichte*).

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 legal rules and administrative acts can be brought before the Constitutional Court (*Verfassungsgerichtshof*).

1.2 List of main legislation transposing and implementing the directives

Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz*, *GlBG*),[2] which also contains the guidelines for the equal treatment legislation for forestry and agricultural workers by the states in Part IV. Apart from federal legislation, federal states have also implemented non-discrimination legislation within their areas of competence (a full list can be found under 2.2).

[1] Federal Constitutional Act (*Bundes-Verfassungsgesetz*), BGBl. Nr. 1/1930 (WV) idF BGBl. I Nr. 194/1999 (DFB).

[2] Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz*, *GlBG*), BGBl. I Nr. 66/2004.

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

Act on the Equal Treatment Commission and the Ombud for Equal Treatment (*Gesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, GBK/GAW-Gesetz*).[4]

Prohibitions of discrimination against pregnant workers and parents, as well as respective protections and guarantees, are covered in several different laws, such as the Maternity Protection Act (*Mutterschutzgesetz, MSchG*),[5] the Paternity Leave Act (*Väter-Karenzgesetz*)[6], the Childcare Benefits Act (*Kinderbetreuungsgeldgesetz, KBGG*)[7] and others.

1.3 Sources of law

The Austrian legal system follows the civil law tradition, meaning that primary legal sources are generally codified. Decisions by courts and administrative bodies do not count as authoritative legal sources per se (no official adherence to precedent). Nonetheless, such decisions – especially by high courts – can develop a certain authority, since their interpretation of black-letter law is usually followed by lower courts and administrative bodies. 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 a dissenting view.

Apart from this, academic consensus (*herrschende Lehre*) is also relied upon when establishing the exact meaning and scope of legal sources.

The anti-discrimination and gender equality provisions of the relevant EU directives have been implemented by federal or state legislation. The legislator has mostly used the German language version of the relevant EU directives as national legal provisions. This approach has left room for interpretation of the relevant laws by the courts.

1.4 Main surveys, reports on gender equality and other issues

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 for Civil Servants.[8] Due to the continuing reporting and the comparability of the data, these reports give a good overview of the development and 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), although there tend to be fewer women in the highest pay groups. In areas where women are still under-represented (e.g. police forces and the military), the report provides a tracking tool for progress and instruments for fulfilling the obligations under the working Plan for the Advancement of Women

[3] Equal Treatment Act for Federal Civil Servants and Federal Contract Employees (*Bundes-Gleichbehandlungsgesetz*, B-GBG), BGBl. Nr. 100/1993.
[4] Act on the Equal Treatment Commission and the Ombud for Equal Treatment (*Gesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, GBK/GAW-Gesetz*), BGBl. Nr. 108/1979 idF BGBl. Nr. 577/1980.
[5] Maternity Protection Act (*Mutterschutzgesetz, MSchG*), BGBl. Nr. 221/1979.
[6] Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.
[7] Childcare Benefits Act (*Kinderbetreuungsgeldgesetz*), BGBl. I Nr. 103/2001.
[8] Federal Report on Equality 2020 (*Bundes-Gleichbehandlungsbericht 2020)*, available at: https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungsberichte/gleichbehandlungsberichte-des-bundes.html.

(*Frauenförderungsplan*). The second part of the report covers the activities of the Equal Treatment Commission (*Gleichbehandlungskommission*), providing an anonymised compilation of its cases.

Public reporting is also required for activities under the scope of the Equal Treatment Act for the Private Sector. The first part of the report covers an overview of the work of the Equal Treatment Commission, reporting by the Ministry of Labour on the implementation of equal treatment legislation, and reporting by social partners and other interest groups on equality (i.e. the Chamber of Labour, the Chamber of Commerce, and others). The second part of the report is issued by the Austrian equality body, the Ombud for Equal Treatment *(Gleichbehandlungsanwaltschaft*). It 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.[9] Moreover, the Ombud for Equal Treatment regularly publishes informational material on non-discrimination issues on its webpage, www.gleichbehandlungsanwaltschaft.gv.at.

From 2014 to 2016, the laws and instruments implementing gender equality (*Gleichbehandlungsinstrumente*) were evaluated by experts from within several ministries, including the Ministry for Women and the Ministry for Labour, as well as social partners and other interest groups. The results of the evaluation include proposals for developing the equality agenda and are available to the public.[10]

In 2010, the largest – to date – official and scientifically backed report on the situation of women with regard to equal treatment was published by the Minister for Women's Affairs (*Frauenbericht 2010*).[11] It has not been updated since.
Apart from these surveys and reports, the Chamber of Labour (*Arbeiterkammer*), as well as the Federal Statistics Office (*Statistik Austria*), may publish topical surveys and reports touching on equal treatment issues, available on their respective webpages, www.arbeiterkammer.at and www.statistik.at.

[9] Activity Report of the Ombud for Equal Treatment 2017 and 2018 (*Tätigkeitsbericht GAW 2017 und 2018*), available at: https://www.gleichbehandlungsanwaltschaft.gv.at/publikationen-und-links/taetigkeitsberichte.html.

[10] Expert Report on the Evaluation of the Instruments of Equal Treatment (*ExpertInnenbericht Evaluierung der Instrumente des Gleichbehandlungsrechts*), 2017, available at: https://www.bundeskanzleramt.gv.at/agenda/frauen-und-gleichstellung/gleichbehandlung/gleichbehandlungsberichte/evaluierung-der-instrumente-des-gleichbehandlungsrechts.html.

[11] Women's Report – Report on the Situation of Women in Austria between 1998 and 2008 (*Frauenbericht – Bericht betreffend die Situation von Frauen in Österreich im Zeitraum von 1998 bis 2008)*, 2010, available at: https://www.bundeskanzleramt.gv.at/service/publikationen-aus-dem-bundeskanzleramt/publikationen-zu-frauen-und-gleichstellung/studien-und-berichte.html.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Article 2 of the Austrian Basic Law (*Staatsgrundgesetz 1867*),[12] which is part of the Austrian Constitution, contains a general equality principle *('Vor dem Gesetze sind alle Staatsbürger gleich'* – meaning all citizens are equal before the law).

Article 7(1) of the Federal Constitutional Act (*Bundes-Verfassungsgesetz 1920, B-VG*) enhances the general equality principle by prohibiting preferential treatment based on sex, among other grounds. This Article serves as a constitutional principle for legislation and is an important benchmark for testing the constitutionality of legislation and administrative acts.

Article 7(2) establishes equal treatment between men and women as a constitutional objective. Constitutional objectives are meant to guide legislative bodies and, to some extent, administrative authorities; they do not, however, grant actionable individual claims. In order to achieve equality, positive action measures are considered constitutional.

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 (ECHR), together with most additional protocols, was ratified as national constitutional law and is thus directly applicable by national courts and administrative bodies. However, Austria has yet to ratify Protocol No. 12 (general prohibition of discrimination, expanding the limited scope of Article 14 ECHR).

Standing legal doctrine states that fundamental rights and constitutional principles apply only to relations between the state and individuals and have no direct horizontal effects (also: third-party effects, *Drittwirkung*). Indirect horizontal effects of fundamental rights are commonly recognised in legal doctrine and in case law.[13]

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 state level in 1993 (Equal Treatment Act for the Private Sector, Federal Equal Treatment Act for Civil Servants). 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. The Federal Equal Treatment Act for Civil Servants furthermore states that discrimination based on sex is

[12] Austrian Basic Law (*Staatsgrundgesetz 1867),* RGBl. Nr. 142/1867.
[13] For example, OGH 27.09.2013, 9 ObA 104/13d, ECLI:AT:OGH0002:2013:009OBA00104.13D.0927.000.

also qualified as a breach of duty (Paragraph 10), which may carry specific consequences, such as disciplinary measures and special forms of claims for damages.

Additionally, each Austrian federal state has adopted its own equal treatment legislation:

- Burgenland:
    - Act of 15 July 1997 on the Equal Treatment of Women and Men and the Promotion of Women in the Scope of the State and the Municipalities (*Burgenländisches Landes-Gleichbehandlungsgesetz – Bgld. L-GBG*), LGBl. Nr. 59/1997; and
    - Act of 8 July 2005 on the Prohibition of Discrimination Based on Ethnicity, Religion, Ideology, Disability, Age or Sexual Orientation (*Burgenländisches Antidiskriminierungsgesetz – Bgld. ADG*), LGBl. Nr. 84/2005).
- Kärnten (Carinthia):
    - Act of 23 September 2021 on the Equal Treatment of Women and Men and the Prohibition of Discrimination (*Kärntner Landes-Gleichbehandlungsgesetz 2022 – K-LGlBG 2022*), LGBl. Nr. 70/2021.
- Niederösterreich (Lower Austria):
    - Niederösterreich Equal Treatment Act (*NÖ Gleichbehandlungsgesetz – NÖ GBG*), LGBl. 2060-0; and
    - Niederösterreich Anti-Discrimination Act (*NÖ Antidiskriminierungsgesetz 2017 – NÖ ADG 2017*), LGBl. Nr. 24/2017.
- Oberösterreich (Upper Austria):
    - Act on the Equal Treatment of Women and Men in the Service of the State, the Municipalities and the Municipal Associations (*Oö. Gleichbehandlungsgesetz 2021 - Oö. GBG 2021*), LGBl. Nr. 76/2021; and
    - Act on the Prohibition of Discrimination Based on Ethnicity, Religion, Ideology, Disability, Age, Sex or Sexual Orientation (*Oö. Antidiskriminierungsgesetz - Oö. ADG*), LBGl. Nr. 50/2050.
- Salzburg:
    - Act of 1 February 2006 on the Equal Treatment in the Scope of the State, the Municipalities and the Municipal Associations (*Salzburger Gleichbehandlungsgesetz – S. GBG*), LGBl. Nr. 31/2006.
- Steiermark (Styria):
    - Act of 6 July 2004 Enacting a Law on Equal Treatment in the Scope of the State, the Municipalities and the Municipal Associations (*Landes-Gleichbehandlungsgesetz – L-GBG*), LGBl. Nr. 66/2004.
- Tirol (Tyrol):
    - Act of 17 November 2004 on Equal Treatment in State Civil Service (*Landes-Gleichbehandlungsgesetz 2005 – L-GlBG 2005*), LGBl. Nr. 1/2005;
    - Act of 17 November 2004 on Equal Treatment in the Service of Municipalities and Municipal Associations (*Gemeinde-Gleichbehandlungsgesetz 2005 – G-GlBG 2005*), LGBl. Nr. 2/2005; and

- Act of 1 February 2005 on the Prohibition of Discriminations (*Tiroler Antidiskriminierungsgesetz 2005 – TADG 2005*), LGBl. Nr. 25/2005.

- Vorarlberg:

  - Act on the Prohibition of Discrimination (*Antidiskriminierungsgesetz – ADG*), LGBl. Nr. 17/2005.

- Wien (Vienna):

  - Act on the Equal Treatment of Women and Men and the Promotion of Women as Civil Servants of the City of Vienna (*Wiener Gleichbehandlungsgesetz – W-GBG*), LGBl. 18/1996; and
  - Act on Combating Discrimination (*Wiener Antidiskriminirungsgesetz*), LGBl. Nr. 35/2004.

Furthermore, prohibitions of disability discrimination have been implemented in specialised legislation protecting individuals with disabilities in the workplace and in areas of everyday life (*Behinderten-Einstellungsgesetz, BehEinstG*[14] and *Bundes-Behinderten-Gleichstellungsgesetz, BGstG*[15]).

Equal treatment provisions consistent with EU law can also be found in a number of topical laws, such as the Maternity Protection Act (*Mutterschutzgesetz, MSchG*),[16] the Paternity Leave Act (*Väter-Karenzgesetz*),[17] the Childcare Benefits Act (*Kinderbetreuungsgeldgesetz, KBGG*),[18] a great number of different labour law and social security law acts and provisions, and others.

In addition to the equality and anti-discrimination legislation, the Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG)*[19] is of relevance, especially in the context of pay equality. It structures the process of collective bargaining and stipulates the legal relevance of collective bargaining agreements for working conditions (*Kollektivverträge*), including minimum pay. Additionally, it contains the rules and regulations for works agreements – agreements at company level between works councils and company management (*Betriebsvereinbarungen*), which can be used to implement positive action measures and work-life balance measures within a company. By law, the personal scope of collective bargaining agreements is extended to all employees of a sector, irrespective of their union membership. The same goes for works agreements – they are valid for all employees of a company.

Starting in the first half of the 20th century, Austrian labour law jurisprudence has also developed a non-specific requirement of equal treatment in working life (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*)[20] which differs conceptually from equal treatment as developed by EU law. It prohibits the arbitrary unfavourable treatment of employees. While it is not limited to enumerated grounds for discrimination, its scope is less comprehensive than the discrimination prohibition according to the equal treatment legislation based on EU law. For instance, it does not cover the conclusion and termination of employment relationships.

[14] Act on the Employment of People with Disabilities (*Behinderten-Einstellungsgesetz, BehEinstG*), BGBl. Nr. 22/1970.
[15] Act on the Federal Civil Service Employment of People with Disabilities (*Bundes-Behinderten-Gleichstellungsgesetz, BGstG*), BGBl. I Nr. 82/2005.
[16] Maternity Protection Act (*Mutterschutzgesetz, MSchG*), BGBl. Nr. 221/1979.
[17] Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.
[18] Childcare Benefits Act (*Kinderbetreuungsgeldgesetz*), BGBl. I Nr. 103/2001.
[19] Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG),* BGBl. No. 22/1974.
[20] See, e.g. OGH 20.09.1962, 4 Ob 105/62; Schrittwieser, B. (2012), *Gleichbehandlung im Arbeitsrecht*, VÖGB / AK Österreich p. 22.

3 Implementation of central concepts[21]

3.1 Sex/gender/transgender

3.1.1 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 term '*Gender'* has been used in German more widely in recent years, meaning both 'sex' and 'gender' interchangeably, as well as an umbrella term for most phenomena connected to sexual and gender identity. However, this debate has had little impact on binding legal terminology.

3.1.2 Protection of transgender, intersex and non-binary persons

Table 1: Protection of transgender, intersex and non-binary persons

Are gender identity / transgender status / intersex status / sex characteristic etc. specific grounds of prohibited discrimination?	**Is discrimination against transgender, intersex and non-binary persons forbidden on the basis of the existing prohibition on sex discrimination?**
No. However, the Constitutional Court has held in a ground-breaking decision[22] in 2018 that the protection of private and family life of Article 8 ECHR includes the protection of an individual's sexual integrity and that thus, Article 8(2) ECHR prevents the Austrian legislator from violating the sexual integrity of intersex individuals in the realm of civil registry law (*Personenstandsrecht*) by only recognising two sexes, instead of a third option (inter/diverse/…). Since then, it has been possible to check a third box (apart from male and female) when officially registering one's sex on official forms. This third option is often labelled 'diverse' or 'other' or 'prefer not to say', etc.	Yes. Non-discrimination based on '*Geschlecht*', e.g. in Paragraph 3 of the Federal Equal Treatment Act for Civil Servants, can be legally interpreted as also, in principle, covering intersex and trans people, as well as protection of individuals undergoing gender-affirming surgery, among others.

3.1.3 Specific requirements

Transgender individuals*

It is not necessary to have undergone gender reassignment surgery in order to change an individual's assigned birth gender on official documents and registries.[23] Case law has defined the circumstances under which a sex change has to be carried out by officials:

A decision by the Austrian Administrative Court (*Verwaltungsgerichtshof*, *VwGH*) states that if a person has undertaken 'gender-corrective measures that have led to a significant approximation to the appearance of the other sex', the civil registry office

[21] See Burri, S. (2018), *EU gender equality law – update 2018*, European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/4767-eu-gender-equality-law-update-2018-pdf-444-kb.
[22] VfGH 15.06.2018 G77/2018, ECLI:AT:VFGH:2018:G77.2018.
[23] VwGH 27.02.2009, 2008/17/0054, ECLI:AT:VWGH:2009:2008170054.X02.

(*Personenstandsbehörde*) needs to recognise the sex change if there is a high probability that 'the sense of belonging to the other sex will not change anymore.'[24]

Another decision by the Austrian Supreme Court (*Oberster Gerichtshof, OGH*) holds 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 chosen gender; in order to change one's assigned birth gender, it is required to at least complete the first stages of gender-affirmative treatments.[25]

Intersex Individuals*

According to a recent ruling by the Constitutional Court, civic registry authorities are required to recognise the right of intersex people to change their registration status to a 'third gender option'.[26] See also table above.

In 2017, the Bioethics Commission at the Federal Chancellery released recommendations regarding the medical treatment of intersex people. Taking into account these recommendations, the Ministry of Health issued non-binding guidelines on the treatment of intersex people in 2019.[27] One of the most contentiously discussed issues was the question of balancing the medical needs of intersex babies and children with fundamental rights of autonomy and self-realisation. Thus, the guidelines provide for the creation of multi-professional case conferences, including different medical, psychological and social professionals, in order to do justice to the particular needs of every intersex child. They also include a clear condemnation of mere aesthetic gender assimilative surgeries.

In June 2021, Parliament adopted a motion to ask the Federal Minister for Social Affairs, Health, Care and Consumer Protection, as well as the Federal Minister for Women, Family, Youth and Integration, to take the necessary steps to ensure that intersex children are protected from unnecessary medical procedures.[28]

3.2 Direct sex discrimination

3.2.1 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 according to the wording and content of this provision (e.g. Paragraph 4a of the Federal Equal Treatment Act for Civil Servants). The wording of these provisions is closely based on the German language version of Recast Directive 2006/54/EC.[29]

[24] VwGH 27.02.2009, 2008/17/0054, ECLI:AT:VWGH:2009:2008170054.X02.
[25] OGH 21.04.2009 10 ObS 29/09a, ECLI:AT:OGH0002:2009:010OBS00029.09A.0421.000.
[26] VfGH 15.06.2018 G77/2018, ECLI:AT:VFGH:2018:G77.2018.
[27] *Empfehlungen zu Varianten der Geschlechtsentwicklung*, available at: https://www.sozialministerium.at/Themen/Gesundheit/Gesundheitssystem/Gesundheitssystem-und-Qualitaetssicherung/Planung-und-spezielle-Versorgungsbereiche/Empfehlungen-zu-Varianten-der-Geschlechtsentwicklung.html.
[28] Sten Prot NR 111/231, XXVII GP, 16./17.06.2021, based on 1594/A(E), XXVII GP, 19.05.2021.
[29] Paragraph 5(1) of the Equal Treatment Act for the Private Sector states: 'Eine unmittelbare Diskriminierung liegt vor, wenn eine Person auf Grund ihres Geschlechtes in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde' ('Direct discrimination exists, if a person because of his or her sex experiences less favourable treatment in a comparable situation than another person experiences, has experienced or would experience').

3.2.2 General discrimination

In Austria, non-discrimination law also prohibits instances of discrimination without a specific identifiable victim. In 2018, the High Administrative Court (*Verwaltungsgerichtshof, VwGH*) had to decide whether the Facebook posting by a bar owner (claiming essentially that asylum seekers would no longer be permitted in her bar) constituted discrimination. It reached the decision that this indeed amounted to direct discrimination, regardless of whether an actual victim could be identified.[30]

Even previously, there has been extensive academic discussion on this issue with regard to job advertisements.

Paragraph 9 of the Equal Treatment Act for the Private Sector states the requirement for gender-neutral job advertisements. An employer who does not adhere to this requirement will be committing an administrative violation and will be fined up to EUR 360 (according to Paragraph 10 of the same Act). Paragraphs 23 and 24 of the same Act stipulate a general requirement for discrimination-free job advertisements (for other grounds of discrimination). It is thus not necessary to present an identifiable victim.

However, if such a victim is specified, there might be an additional charge of discrimination (conclusion of an employment relationship) according to Paragraph 3 of the same Act, carrying different legal consequences (such as damages, etc.). The fact of a discriminatory job advertisement in itself does not constitute discrimination; however, it might be a strong indication for the existence of discrimination.[31]

The Ombud for Equal Treatment can inform the district administrative authority (*Bezirksverwaltungsbehörde*) of the offence, upon the request of a job applicant or of its own accord. The district administrative authority can then issue a warning to the employer and subsequently fine them. If an administrative penal proceeding ensues, the Ombud can act as party to the case.

The specific demarcation between an administrative offence and discrimination regarding the conclusion of an employment relationship is a matter of academic debate.[32]

3.2.3 Prohibition of pregnancy and 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.[33]

3.2.4 Specific difficulties

As shown in Section 5, specifically 5.6, certain gaps in legal protection arise due to the incomplete transposition of the Work-Life Balance Directive.

[30] VwGH 24 April 2018, Ro 2017/03/0016, ECLI:AT:VWGH:2018:RO2017030016.J00.
[31] Hopf, H., Mayr, K., Eichinger, J. and Erler, G., (2021) 'Gleichbehandlungsgesetz § 9', *GlBG* ('Equal Treatment Act Section 9', ETA), Vienna, Manz, para 18.
[32] Hopf, H., Mayr, K., Eichinger, J. and Erler, G., (2021) 'Gleichbehandlungsgesetz § 9', *GlBG* ('Equal Treatment Act Section 9', ETA), Vienna, Manz, para 19.
[33] OGH 27.02.2014 8 ObA 81/13i, ECLI:AT:OGH0002:2014:RS0129463.

3.3 Indirect sex discrimination[34]

3.3.1 Explicit prohibition

Paragraph 5(2) of the Equal Treatment Act for the Private Sector is based on the German language version of Article 2(1b) of Directive 2006/54/EC.[35]

3.3.2 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. 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.

While general evidence rules in civil procedural law restrict *prima facie* evidence or presumptions of evidence, the Austrian Supreme Court has recognised the reversal of the burden of proof in sex discrimination cases if statistical evidence supports the assumption of indirect discrimination: in such a case, the employer needs to prove that discrimination did *not* take place.[36] This is also supported by the reversal of the burden of proof in Paragraph 12(12) of the Equal Treatment Act for the Private Sector (for details, see Section 11.5).

3.3.3 Application of the objective justification test

In Austrian jurisprudence, three possible categories of 'legitimate aims' are recognised in the realm of the objective justification test: company-related aims (*unternehmensbezogene Ziele*), job-related aims (*arbeitsplatzbezogene Ziele*) and socio-political / public interest aims (*Ziele, die im öffentlichen Interesse liegen / sozialpolitische Ziele*).[37] However, following the Court of Justice of the European Union (CJEU) (e.g. C-187/00, *Kutz-Bauer*), the Austrian Supreme Court (OGH) consistently rules that budgetary considerations (e.g. if the adoption of non-discriminatory practices would be cost-intensive) cannot justify indirect discrimination.[38]

3.3.4 Specific difficulties

Public Employment Service algorithm: the Austrian Public Employment Service (*Arbeitsmarktservice, AMS*) uses an algorithm to help decide which jobs are appropriate for each job seeker. This algorithm includes prognostics on the probability of employment within the near future in its decision matrix. Being a woman is *de facto* a disadvantage on the labour market; thus, being a member of the female sex is

[34] See for more information Mulder, J. (2021) *Indirect sex discrimination in employment* European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/5362-indirect-discrimination-in-employment-pdf-1-434-kb.

[35] Paragraph 5(2) states: 'Eine mittelbare Diskriminierung liegt vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen, die einem Geschlecht angehören, in besonderer Weise gegenüber Personen des anderen Geschlechtes benachteiligen können, es sei denn, die betreffenden Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Zieles angemessen und erforderlich.' ('Indirect discrimination exists, if apparently neutral statutes, criteria or processes can disadvantage members of one sex in particular ways compared to members of the other sex, unless they are justified by the appropriate pursuit of a legitimate goal and are appropriate for achieving this goal.').

[36] OGH 01.12.2004, 9 ObA 90/04g, ECLI:AT:OGH0002:2004:009OBA00090.04G.1201.000.

[37] Hopf, H., Mayr, K. and Eichinger, J. (2009) *Gleichbehandlungsgesetz § 5 GlBG*, Vienna, Manz, para 113, 114-143; Rebhahn, R. (2005) *Gleichbehandlungsgesetz § 5 GlBG*, Vienna, Springer para 52.

[38] OGH 28.06.2001, 10ObS43/01y; 10ObS150/01h; 10ObS64/04s, ECLI:AT:OGH0002:2001:RS0115588.

considered as a negative criterion by the algorithm.[39] After the Austrian Data Protection Authority (*Datenschutzbehörde*) ordered the AMS to stop the implementation of the algorithm due to data protection concerns in August 2020, the Federal Administrative Court (*Bundesverwaltungsgericht*) repealed this decision in December 2020.[40] The Data Protection Authority has appealed this decision to the High Administrative Court (*Verwaltungsgerichtshof, VwGH*). Currently, the AMS is awaiting the court decision before implementing the algorithm. Public discussion on the issue is scarce and mostly restricted to specialised expert-level groups. While a few non-profit organisations (especially the data protection and net politics NGO epicenter.works)[41] have been trying to generate public debate about the algorithm, mainstream media has been slow to pick up this debate.

Part-time work: the Austrian Supreme Court held that treating part-time workers less favourably than full-time workers can constitute indirect discrimination based on sex, since most part-time jobs were held by women.[42] Recently, the Court also stated that if a part-time worker regularly works overtime, the overtime has to be taken into account when calculating her retirement pension (thus, as a result, increasing the net pension they will receive).[43] However, there are limits: for instance, the Court found that granting a paid break of 30 minutes to full-time workers, but not to part-time workers with a daily working time under six hours, does not amount to discrimination. However, if a break is statutorily mandated and paid for full-time workers, but unpaid for part-time workers, this does constitute pay discrimination.[44] A case filed by the Austrian Trade Union Federation (*Österreichischer Gewerkschaftsbund, ÖGB*), arguing that part-time workers should be entitled to a full child supplementary allowance granted by collective agreement (instead of just the aliquot portion of the allowance that corresponds to their part-time hours) was also not successful;[45] the case eventually led to a preliminary ruling by the CJEU.[46]

3.4 Multiple discrimination and intersectional discrimination[47]

3.4.1 Definition and explicit prohibition

Multiple discrimination (*Mehrfachdiskriminierung*) is covered by Paragraph 12(13) of the Equal Treatment Act for the Private Sector, and Paragraph 19a of the Federal Equal Treatment Act for Civil Servants. Both paragraphs hold that if multiple discrimination occurs, this should be considered when deciding on the amount of compensation. However, the different grounds for compensation must be argued by the claimant; if a ground may apply, but is not addressed by the claimant, the court will not consider it *ex officio*.

[39] Greif, E. and Kullmann, M. (2021), 'Algorithmenbasiertes Personalrecruiting Antidiskriminierungs- und datenschutzrechtliche Aspekte' (Algorithm-based staff recruitment. Anti-discrimination and data protection law aspects), *ZAS* 2021/13; Wagner, B., Lopez, P., Cech, F., Sekwenz, G. and Grill, M.-T. (2021) 'Der AMS-Algorithmus. Transparenz, Verantwortung und Diskriminierung im Kontext von digitalem staatlichem Handeln' ('The AMS algorithm. Transparency, responsibility and discrimination in the context of digital operations by the state'), *juridikum* 2020, p. 191.

[40] BVwG, 18.12.2020, W256 2235360-1, ECLI:AT:BVWG:2020:W256.2235360.1.00.

[41] See: https://epicenter.works/.

[42] OGH 25.01.2019, 8 Ob A 70/18d, ECLI:AT:OGH0002:2019:008OBA00070.18D.0125.000.

[43] OGH 30.08.2022, 8 ObA 33/22v, ECLI:AT:OGH0002:2022:008OBA00033.22V.0830.000.

[44] OGH 25.05.2020, 9 Ob A 121/19p, ECLI:AT:OGH0002:2020:009OBA00121.19P.0525.000.

[45] OGH 13.09.2012, 8 Ob A 20/12t, ECLI:AT:OGH0002:2012:008OBA00020.12T.0913.000.

[46] Judgment of 5 November 2014, ÖGB, C-476/12, ECLI:EU:C:2014:2332.

[47] See for more information 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.

3.4.2 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.[48]

In a prominent court case, the Supreme Court had to consider claims of multiple discrimination (sex and religion) by an employee at a private enterprise, who started wearing a headscarf and then a face veil (*niqab*) at her workplace and was consequently dismissed. The Supreme Court ultimately ruled that the termination of her contract constituted discrimination based on religion, even though it considered that prohibiting a *niqab* might be, in principle, justified because of the specific requirements (customer communication, etc.) of the claimant's job. It did not, however, find that discrimination based on sex had taken place: while the claimant had asserted that the termination also amounted to indirect discrimination based on sex, the Court found otherwise, due to the fact that the employer had issued an *individual* Directive to the employee to not wear a face veil. In the opinion of the Court, such an instruction, due to its singular directionality, did not constitute a '*prima facie* neutral provision, criterion or practice'. The Court did not, however, examine whether direct discrimination based on sex had taken place, since this was not part of the claimant's complaint.[49]

3.5 Positive action[50]

3.5.1 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 for Civil Servants provide a legal basis for positive action measures. Additionally, Paragraph 97(1)(25) of the Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*)[51] holds that works agreements can contain positive action measures for women, as well as measures to improve work-life balance (see Paragraph 97(1) Clause 25).

3.5.2 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'* (meaning material equality and thus providing the closest equivalent to the central meaning of equal opportunities). The term 'gender mainstreaming' is also in use, mostly as a definition for administrative and governmental practices to establish equality. 'Gender budgeting' describes the fiscal part of gender mainstreaming strategies, intended to ensure a fair and equitable distribution of resources in terms of gender equality. It is enshrined in the Austrian Constitution (Article 13(3)). The term 'positive measure' (*positive Maßnahme*) is less common and usually describes measures such as a quota for women or similar instruments.[52]

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48 *12. Gleichbehandlungsbericht des Bundes 2018*, available at: https://www.frauen-familien-jugend.bka.gv.at/frauen/gleichbehandlung/gleichbehandlungsberichte/gleichbehandlungsberichte-des-bundes.html.

49 OGH 25.05.2016, 9 ObA 117/15v, ECLI:AT:OGH0002:2016:RS0131188.

50 See for more information McCrudden, C. (2019), *Gender-based positive action in employment in Europe. A comparative analysis of legal and policy approaches in the EU and EEA*, 2019, European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb.

51 Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*), BGBl. Nr. 22/1974.

52 See, e.g., Gahleitner, S. (2019), *40 Jahre Gleichbehandlungsgesetz – Europäische Impulse bei der Gleichstellung der Geschlechter,* DRdA 5/2019, 391.

Moreover, the Federal Budget Law (*Bundeshaushaltsgesetz*)[53] formulates material equality as a goal of governmental activity (Paragraph 2). In order to achieve this goal, every level of Government needs to take into account the impact on gender equality of legislative proposals, budgeting plans, reporting requirements and other projects (‘*wirkungsorientierte Folgenabschätzung’*).

3.5.3 Specific difficulties

In Austria, the labour market is regulated by different instruments, as mentioned above. Federal law, state law (for civil servants at the state level), collective bargaining agreements (for employment sectors) and works agreements (at company level) create a complex web of labour market rules that is not easy to decipher for the lay person. The competencies for the regulation of certain topics are sometimes exclusive (for instance, collective bargaining agreements define minimum wages/salaries for certain sectors); sometimes, they overlap.

This means that efforts to introduce equality measures may need to be anchored in several legal instruments, requiring the consent of a multitude of stakeholders (such as social partners, works councils, company management, federal and state government and legislators).

In the private sector, the introduction of effective positive action measures at company level depends on works agreements. These, in turn, require the establishment of works councils. However, not every company has a works council.

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 for Civil Servants are the template for nearly all public service legislation).

Moreover, it is not quite clear whether and how individuals can derive subjective rights from positive action measures and thus enforce them in court, which might render certain positive action measures quite toothless. An example: universities in Austria have adopted working plans for the advancement of women (*Frauenförderpläne).* Among other things, such plans usually formulate objectives of increasing the number of female professors. In 2016, the High Administrative Court (*Verwaltungsgerichtshof, VwGH*) had to decide a case where two candidates (one female, one male) were found to be equally qualified for a professorship, yet the male candidate was chosen for the job by the rector, even though there was a binding university policy in place – a Plan for the Advancement of Women (*Frauenförderplan*), demanding that in the absence of gender parity among professors, the candidate of the less represented sex had to be chosen for the job. The VwGH accepted that the *Frauenförderplan* had been ignored, but denied that this translated into a subjective right for the female candidate. Thus, it held that the staffing decision in favour of the male candidate did not per se establish discrimination. It furthermore stated that the Working Group for Equal Opportunities (*Arbeitskreis für Gleichbehandlungsfragen*) – an institution that has to be established by law at every university – was therefore not even entitled to file a complaint to the university’s Arbitration Commission, since it was only competent to contest discrimination.[54] It could be argued that this decision significantly reduces the scope of action of the Working Group for Equal Opportunities, and thus the legal protection of unsuccessful candidates. It also undermines the impact of a *Frauenförderplan*.

[53] Federal Budget Law (*Bundeshaushaltsgesetz*), BGBl. I Nr. 139/2009.

[54] VwGH 5 October 2016, Ra 2015/10/0117, ECLI:AT:VWGH:2016:RA2015100117.L00. Similarly: BVwG Wien 11 October 2016, W128 2117806-1, ECLI:AT:BVWG:2016:W128.2117806.1.00.

It is worth mentioning that the Federal Equal Treatment Commission (B-GBK) holds the opposite legal view on these matters. Both non-compliance with the female quota requirement by the Appointment Commission and failure to respect the *Frauenförderpläne* are seen as potential sex discrimination by the B-GBK.[55]

Apart from questioning the effectiveness of positive action measures such as working plans for the advancement of women, there seems to be a heavy burden of proof to establish discrimination, if it must be shown that the outcome of an appointment procedure was influenced in a negative way. This is especially true if the contested practice was in itself a breach of equality measures designed to protect candidates from sex discrimination.

3.5.4 Measures to improve the gender balance on company boards[56]

Legislation on quotas for supervisory boards (*Aufsichtsräte*) was introduced in October 2017 and came into effect on 1 January 2018.[57] Boards of listed stock companies and of companies with more than 1 000 employees, and consisting of at least six seats, have to appoint 30 % of the under-represented sex to the board. 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. Since the quota came into force, the number of women on supervisory boards has roughly doubled.[58]

However, the quota only applies to supervisory boards; management boards (*Vorstände*) are still mostly male.[59] Thus, the Chamber of Labour is calling for a quota for management boards, as well.[60] However, there are not yet any discernible legislative projects in this regard.

Certain enterprises of a certain size (usually 500+ employees) have to issue regular sustainability reports, including reporting on diversity. The basis for this is the GRI-standards (https://www.globalreporting.org/) and the Act to further Sustainability and Diversity (*Nachhaltigkeits- und Diversitätsverbesserungsgesetz, NaDiVeG*), BGBl. I Nr. 20/2017.

3.5.5 Positive action measures to improve the gender balance in other areas

In public life, there are a number of areas where quotas have been introduced. For example, while there are no laws requiring quotas or other gender balance measures within political parties, most parties have adopted self-binding quota requirements regarding quotas for candidates for national/regional/EU elections and leadership

[55] B-GBK 15 September 2014, I/141/14.

[56] See for more information Senden, L. and Kruisinga, S. (2018) *Gender-balanced company boards in Europe. A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*, available at: https://www.equalitylaw.eu/downloads/4537-gender-balanced-company-boards-in-europe-pdf-1-68-mb.

[57] Law on Equality of Men and Women on Boards (*Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat, GFMA-G*), BGBl. I Nr. 104/2017.

[58] From 16.1 % in 2017 to 32.2 % in March of 2021. See https://www.ots.at/presseaussendung/OTS_20210307_OTS0003/ak-frauenmanagementreport-jetzt-braucht-es-die-quote-fuer-den-vorstand.

[59] AK Frauen Management Report 2023, 02.03.2023, available at: https://wien.arbeiterkammer.at/frauenmanagementreport.

[60] Original Text Service (OTS) by the Chamber of Labour, 'AK.Frauen.Management.Report: Jetzt braucht es die Quote für den Vorstand!' ('Chamber of Labour.Women.Management.Report: Now we need a quota for management boards!'), 07.03.2021, available at: https://www.ots.at/presseaussendung/OTS_20210307_OTS0003/ak-frauenmanagementreport-jetzt-braucht-es-die-quote-fuer-den-vorstand.

functions. If a party nominates over 40 % of women as delegates to Parliament, they receive a bonus subvention.[61]

In public and semi-public enterprises, the 'Public Corporate Governance Kodex' is in place – a self-binding, non-formal document, committing to a quota goal of at least 40 % of women on supervisory boards. According to information by the Minister for Women's Affairs in 2022, the average percentage of women on supervisory boards of public and semi-public enterprises is at roughly 50 % (46.6 % according to a study done by the Chamber of Labour).[62]

In 2000, the Inter-Ministerial Working Group for Gender Mainstreaming (*IMAG GM*) was introduced in order to ensure the implementation of gender mainstreaming and gender budgeting measures in all departments.[63] It consists of civil servants from the different ministries. In 2011, the Council of Ministers (*Ministerrat*), an informal panel formed of all cabinet ministers, issued a self-binding resolution (*Ministerratsbeschluss*) on a federal gender mainstreaming strategy. This strategy sought to structurally anchor the *IMAG GM* as a permanent administrative fixture, create a basis for gender-specific data collection and law-making, and establish information and education on gender matters as an important intra-administrative goal. Importantly, it held that gender aspects should be considered when granting subsidies and other federal support.[64]

Advertisements of public service jobs often contain a kind of tiebreak clause, stating that if candidates are equally qualified, the female candidate will be given preference, after an objective evaluation. However, in practice, the question of what 'equal qualification' entails is difficult. While tiebreaker clauses are not required, they do have to be observed once they are included in a job advertisement (nonetheless, a violation does not *automatically* constitute discrimination based on sex).[65]

Tiebreaker clauses have given rise to a number of discrimination cases (initiated both by male and female candidates). For example, the Supreme Court (*OGH*) has ruled that an 'automatic' preference of female over male candidates (that are equally qualified) – meaning that there is no additional evaluation to consider reasons that may also lie within the person of each candidate – amounts to discrimination (against men).[66] However, the Constitutional Court (*Verfassungsgerichtshof, VfGH*) has held that it does not amount to discrimination when women are advantaged if the female sex is a necessary requirement for obtaining the benefit in question (the case dealt with an evaluation of gynaecologists who applied for a contract with a public healthcare provider).[67]

Many public institutions have furthermore adopted plans for the promotion of women in their service, usually containing an expressed commitment to raising the number of female employees, rules on non-discriminatory job advertisements (i.e. gender-neutral formulation of job requirements, tiebreaker clauses as the one mentioned above, etc.), a commitment to raise consciousness regarding gender equality, and sometimes the introduction of an equal treatment representative or ombudsperson, respective working groups or mentoring programmes. At times, flexible work hours can be part of such a plan, as well. Often, such plans also contain a repetition of legal requirements – e.g. that

[61] Paragraph 4a of the Law on the Financing of Parliamentary Groups (*Klubfinanzierungsgesetz*), BGBl. Nr. 156/1985.
[62] Wieser, C. & Haager, T. (2022), *AK.Frauen.Management.Report.2022.* Most recent report available for download at: https://www.arbeiterkammer.at/service/studien/frauen/AK_Frauen.Management.Report_2022.html.
[63] See: https://www.imag-gmb.at/gender-mainstreaming/implementierung-in-oesterreich/umsetzung-auf-bundesebene.html.
[64] *Ministerratsbeschluss* BKA-F140.240/0058-II/1/2011, 06.09.2011.
[65] OGH 23.11.2010, 8 ObA 35/10w.
[66] OGH 17.12.2001, 1 Ob 273/01 f; OGH 30.01.2001, 1 Ob 80/00 x.
[67] VfGH 09.12.2014, V 54/2014.

mothers/parents may not be disadvantaged for taking maternity/parental leave, equal access to educational measures, etc.

However, in practice, such plans tend to have limited impact, and especially do not address real obstacles for equality within company culture – such as late-day meetings, overlap of work schedules with school/kindergarten, prevention of 'old boys clubs', etc.

3.6 Harassment and sexual harassment

3.6.1 Definition and explicit prohibition of harassment

National legislation defines sex-related harassment as behaviours based on sex that are unwanted by the victim, and that create or intend to create an intimidating, hostile or degrading work environment, and/or that have discriminatory effects for the victim (such as passing over that person for a promotion). The perpetrator of harassment can be the employer or a third person (e.g. a fellow employee or a customer), and the harassment can happen within or outside the employment relationship. Failure to protect an employee from harassment can also amount to discrimination, as well as the instruction to harass. In 2021, the Austrian Supreme Court (*OGH*) ruled that the employer was liable even if the harassment was perpetrated by someone who did not hold an official position at the company anymore, but acted as if they did, if this was knowingly tolerated by the employer.[68]

Furthermore, if a person is harassed because of the sex of another person that they have a close relationship with (discrimination by association), this can also amount to discrimination (Paragraph 7 of the Equal Treatment Act for the Private Sector). Paragraph 8a of the Federal Equal Treatment Act for Civil Servants contains similar provisions, albeit without mentioning harassment outside the employment relationship or harassment by association. Civil service legislation also contains corresponding provisions.

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

3.6.2 Scope of the prohibition of harassment

Harassment can include verbal and physical expressions (gestures) aimed at an individual or a group, based on gender stereotypes. It can be directed at someone's looks, way of dressing, qualifications, skills, behaviour, personal and family status, etc. It can consist of insults, jokes, rumours, invasive questions, the allocation of tasks, etc. Harassment based on sex can also include harassment based on sexual and gender identity and orientation.[69]

3.6.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is defined as unwanted behaviours pertaining to the sexual sphere that create or intend to create an intimidating, hostile or degrading work environment, and/or that have discriminatory effects for the victim. Sexual harassment may be carried out by an employer or third person, and happen within or outside the employment relationship. Failure to protect an employee from sexual harassment can also amount to discrimination, as well as the instruction to harass. Furthermore, if a person is sexually harassed by association, this can also amount to discrimination (Paragraph 6 of the Equal Treatment Act for the Private Sector). Paragraph 8 of the Federal Equal Treatment Act for Civil Servants contains similar provisions, albeit without mentioning sexual harassment outside the employment relationship or sexual harassment by association.

[68] OGH 29.04.2021, 9 ObA 19/21s, ECLI:AT:OGH0002:2021:E131780.
[69] LG Salzburg 14.07.2006, 18 Cga 120/05t.

3.6.4 Scope of the prohibition of sexual harassment

Sexual harassment can cover a multitude of behaviours, such as putting up posters with pin-ups, pornographic images at the workplace (including on a computer screen), staring, joking, making remarks on the looks or sexual behaviour of a person, etc. It can also include unwanted invitations to engage in explicit behaviour, promises of professional success in return for sexual favours or threat of disadvantages upon refusal, etc. It can consist of verbal expressions, texts, emails, phone calls, gestures or other behaviour such as touching, exhibitionist behaviours, etc.

3.6.5 Understanding of (sexual) harassment as discrimination

Sexual harassment and sex-related harassment are explicitly defined as discrimination on the grounds of sex/gender (see above).

Sexual harassment can also constitute a criminal offence. This is defined in Paragraph 218 of the Criminal Code,[70] 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 may also apply to some forms of (sexual) 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.[71]

3.6.6 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. Additionally, 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 in the case of a loss at court. Moreover, negative consequences and re-victimisation might occur in the workplace. For example, in 2021, the Supreme Court (*OGH*) ruled in a case where a worker was dismissed from her job because she tried to get help against sexual harassment.[72]

3.7 Instruction to discriminate

3.7.1 Explicit prohibition

The Equal Treatment Act for the Private Sector includes an explicit prohibition of the instruction to discriminate in connection with workplace discrimination and discrimination in the 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'. As mentioned above, instruction to (sexually) harass is also prohibited by the Equal Treatment Acts.

[70] Paragraph 218 of the Act on Criminal Law (*Strafgesetzbuch, StGB*), BGBl Nr. 60/1974. This provision came into effect on 1 January 2016.
[71] See *Erläuterungen zur RV* 689 XXV. GP.
[72] OGH 25.11.2021, 9 ObA 110/21y, ECLI:AT:OGH0002:2021:009OBA00110.21Y.1125.000.

3.7.2 Specific difficulties

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

3.8 Other forms of discrimination

Other forms of discrimination, such as discrimination by association, are prohibited by Paragraph 5(4) of the Equal Treatment Act for the Private Sector, as well as Paragraph 4a(5) of the Federal Equal Treatment Act for Civil Servants. As mentioned above, the Equal Treatment Act for the Private Sector also prohibits (sexual) harassment by association as a form of discrimination.

Algorithmic discrimination: as mentioned above, a case regarding the Austrian Public Employment Service's use of a gender-specific algorithm has been under legal review; currently, an appeal to the High Administrative Court is pending.[73]

3.9 Evaluation of implementation

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

However, the transposition of the Work-Life Balance Directive remains incomplete (see Section 5.6).

3.10 Remaining issues

During the COVID-19 pandemic, many employees were working from home. However, (sexual) harassment can also occur in this context, via phone calls, emails, etc. Due to increased job insecurity, employees were less likely to challenge harassment, as the Ombud for Equal Treatment (*Gleichbehandlungsanwaltschaft*) found.[74] In 2021, the Ombud made sexual harassment one of its focus topics, offering, among other things, consultations for companies wanting to prevent sexual harassment.[75]

[73] *Datenschutzbericht 2020*, p. 39, available at: https://www.dsb.gv.at/download-links/dokumente.html.
[74] See: https://www.gleichbehandlungsanwaltschaft.gv.at/aktuelles-und-services/gleichbehandlungs-blog/-sexuelle-Bel-stigung-in-der-krise.html.
[75] *Gleichbehandlungsanwaltschaft*, https://www.gleichbehandlungsanwaltschaft.gv.at/aktuelles-und-services/aktuelle-informationen/Fokusthema--Sexuelle-Bel-stigung-.html.

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)[76]

4.1 General (legal) context

4.1.1 Political and societal debate and pending legislative proposals

The gender pay gap, as well as the pension gap (the latter amounting to over 40 %) are regularly the issue of public debate. Each year, a number of NGOs commemorate Equal Pay Day by organising events and information campaigns on the gender pay gap.[77]

The gender pay gap in the private sector in Austria has also been demonstrated frequently by the Eurostat evaluations of European Member States. Austria has one of the highest and most persistent gender pay gaps of 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.[78] The annual national statistics confirm these findings.[79] In order to battle pay gaps, the Chamber of Labour (among others) demands more rigorous legislation on pay transparency (*Einkommenstransparenz*), in line with proposals in the European Commission's Gender Equality Strategy 2020-2025, notably the 2021 proposal for a Directive on pay transparency.[80]

Pensions in the statutory social security systems are calculated based both on the duration of contribution periods and on the contribution amounts accumulated during a person's working life. Lower income therefore results in a lower old-age pension. The gender pension gap in Austria is consistently wide (about 40 % to 50 %, depending on the method of calculation).[81] Due to the different pay schemes and calculation factors for pensions in the public sector, the gender pay gap and the gender pension gap are less of a problem for civil servants than for employees in the private sector and for the self-employed.

Another issue is the lack of transparent, plausible and binding classification schemes for comparing and evaluating what work is worth. Intrinsic societal stereotypes result in a lower valuing of care work and other work typically performed by women, and this became especially evident during the COVID-19 pandemic.[82]

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[76] See on equal pay Burri, S. (2019), *National Cases and Good Practices on Equal Pay,* European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/publications/thematic-reports.
See also Foubert, P. (2017), *The enforcement of the principle of equal pay for equal work or work of equal value: A legal analysis of the situation 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/4466-the-enforcement-of-the-principle-of-equal-pay-for-equal-work-or-work-of-equal-value-pdf-840-kb.
See on the issue of pay transparency: Veldman, A. (2017), *Pay transparency in the EU A legal analysis of the situation 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/4073-pay-transparency-in-the-eu-pdf-693-kb.

[77] See: https://www.equal-pay-day.at/.

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

[79] Statistik Austria, https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/einkommen/index.html.

[80] See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F503420_en.

[81] See: https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/pensionen/index.html.

[82] See: https://www.gleichbehandlungsanwaltschaft.gv.at/aktuelles-und-services/gleichbehandlungs-blog/arbeitsbewertung-in-der-krise.html.

4.2 Equal pay

4.2.1 Implementation in national law

It is firmly established by court practice that if a national rule at any level (including in collective bargaining agreements, works agreements, and individual contracts) contradicts Article 157 of the TFEU, this is grounds to invalidate the national rule concerned. The concept of equal pay applies in full to all issues that have arisen after Austria's accession to the (then) EC in 1995.[83]

Paragraph 3 of the Equal Treatment Act for the Private Sector and Paragraph 4 of the Federal Equal Treatment Act for Civil Servants contain a prohibition of discrimination based on sex, personal or family status when determining remuneration (*Festsetzung des Entgelts*).

4.2.2 Definition in national law

Pay (*Entgelt)* in a general sense is the amount of money that a person is entitled to for his or her labour. It does not have a succinct legal definition in national law, but is an umbrella term for a number of different concepts. There is an important legal distinction between pay for manual workers (*Arbeiter/innen*) – wage (*Lohn*), and employees working mostly in offices (*Angestellte*) – salary (*Gehalt*). This distinction is not just theoretical, but carries some practical weight, for instance regarding the dates on which payment is due, etc. Wages and salaries are governed by a number of different rules in federal law, collective bargaining agreements (sectoral level) and works agreements (company level). Collective remuneration levels are also an important guideline for establishing the appropriate amount of pay in areas without collective remuneration norms.

Federal civil servants fall under yet another pay scheme, the Federal Civil Servants' Salary Act (*Gehaltsgesetz, GehG*).[84] Pay levels are annually adjusted to inflation. Similar legislation exists at state level.

According to Paragraph 9 of the Equal Treatment Act for the Private Sector, job advertisements must contain the minimum pay required by collective bargaining agreement. They must indicate any willingness to pay a higher rate, since individually negotiated pay is one of the major obstacles to equal pay in practice.

According to Paragraph 11a of the Equal Treatment Act for the Private Sector, enterprises that regularly employ more than 150 people have to publish a report on income distribution in their workforce, itemised by gender (*Einkommensbericht*) every two years.

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

Paragraph 3 clause 2 in conjunction with Paragraph 5 of the Equal Treatment Act for the Private Sector explicitly forbids direct and indirect discrimination when determining pay. These Paragraphs give definitions of direct and for indirect discrimination in conformity with the requirements of Directive 2006/54/EC.

[83] See RIS-Justiz RS0117073, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20021113_OGH0002_009OBA00193_02A0000_001/JJR_20021113_OGH0002_009OBA00193_02A0000_001.pdf.

[84] Federal Civil Servants' Salary Act (*Gehaltsgesetz, GehG*), BGBl. Nr. 54/1956.

4.2.4 Related case law

Well-established case law by the Supreme Court obliges employers to eliminate gender-specific criteria from hiring processes and pay negotiations. Following the CJEU ruling in *Brunnhofer* (C-318/99), the Supreme Court confirmed pre-existing case law determining that contributions to occupational pension schemes are pay within the meaning of Article 157 of the TFEU.[85]

In 2021, the Supreme Court had to deal with a case that included, among other things, the question of whether it constituted pay discrimination based on sex if an employer made, on average, higher contributions to a company pension fund for their female than for their male employees. The reason was that the employer intended to compensate for a lack of contributions for the female staff, based on the lower legal retirement age for women. However, due to the fact that the limitation period for the claim had already expired, the Supreme Court refused to review the case and did not examine the substantive question at hand.[86]

The Supreme Court had already decided on a similar case in 2019. An employer calculated occupational pensions for female employees according to a more favourable method than those for male employees of the same age, in order to compensate for the fact that they received, on average, lower retirement benefits than men. The Supreme Court found that a differentiation on sex alone was discriminatory and could also not establish a positive action measure to promote equality.[87]

As mentioned above, the Supreme Court found in a 2020 case that paying legally mandated breaks for full-time workers, but not to part-time workers (no matter their daily working hours), constituted discrimination based on sex, since most part-time workers are female.[88]

In 2022, the Supreme Court decided that when a worker who previously received an all-in wage for a full-time job goes into parental part-time work, it is possible for them to receive an aliquot for the base salary of their all-in wage and charge overtime separately.[89]

4.2.5 Permissibility of pay differences

Pay differences on the grounds of sex/gender are to date not permissible and can present grounds for individual claims.

However, a difference in payment between part-time and full-time workers does not *automatically* constitute discrimination based on sex, if the difference is justified.[90]

4.2.6 Requirement for comparators

When filing a complaint at court or making an application to the Equal Treatment Commission (*Gleichbehandlungskommission, GBK*), claimants have to demonstrate that they have been treated less favourably than a specific employee of another sex/gender by offering at least circumstantial proof (Paragraph 5(1) of the Equal Treatment Act for the Private Sector). In order to establish a comparable situation, it does not suffice that two employees are classified in the same job group by collective bargaining

[85] E.g. OGH 17.12.2019, 10 ObS 49/19g, ECLI:AT:OGH0002:2019:010OBS00049.19G.1217.000.
[86] OGH 25.06.2021, 8 ObA 95/20h, ECLI:AT:OGH0002:2021:008OBA00095.20H.0625.000.
[87] OGH 27.02.2019, 9 ObA 25/18v, ECLI:AT:OGH0002:2019:009OBA00025.18V.0227.000.
[88] OGH 25.05.2020, 9 ObA 121/19p, ECLI:AT:OGH0002:2020:009OBA00121.19P.0525.000.
[89] OGH 28.09.2022, 9 ObA 83/22d, ECLI:AT:OGH0002:2022:009OBA00083.22D.0928.000.
[90] OGH 25.05.2020, 9 Ob A 121/19p, ECLI:AT:OGH0002:2020:009OBA00121.19P.0525.000.

agreement;[91] rather, a qualitative examination needs to be carried out in each case, including of the type of work, the qualifications required, and the conditions of work.[92]

In cases where no specific comparator is available, 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.[93] As the wording of Paragraphs 3 (on sex discrimination) and 19 (on age discrimination, among other grounds) 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 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 interpreted Paragraph 5(1) of the Equal Treatment Act for the Private Sector as requiring a hypothetical comparator if no specific comparator was available.

In cases of pregnancy discrimination, no such comparator may be necessary.[94] For instance, if a pregnant employee is on maternity leave, the allowance paid to her during her leave is calculated based on her former pay, including pending pay rises. Moreover, the employer has to consider periods of maternity leave as times of active employment, which is relevant when calculating certain benefits that count as pay, such as company pensions.[95]

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

Collective bargaining agreements can contain work evaluation systems; implementation at company level mostly depends on works agreements. Paragraph 11 of the Equal Treatment Act for the Private Sector commits collective bargaining parties at all levels to uphold the principle of equal pay for equal work or work of comparative worth in all classification schemes and norms of collective law-making. Furthermore, they are prohibited from distinguishing different criteria for evaluating women's work on one hand and men's work on the other.

Apart from that, as mentioned above, for each case of alleged pay discrimination a qualitative evaluation needs to take place, considering objective criteria such as the type of work, the qualifications required for the particular job, and the conditions of work.[96]

4.2.8 Other relevant rules or policies

Austrian jurisprudence has developed a general principle of equal treatment in labour law (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*), based on Paragraph 879 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) on common moral standards (*gute Sitten*) and Paragraph 1157 of the Civil Code (duty of care of the employer).[97] It states (among other things) that an employer may not arbitrarily treat one employee worse than others in certain contexts, for instance when granting additional benefits, pay rises, etc. If the principle has been breached, the employee may be entitled to damages.[98]

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91 OGH 08.05.2002, 9 ObA 108/02a, ECLI:AT:OGH0002:2002:009OBA00108.02A.0508.000.
92 Wr GKK, Slg 1999, I-2865, in line with CJEU jurisprudence.
93 OGH 29.01.2013, 9 ObA 154/12f, ECLI:AT:OGH0002:2013:009OBA00154.12F.0129.000.
94 In line with CJEU case law, e.g. Judgment of 8 November 1990, *Dekker*, 177/88, ECLI:EU:C:1990:383; Judgment of 14 July 1994, *Webb,* C-32/93, ECLI:EU:C:1994:300, para 25.
95 Windisch-Graetz, M. (2018), '§3 GlBG', in: Neumayr, M. and Reissner, G.-P., *Zeller Kommentar zum Arbeitsrecht* (3rd edition), para 25.
96 *Wr GKK,* Slg 1999, I-2865, in line with CJEU jurisprudence.
97 E.g. OGH 20.09.1962, 4 Ob 105/62; OGH 25.01.1966, 4 Ob 5/66; KG Wr. Neustadt 25.09.1975, 2 d Cg 7/75, Arb 9399 mwN; OGH 19.04.1977, 4 Ob 70/77, Arb 9581 mwN; OGH 29.10.1993, 9 ObA 220/93, ECLI:AT:OGH0002:1993:009OBA00220.93.1029.000; recently OGH 28.10.2015, 9 ObA 102/15p, ECLI:AT:OGH0002:2015:009OBA00102.15P.1028.000.
98 OGH 05.10.1976, 4 Ob 71-87/76; OGH 19.04.1977, 4 Ob 70/77; OGH 19.01.1982, 4 Ob 134/81; and others.

4.2.9 Job evaluation and classification systems

Collective bargaining agreements contain systems of pay grades, structured by qualification levels and seniority and laying out the minimum pay levels required for the different job categories. Employers are required to evaluate and define the classification of the jobs they offer accordingly. This classification can be challenged and adapted at court. The pay grades are among the most important elements of collective bargaining agreements. Social partners re-negotiate them on an annual basis.

4.2.10 Wage transparency[99]

As already mentioned, remuneration policies in the private sector are regulated to a very large degree by sectoral collective bargaining agreements. These are required to contain gender-neutral pay schemes as described above. Collective bargaining agreements are accessible to the public via an online database maintained by the Austrian Trade Union Federation (*Österreichischer Gewerkschaftsbund, ÖGB*), which is regularly updated as soon as pay rises come into effect.[100] In rare cases, a job falls into an area not regulated by a collective bargaining agreement; however, appropriate pay levels can still be inferred from the closest comparable sectoral pay schemes.

According to Paragraph 9 of the Equal Treatment Act for the Private Sector, job advertisements must contain the minimum pay for the job in question. Willingness to pay a higher rate must be made transparent.

Pay levels for federal civil servants are regulated by the Federal Civil Servants' Salary Act,[101] which is annually adjusted to inflation, as are salaries for state civil servants.

As already mentioned, Paragraph 11a of the Equal Treatment Act for the Private Sector provides that enterprises that regularly employ more than 150 persons have to publish bi-annual reports on income distribution in their workforce, itemised by gender (*Einkommensberichte*). In these reports, the pay levels of the company's staff must be anonymised and then organised by gender and qualifications and correlated to existing pay schemes in the applicable collective bargaining 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.

There is continued political debate on the issue of wage transparency. In this author's opinion, the parameters established by Proposal COM/2021/93 final are currently not met by Austria, especially in the private sector. Main divergencies regard the confidentiality requirement of income reports (as opposed to Article 8(3) of the proposal), the content of the reports (i.e. there is no requirement to report on gender pay gaps within a company), and the competencies of the equality body, among others. Furthermore, injunctions ordering companies to take *structural or organisational* measures to comply with equal pay requirements (as proposed by Article 15 of the Proposal) are largely unknown in Austrian labour law.

[99] See Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final.
[100] See: https://www.kollektivvertrag.at/cms/KV/KV_0/home.
[101] Federal Civil Servants' Salary Act (*Gehaltsgesetz*), BGBl. Nr. 54/1956.

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

The recommendation is mostly fulfilled by the implementation of income reports, as mentioned above. Paragraph 11a of the Equal Treatment Act for the Private Sector (see above) entered into force in its entirety in 2014 (with a transition phase between 2010 and 2014). However, the concept of 'work of equal value' remains quite vague. As mentioned above, the lack of transparent, plausible and binding classification schemes for comparing and evaluating what work is worth allows for intrinsic societal stereotypes to persist. This particularly results in a lower valuing of care work and other work typically performed by women, as became painstakingly clear during the COVID-19 pandemic.[102]

4.2.12 Other measures, tools or procedures

The 'wage calculator' (*Gehaltsrechner*), a 2017 initiative by the Ministry for Women, is an online tool to calculate average wages and salaries according to profession, sector or region and can thus provide an instrument for works councils, unions and individuals in their campaigns for pay equality.[103]

Another 2017 initiative by the Ministry for Women, Project Fair Pay (*Projekt Fairer Lohn*), collects arguments, testimonials and how-to's on pay transparency and income reports. It was developed by social partners, experts and government officials.[104]

Apart from this, disclosure of wages and salaries for companies of a certain size has been a regular demand from parties on the left, unions and the Chamber of Labour.[105]

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the scope (Article 14(1) of Recast Directive 2006/54)

Paragraph 1 of the Equal Treatment Act for the Private Sector and Paragraph 1 of the Federal Equal Treatment Act for Civil Servants contain a comprehensive definition of the personal scope of the implementing legislation.[106]

In the private sector, all employees with an employment contract under the applicable labour legislation fall under the personal scope. This includes workers/employees with regular contracts, with fixed-term and part-time contracts, and also individuals with irregular work contracts who have a steady working relationship with one or more employers, as well as apprentices.[107] In the public sector, the personal scope of equal treatment legislation covers public servants (*Beamte*) and individuals employed under federal or state public employment legislation (*Vertragsbedienstete*).

Paragraph 4 of the Equal Treatment Act for the Private Sector includes an individual's family status in the scope of protected grounds against discrimination, as do Paragraphs 4 and 5 of the Federal Equal Treatment Act for Civil Servants. Moreover,

[102] See: https://www.gleichbehandlungsanwaltschaft.gv.at/aktuelles-und-services/gleichbehandlungs-blog/arbeitsbewertung-in-der-krise.html.
[103] See: https://www.gehaltsrechner.gv.at/.
[104] See: http://www.fairer-lohn.gv.at/.
[105] See: https://www.derstandard.at/story/2000079462438/ak-praesidentin-fordert-offenlegung-von-gehaeltern-in-allen-betrieben; https://www.ots.at/presseaussendung/OTS_20180511_OTS0054/oegb-schumann-geheimniskraemerei-unterstuetzt-einkommensungerechtigkeit; https://www.diepresse.com/5947515/grune-wollen-pflicht-zur-einkommenstransparenz.
[106] Civil service legislation in the states also reflects this.
[107] In legal terminology, individuals working under such contracts are referred to as 'employee-like persons' (*arbeitnehmerähnliche Personen*) or as 'free contractual workers' (*freie Dienstnehmer/innen*).

Paragraph 4a explicitly mentions expectant/new mothers on maternity leave as protected groups.

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

Paragraph 3 of the Equal Treatment Act for the Private Sector explicitly prohibits discrimination in the context of: 1. the conclusion of an employment relationship; 2. remuneration; 3. the granting of voluntary social benefits which do not constitute pay; 4. vocational and advanced training and retraining measures; 5. professional advancement, especially promotions; 6. other working conditions; and 7. the termination of an employment relationship. Likewise, the following Paragraph 4 of the same Act prohibits discrimination in connection with 1. career counselling, vocational and advanced training and retraining measures outside of an employment relationship; 2. membership of and participation in an employee or employer organisation or an organisation of employees of a certain sector, including access to services provided by such organisations; and 3. the founding, establishment or expansion of an enterprise or company, as well as when taking up or expanding self-employed activities.

Paragraph 4 of the Federal Equal Treatment Act for Civil Servants similarly prohibits discrimination in connection with 1. the conclusion of an employment relationship; 2. remuneration; 3. the granting of voluntary social benefits which do not constitute pay; 4. internal vocational and advanced training and retraining measures; 5. professional advancement, especially promotions and referrals to higher paid posts; 6. other working conditions; and 7. the termination of an employment or training relationship. Moreover, Paragraph 5 provides that when choosing a candidate for a post, the following criteria may not be considered in a discriminatory way: 1. present or past gaps in employment, part-time work or reduction of weekly working hours; 2. age and family status; 3. income of spouses or partners; 4. time constraints due to care obligations towards children or other family members or the intention to take advantage of the possibility to work part-time or with reduced hours.

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

Both Paragraph 9(1) of the Equal Treatment Act for the Private Sector and Paragraph 10a(2) of the Federal Equal Treatment Act for Civil Servants contain an exception for gender-neutral job advertisements/tenders if an individual’s sex is a genuine occupational requirement for the job in question.

4.3.3 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. The Paternity Leave Act (*Väter-Karenzgesetz*)[108] establishes that fathers who choose to take parental leave enjoy similar protections.[109] 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 with a fixed-term contract an extension of their contract until the start of the maternity protection period (with some exceptions).

Apart from this, the Equal Treatment Act for the Private Sector and the Federal Equal Treatment Act for Civil Servants also protect employees and workers with parental obligations, as well as expectant mothers in some cases (see above).

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

Claims based on the Maternity Protection Act do not usually affect claims based on the Equal Treatment Act for the Private Sector, as stipulated, for example, by Paragraphs 10(8) and 20(4) of the Maternity Protection Act. However, the Maternity Protection Act offers a higher degree of protection than the one required by the Directive.

4.3.5 Particular difficulties

In the opinion of the author, there are no particular implementation difficulties.

4.3.6 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 for Civil Servants) from 1993 onwards. In the private sector, Paragraph 8 of the Equal Treatment Act for the Private Sector states that laws, regulations and instruments of collective labour law can contain positive action measures to further equality. Moreover, social partners can implement positive action measures through works agreements, according to Paragraph 97 No. 25 of the Labour Constitution Act.

4.4 Evaluation of implementation

Overall, Austria is compliant with the requirements imposed by EU law. However, currently, no new proposals are pending, despite Austria having one of the largest pay gaps in the European Union.[110]

4.5 Remaining issues

The COVID-19 pandemic has affected women on the labour market in a disproportionate way, especially those working under precarious working conditions, and has led to a re-traditionalisation of gender roles.[111]

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[108] BGBl. Nr. 651/1989.
[109] Especially Paragraphs 7ff.
[110] See: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en.
[111] Froissner, F., Glassner, V. and Theurl, S. (2021) 'Krisengewinner Patriarchat? Wie die COVID-Arbeitsmarktkrise Frauen trifft' (Is patriarchy the winner in this crisis? How the COVID labour market crisis affects women), in Filipič, U. and Schönauer, A. (eds), *Ein Jahr Corona: Ausblick Zukunft der Arbeit* (A year of coronavirus: prospects for the future of work), Vienna, ÖGB-Verlag, pp. 56-68, available at: https://www.ssoar.info/ssoar/bitstream/handle/document/72645/ssoar-2021-foissner_et_al-Krisengewinner_Patriarchat_Wie_die_COVID-

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, and Directive 2019/1158)[112]

5.1 General (legal) context

5.1.1 Overview of national acts on work-life balance issues

Work-life balance issues are mostly regulated in the Maternity Protection Act (*MSchG*),[113] the Paternity Leave Act (*Väter-Karenzgesetz*),[114] the Family Time Bonus Act,[115] and the Federal Allowance Act.[116] Additionally, regulations on *force majeure* leave and care leave provisions are regulated within the scope of labour legislation on additional paid holidays (*Urlaubsgesetz*). Care leave to care for terminally ill individuals, seriously ill children, or other relatives in need of care, as well as a corresponding modification of working contracts, can be found in the Law Amending the Labour Contract Law (*Arbeitsvertragrechtsanpassungsgesetz, AVRAG*).[117] Other labour and civil law acts may also maintain relevant provisions.

A 2019 survey on work-life balance confirmed earlier findings that Austrian workers are generally satisfied with their labour status, but at the same time consider the working hours and the demands at the workplace to be too high.[118]

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 68.3 % in 2020. This is especially prevalent in rural areas.[119] Part-time work contributes to a large extent to the high gender pay gap and the gender pension gap.

In 2021, the Chamber of Labour commissioned a study on the compatibility of family and career during the COVID-19 pandemic, finding that parents experienced high amounts of pressure in their jobs and private lives, due to demands by their employers, the absence of childcare and schooling options and political developments. Women were hit especially hard in this regard.[120]

Arbeitsmarktkrise.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2021-foissner_et_al-Krisengewinner_Patriarchat_Wie_die_COVID-Arbeitsmarktkrise.pdf.

[112] 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 De la Corte Rodríguez, M. (2022), *The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead*, available at: https://www.equalitylaw.eu/downloads/5779-the-transposition-of-the-work-life-balance-directive-in-eu-member-states-a-long-way-ahead.

[113] Maternity Protection Act (*Mutterschutzgesetz, MSchG*), BGBl. Nr. 221/1979.

[114] Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.

[115] Family Time Bonus Act (*Familienzeitbonusgesetz*), BGBl. I Nr. 53/2016.

[116] Federal Care Allowance Act (*Bundespflegegeldgesetz*), BGBl. Nr. 110/1993.

[117] Labour Contract Law (*Arbeitsvertragrechtsanpassungsgesetz, AVRAG*), BGBl. Nr. 459/1993.

[118] See: https://www.familieundberuf.at/tags/studie.

[119] Statistik Austria (Statistics Austria), https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/erwerbstaetigkeit/index.html.

[120] Froissner, F., Glassner, V. and Theurl, S. (2021) 'Krisengewinner Patriarchat? Wie die COVID-Arbeitsmarktkrise Frauen trifft' (Is patriarchy the winner in this crisis? How the COVID labour market crisis affects women), in Filipič, U. and Schönauer, A. (eds), *Ein Jahr Corona: Ausblick Zukunft der Arbeit* (A year of coronavirus: prospects for the future of work), Vienna, ÖGB-Verlag, pp. 56-68, available at: https://www.ssoar.info/ssoar/bitstream/handle/document/72645/ssoar-2021-foissner_et_al-Krisengewinner_Patriarchat_Wie_die_COVID-Arbeitsmarktkrise.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2021-foissner_et_al-Krisengewinner_Patriarchat_Wie_die_COVID-Arbeitsmarktkrise.pdf.

Between 2015 and 2018, social partners, industry leaders and governmental departments were asked to report on measures regarding work-life balance in relation to the 'Charter for the Compatibility of Family and Work' (*Charta Vereinbarkeit von Familie und Beruf*), a non-binding general commitment to improve work-life balance by government, industry and social partners. This collection of different measures can be accessed online.[121]

In December 2022, a comprehensive law reform package was passed for workers in the public sector.[122] One of the reasons was to transpose Directive 2019/1158.[123] However, for the private sector, such legislation is still missing.

5.1.2 Political and societal debate and pending legislative proposals

To the author's knowledge, there are no further legislative proposals pending. Debate (both academic and public/political) on the issue of the transposition of Directive 2019/1158 is extremely limited.

However, work-life balance is a continued issue in public debate in other ways.

For example, there is continued debate on childcare facilities, particularly regarding childcare in the countryside and the need to expand resources in this area.

The costs of raising children and the connected poverty risks are also the issue of regular public interest. In December 2021, a long-awaited study of household costs of raising children (*Kinderkostenstudie*) was presented by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, and the Federal Statistics Office (*Statistik Austria*).[124] This study established, among other things, that households with single mothers tend to be in especially precarious financial situations. In October of the same year, both institutions issued another study on child support payments,[125] showing that roughly a third of all children living in single parent households do not receive child maintenance. These studies underline the fact that single mothers are at a high risk of poverty.

A Social Democrat proposal on maintenance guarantees for the children of single parents meant to address this problem (*Unterhaltsgarantie*) was backed by most parties, except for the conservative People's Party (ÖVP) and the right-wing Freedom Party (FPÖ) and has ultimately not been adopted. Nevertheless, it has repeatedly been brought forward in Parliament. While the Government announced at the beginning of 2021 that they would be moving on this issue, nothing has happened so far.[126]

In 2022, a study by the NGOs *Volkshilfe and Kinderfreunde* showed that 69 000 children between the age of 0 and 4 years are at risk of poverty (that is, every fourth child). Therefore, they renewed demands for a basic subsidy system for all children (*Kindergrundsicherung*).[127]

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[121] See: 2019-Evaluierung-Charta-Familie-und-Beruf.pdf.
[122] BGBl. I Nr. 205/2022.
[123] *Erläuterungen zur Regierungsvorlage, 1793 der Beilagen* XXVII. GP, page 1.
[124] Bauer, M., Heuberger, R., Kowarik, A., Kronsteiner-Mann, C., Six, M., and Weinauer, M. (2021), *Kinderkostenanalyse 2021. Endbericht – Methodische Langfassung* (Analysis of the costs of raising children 2021. Final report – methodological long version), Statistik Austria, available at: https://www.statistik.at/wcm/idc/idcplg?IdcService=GET_PDF_FILE&RevisionSelectionMethod=LatestReleased&dDocName=127288.
[125] Statistik Austria *Unterhaltsbefragung* (Maintenance survey), available at: https://www.statistik.at/web_de/presse/126801.html.
[126] 'Doch keine Unterhaltsgarantie' (No maintenance guarantee after all), *Wiener Zeitung*, 27.01.2021, available at: https://www.tagblatt-wienerzeitung.at/nachrichten/politik/oesterreich/2090357-Doch-keine-Unterhaltsgarantie.html.
[127] 'Every 4th Child in Austria is at Risk of Poverty', *Der Standard,* 10 October 2022, available at: https://www.derstandard.at/story/2000139833856/jedes-vierte-kleinkind-in-oesterreich-armutsgefaehrdet.

5.2 Pregnancy and maternity protection[128]

5.2.1 Definition in national law (Article 2 of Directive 92/85)

Legislation specifies an overall protection period for women of at least 16 weeks (maternity leave, *Mutterschutz*) – usually 8 weeks before the due date and 8 weeks after having given birth. This leave is mandatory for both employers and employees.

However, under special circumstances (i.e. health risks), the amount of maternity leave can be increased.

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 employees/workers take a period of parental leave after maternity leave.

5.2.2 Obligation to inform employer (Article 2 Pregnancy Directive)

Employees are not obliged to inform employers of their pregnancy. However, the specific protections for pregnant workers are not applicable until the employer has received definite information about the pregnancy. Employers can demand a doctor's certificate, which is required to include the estimated date of delivery. The start date of the 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.[129]

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

Paragraphs 2a to 9 of the Maternity Protection Act 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.

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;

[128] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992.

[129] OGH 16.06.2008, 8 ObA 27/08s, ECLI:AT:OGH0002:2008:008OBA00027.08S.0616.000.

- 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; and
- have to work in pressurised air (limitative list).

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.

During the COVID-19 pandemic, additional measures to protect pregnant women in the workplace had to be observed, including enhanced hygiene and distancing measures. Under certain conditions, pregnant women can take protective leave due to the COVID-19 pandemic (especially if they are not able to work from home), which is reflected in Paragraph 3a of the Maternity Protection Act. While the provision has since run out, it is still in force for women who are already on leave based on this provision.

5.2.5 Case law on issues addressed in Articles 4 and 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.[130]

5.2.6 Prohibition of night work (Article 7 of Directive 92/85)

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.[131]

5.2.8 Prohibition of dismissal (Article 10(1) of Directive 92/85)

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

Employers can only terminate a pregnant worker's contract for a number of special reasons (see below), after having informed the works council and having obtained subsequent consent from the labour courts. At court, the employers have to offer evidence of the asserted special grounds for dismissal. In cases where a dismissal takes place before the pregnant 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 one of the special grounds listed in Paragraph 12 of the Maternity Protection Act.[132] These are, among others, a failure to attend work without any justification for a significant period, physical or severe verbal assaults against the employer or their family, theft, fraud, or breaches of trust that would also qualify as a criminal offence (such as fraud or serious theft).

[130] See also: VwGH 25.04.1990, 88/08/0154.
[131] OGH 27.10.1970, 4 Ob 92/70.

Employment contracts can also be terminated if the company 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 claim unjustified premature dismissal and demand reinstatement, or cease working and claim legal severance pay (*Kündigungsentschädigung*), as well as damages (if applicable).

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 Paternity Leave Act), and up to four weeks after the end of parental leave.

If an employee's contract has been terminated, they are nonetheless entitled either to have their employment relationship restored or to claim material damages. Additionally, they can claim non-material damages in either case.

5.2.9 Redundancy and payment during maternity leave

During maternity leave, individuals receive their average income, including regular bonuses,[133] but excluding special premiums and average overtime pay, from their healthcare provider.

However, if the specific workplace conditions endanger the health of the pregnant worker or her pregnancy, and if she cannot be employed in another position, the employee is entitled to be exempt from work at full pay by her employer until her maternity leave starts (Paragraph 2b Maternity Protection Act).

5.2.10 Employer's obligation to substantiate a dismissal in writing (Article 10(2) of Directive 92/85)

In general, there is no such obligation. However, an employer can only dismiss a pregnant worker with prior consent of the court, so they will have to give reasons for the dismissal to the court.

5.2.11 Case law on the protection against dismissal

Case law applies to both pregnant workers and workers on maternity leave.

If an employer wants to dismiss a protected worker, case law demands the immediate assertion of possible grounds for dismissal within about one week of occurrence.[134] If consent is obtained from the courts, employers must terminate the contract immediately or lose their right to do so.[135] Protection against dismissal depends on the employee's specific and provable notification about the pregnancy to her employer within at least five working days after the date of the (written) termination.[136]

According to jurisprudence, an employer cannot choose to continue to work with someone hired as a temporary replacement (*Karenzvertretung*) for an employee on leave, instead of the original employee – even if the replacement's work performance is very high and even better than the original employee's was. Such an arrangement would contradict the law's purpose.[137]

[133] Including for night work, if it occurred regularly before the pregnancy. OGH 18.12.2020, 8 Ob A 66/20v, ECLI:AT:OGH0002:2020:008OBA00066.20V.1218.000.
[134] OGH 22.10.2007, 9 ObA 102/06z, ECLI:AT:OGH0002:2007:009OBA00102.06Z.1022.000.
[135] OGH 24.08.2017, 8 ObA 37/17z, ECLI:AT:OGH0002:2017:RS0131679.
[136] OGH 14.03.1996, 8 ObA 2003/96h, ECLI:AT:OGH0002:1996:008OBA02003.96H.0314.000.
[137] OGH 25.06.2014, 9 ObA 50/14i, ECLI:AT:OGH0002:2014:009OBA00050.14I.0625.000.

Material damages due to an unlawful dismissal cannot be limited to the amount of severance payment (including salaries for notice periods) that an employer would have had to pay if the employment had been terminated at the earliest legally possible date. Such a restriction would be tantamount to only sanctioning *premature* discriminatory terminations.[138]

5.2.12 Protection against dismissal during pregnancy and maternity leave

See above, 5.2.11 and 5.2.8.

Table 2: Protection against dismissal during pregnancy and maternity leave

Yes/no	Protected period	Exceptions	Specific procedure?
Yes	Generally, 8 weeks before and 8 weeks after giving birth (prolongation in individual cases possible).	None. It is an absolute right that neither the employer nor the employee can choose to forgo.	In order for dismissals to be effective, the employer has to obtain prior consent of the court.

5.3 Maternity leave

5.3.1 Length (Article 8 of Directive 92/85)

Maternity leave lasts for at least 16 weeks (8 weeks before and 8 weeks after delivery); in cases of premature births, multiple births or C-sections, it can be 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). Case law states that regular maternity leave periods (not factoring in medical leave before delivery) should not exceed 20 weeks.[139]

5.3.2 Obligatory maternity leave

Maternity leave is obligatory for both employers and employees. Employers who let women work during maternity leave periods risk administrative fines. Employers usually follow these rules; there are no relevant infringements on record. Maternity protection rules are monitored and enforced by the Labour Protection Authority (*Arbeitsinspektorat*).

5.3.3 Legal protection of employment rights (Article 11(1) of Directive 92/85)

Employers are required to ensure that pregnant women are protected from dangerous or prohibited working conditions and, if necessary, assigned an alternative suitable workplace. If there is no such suitable workplace available, the pregnant woman is to be sent on paid leave until maternity protection starts.

[138] OGH 27.08.2015, 9 ObA 87/15g, ECLI:AT:OGH0002:2015:009OBA00087.15G.0827.000.
[139] E.g. OGH 04.05.1999, 10 ObS 41/99y, ECLI:AT:OGH0002:1999:010OBS00041.99Y.0504.000.

5.3.4 Legal protection of rights ensured from the employment contract (Article 11(2) of Directive 92/85)

Employees have the right to return to the same workplace after parental leave. They cannot be dismissed until four weeks after returning from parental leave.

Employers are required to acknowledge parental leave periods in full (up to the maximum legal parental leave period) for any entitlements arising out of the employment relationship which depend on length of service (Section 15f Maternity Protection Act).

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 (Article 11(3) of Directive 92/85)

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, to be paid by their healthcare provider. 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, including regular bonuses, but excluding special premiums and average overtime pay.[140]

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

Unemployed pregnant women are entitled to a maternity benefit that amounts to 100 % of their regular monthly unemployment benefit.

Similar provisions are in place for self-employed individuals with annual earnings above the social security threshold, who are entitled to a fixed maternity benefit of EUR 57.89 per day in 2022.

In all cases, maternity benefits include full coverage in the statutory health and pension insurance scheme without the need for individual contributions.[141]

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

Every pregnant employee with earnings above the social security threshold or receiving unemployment benefits is entitled to maternity benefit. Generally, there are no waiting periods.

However, if self-employed individuals wish to report their trade as temporarily suspended, they need to have been insured for at least six months prior to their maternity leave to receive maternity benefit.

Due to the calculation method of the maternity benefit for employees, the amount may be lower than the actual contractual remuneration, if the employment period before maternity has been shorter than three months.

[140] Paragraph 162 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz, ASVG*), BGBl. Nr. 189/1955.

[141] 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 specialised state fund for family burdens (*Familienlastenausgleichsfonds, FLAF*).

5.3.7 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 Paternity Leave Act stipulate 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 its full effect, and employees have the right to return to their former occupation.

5.3.8 Legal right to share maternity leave

Maternity leave aims, *inter alia*, to protect the health of pregnant workers, new mothers and newborns. This is why, in Austria, maternity leave is reserved for women. In this sense, paternity leave – as a parallel to maternity leave – does not exist in Austria. Rather, fathers have the opportunity to take part of their parental leave immediately after the birth of their child (*Frühkarenzurlaub/Papamonat*). See also below.

5.3.9 Case law

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.[142] 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.[143] 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 notified of the pregnancy and are extended during maternity leave and parental leave periods.[144] A parental leave period for a child ends at the start of a consecutive maternity leave period for the next child.[145]

5.3.10 Table on Maternity leave

Table 3 Maternity leave:

Duration	**Obligatory period**	**Possibility to share maternity leave?**	**Payment or allowance**	**Right to return after the end of maternity leave**
Usually 8 weeks before and 8 weeks after giving birth (prolongation in individual cases is possible).	Yes (all of it).	No. There is the possibility of paternity leave, however (usually one month after birth of the child).	Usually equals net income before maternity leave (calculated based on the average net earnings of the last three calendar months before maternity protection, including regular bonuses, but excluding special premiums and average overtime pay).	Yes.

[142] OGH 13.01.1988, 9 ObA 502/87.
[143] OGH 16.05.2002, 8 ObS 297/01m, ECLI:AT:OGH0002:2002:008OBS00297.01M.0516.000.
[144] OGH 15.03.2000, 9 ObA 274/99f, ECLI:AT:OGH0002:2000:009OBA00274.99F.0315.000.
[145] OGH 13.04.1988, 9 ObA 132/87.

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 Paternity 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 of the 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 Paternity Leave Act).

5.4.3 Case law

No relevant case law specifically addressing adoption leave.

5.5 Leave in relation to surrogacy

5.5.1 Prohibition of surrogacy

Surrogacy is prohibited in Austria, according to Sections 2 and 3 of the Assisted Procreation Act (*Fortpflanzungsmedizingesetz – FmedG*), BGBl. Nr. 275/1992.

5.5.2 Leave in relation to surrogacy

N/A.

5.5.3 Case law on leave in relation to surrogacy

n/a

5.6 Transposition of the Work-Life Balance Directive 2019/1158 in general

5.6.1 Transposition of the Work-Life Balance Directive (WLB) by 1 January 2023

So far, Austria has implemented the WLB Directive with regard to the public sector.[146] It includes the following points:

- Heightened protection of workers against dismissals based on paternity leave / care leave / remote work / part-time work based on parental/care obligations. If the worker believes their dismissal was based on one of the grounds above, they can require the grounds for their dismissal in writing; moreover, it is clearly stated that the burden of proof in this case (for a non-discriminatory dismissal) rests on the employer.

- Explicit prohibition of disadvantaging workers who work remotely, or part-time, due to parental/care obligations.

[146] BGBl. I Nr. 205/2022.

- Expansion of the possibility for flexible working time arrangements (parental part-time work) until the child is eight years old (as opposed to: until the child enters school).

- Expansion of care leave (a worker can take care leave for close family members who are not living in the same household).

However, for the private sector, no such legislation has been passed.

The following points still remain to be addressed:

- Paternity leave: contrary to the WLB Directive, additional qualifying conditions exist in Austria, such as the requirement of sharing the same household with the child and the mother of the child (in order to qualify for paternity leave). This has led to situations in the past where even certain hospital stays of the child have been detrimental for a father's entitlement; also, it seems discriminatory against divorced fathers (or other constellations where the birth mother and the other parent(s) do not live together).

- Moreover, the allowance during paternity leave is well below sick pay level (flat rate of EUR 22.60 per day in 2022). Austria has not explicitly stated whether it is making use of the exception of Article 20(7) of the WLB Directive, and it is unclear whether it would meet the requirements of Article 20(7) in any case.

- Parental leave: an additional qualifying condition exists contrary to the WLB Directive: The parent must live in the same household as the child in order to qualify for parental leave, which might present a problem for divorced fathers (and other parents not residing in the same household as the child).

- Care leave: In the private sector, (paid) care leave is only available to care for persons (relatives) living in the same household, or children. An exception is '*Pflegekarenz'* or '*Pflegeteilzeit'* – unpaid (full or partial) leave to care for close relatives, during which the worker can apply for benefits from their healthcare provider.

- Parental part-time work: there is an excessive length of service qualification, requiring a worker to have worked at least three years with the same employer in order to gain the absolute right (with all dismissal protections) to parental part-time work.

5.6.2 Short description of child-related leave

In Austria, there are three types of leave available to parents: maternity leave (as largely corresponding to EU terminology), parental leave (as largely corresponding to EU terminology), and 'leave on the occasion of a child's birth' (*Freistellung anlässlich der Geburt eines Kindes*) – a form of paternity leave.

1. Maternity leave (Mutterschutz)[147]

Maternity leave lasts for at least 16 weeks (8 weeks before and 8 weeks after delivery); in cases of premature births, multiple births or C-sections, it can be 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). Case law states that regular maternity leave periods (not factoring in medical leave before delivery) should not exceed 20 weeks.[148]

[147] Governed by the Maternity Protection Act (*Mutterschutzgesetz, MSchG*), BGBl. Nr. 221/1979.
[148] E.g. OGH 04.05.1999, 10 ObS 41/99y, ECLI:AT:OGH0002:1999:010OBS00041.99Y.0504.000.

Maternity leave is obligatory for both employers and employees. Employers who let women work during maternity leave periods risk administrative fines. Employers usually follow these rules; there are no relevant infringements on record. Maternity protection rules are monitored and enforced by the Labour Protection Authority (*Arbeitsinspektorat*).

During maternity leave, the worker is entitled to maternity allowance (*Wochengeld*) under statutory social health insurance rules, to be paid by their healthcare provider. 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, including regular bonuses, but excluding special premiums and average overtime pay.[149]

2. Parental leave (Karenz)

Parental leave starts at the end of the maternity leave period. It has to be distinguished legally and bureaucratically from childcare benefits, which can be claimed during parental leave. However, while parental leave is a labour law construction and has to do with the employment relationship, childcare benefits are an allowance paid by the healthcare provider and do not necessarily depend on the employment relationship.

Parental leave with all labour law protections (e.g. protections against dismissal, etc.) can last until the second birthday of the child at the latest, or until the start of the maternity leave period for a younger sibling. In principle, both parents are entitled to use part (or all) of the leave. A leave of any number of days is possible.

Both parents have the right to parental leave independently. The statutes require parents to coordinate the allocation 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. When the parents first switch (meaning one of them is finishing parental leave and the other one is starting it), they may take one month of parental leave at the same time (which shortens the overall duration by one month).

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.

Parental leave is structured as an unpaid full-time leave period during which the employment contract remains intact, but dormant; 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.

As mentioned, parental leave is legally distinct from childcare benefits (*Kinderbetreuungsgeld*), payable by the healthcare provider, which can be applied for by a parent during parental leave.

There are two systems of childcare benefits: income-related childcare benefits (*einkommensbezogenenes Kinderbetreuungsgeld*) and the so-called childcare benefits account (*Kinderbetreuungsgeldkonto*), a non-income-related form of childcare benefits. In principle, individuals can choose between the two systems. However, only one system can

[149] Paragraph 162 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz, ASVG*), BGBl. Nr. 189/1955.

be chosen per child; for instance, it is not possible that the mother chooses one system and the father another.

For both systems, there are a number of conditions. The applicant needs to reside legally in Austria, in a household together with the child, and be entitled to family allowance (*Familienbeihilfe*). While receiving childcare benefits, the additional earnings of the applicant may not exceed a certain amount.

Income-related childcare benefits: individuals who have been employed or self-employed for 182 days before the birth of a child (maternity leave counts as work) and made contributions to the pension and healthcare insurance providers can apply for income-related childcare benefits. These amount to about 80 % of the income of an employee (about EUR 2 000 per month maximum) or a daily allowance of EUR 56.87 (2021) for self-employed individuals. Since income-related childcare benefits are meant to compensate the individual for the loss of earnings during parental leave, the limit for additional earnings while receiving benefits is EUR 7 300 per year.

Income-related childcare benefits can be received for 12 months after the birth of a child, or a total of 14 months if both parents make use of it.

Childcare benefits account: in contrast to income-related childcare benefits, the childcare benefits account provides parents with a lump sum that can be received for at least 365 and up to 851 days after the birth of a child. Within this range, any number of days is possible. Depending on the number of days that are chosen, the daily allowance ranges between EUR 33.88 (for the shortest possible period) and EUR 14.53 (for the longest possible period). Note that the longest possible period is longer than the period for parental leave! This means that after two years, a parent that does not return to their place of work loses all parental leave-specific protections.

In this system, it is possible to have additional earnings of up to EUR 16 200 per calendar year.

Both systems have a 'partnership bonus' (*Partnerschaftsbonus*): if both parents make use of childcare benefits in an approximately equal way, each parent receives a bonus of EUR 500.

3. Leave On the Occasion of a Child's Birth / Paternity Leave (also referred to colloquially as 'Dad's Month' – Papamonat)

Fathers have the right to stay with their newborn child for up to a month within the period of (usually) eight weeks after birth. However, family time bonus leave shortens the length of parental leave – in this sense, it is not an independent form of leave per se, but rather, a special form of parental leave for fathers who want to stay with their newborn after birth.

During this time, fathers can also claim part of their childcare benefits (=parental leave allowance) (*Kinderbetreuungsgeld*), which includes statutory health benefits in kind. However, the benefits for this month are quite low (a fixed rate of EUR 22.60/day in 2021).[150] This remuneration is officially referred to as 'family time bonus' (*Familienzeitbonus*). In comparison, mothers are entitled to maternity benefits mirroring their previous income.

[150] See Paragraph 3 Family Time Bonus Act (*Familienzeitbonusgesetz*), BGBl. I Nr. 53/2016.

To make matters complicated, there are a number of different Acts regulating the types of leave. The complexity of legislation is due to historical reasons.

Maternity leave and mothers' parental leave are largely regulated by the Maternity Protection Act (*Mutterschutzgesetz, MSchG*), BGBl. Nr. 221/1979.

The '*Papamonat'* and fathers' parental leave are largely regulated by the Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.[151] This Act regularly refers to the MSchG.

Childcare benefits are regulated largely by the Childcare Benefits Law (*Kinderbetreuungsgeldgesetz*), BGBl. I Nr. 103/2001.

The family time bonus is regulated largely by the Family Time Bonus Act (*Familienzeitbonusgesetz*), BGBl. I Nr. 53/2016.

Regarding the public sector, parental leave provisions can also be found in the Act on Public Service Law for Tenured Public Servants (*Beamten-Dienstrechtsgesetz 1979*),[152] and the Act on Contractual Public Employees (*Vertragsbedienstetengesetz 1948*).[153]

Protection against (gender) discrimination – including discrimination based on the status as a parent – are covered by the Equal Treatment Acts: Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz*, *GlBG*), BGBl. I Nr. 66/2004; Equal Treatment Act for Federal Civil Servants and Federal Contract Employees (*Bundes-Gleichbehandlungsgesetz*, B-GBG), BGBl. Nr. 100/1993.

5.7 Paternity leave

5.7.1 Paternity leave in national law (Article 16 Recast Directive and Article 3(a) and 4 WLB Directive)

See Section 5.6.2.

Fathers are entitled to one month of leave, to be taken anytime from the birth of the child until the end of the mother's maternity leave (usually within eight weeks after birth).[154]

Co-parents (no matter the gender) are also entitled to take parental leave and thus, paternity leave. Prerequisite is that they reside in the same household as the child.

This does, however, present a problem for fathers who are separated from the mother, but want to actively participate in their child's life. It also is a problem for constellations in which there are more than two parents (e.g. a rainbow family with one mother and two fathers), if they do not all reside in the same household.

It has also led to problems in the past if the child had to stay at the hospital due to complications during the time of the intended leave, since the child did not officially reside at the parents' household yet. Recent legislation has made it clear that medically indicated hospital stays do not hinder the fulfilment of this requirement, if the father spends at least four hours / day on average with care work, according to paragraph 2(3a) of the Paternity Leave Act.[155]

[151] A more literal translation would be 'Fathers'-Parental Leave Act' – this would in fact also avoid confusion, since paternity leave per se does not exist in Austria (as explained above); rather, part of the parental leave can be taken by fathers after a child's birth.
[152] Act on Public Service Law for Tenured Public Servants (*Beamten-Dienstrechtsgesetz 1979*), BGBl. Nr. 33/1979.
[153] Act on Contractual Public Employees (*Vertragsbedienstetengesetz 1948*), BGBl. Nr. 86/1948.
[154] See paragraph 1a of the Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.
[155] Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.

5.7.2 Paid paternity leave (Article 8(1) and (2) WLB)

See Section 5.6.2.

Fathers can claim remuneration, officially referred to as 'family time bonus' (*Familienzeitbonus*). The allowance is quite low: a flat rate of EUR 22.60/day in 2022.[156] In comparison, mothers are entitled to maternity benefits mirroring their previous income.

In Austria, sick pay has two forms. In the first 6 to 12 weeks of illness, the employer continues to pay the full salary (*Entgeltfortzahlung*), depending mostly on the length of the employment relationship. Afterwards, the employer will reduce the salary to 50 % for another four weeks; during this time, the healthcare provider will start paying "*Krankengeld*" (illness allowance). While the employee still receives 50 % of their salary, the healthcare provider will also pay 50 % of the illness allowance. After the employer stops paying, the entitlement to illness allowance arises in full, depending both on the salary and the length of the illness. It amounts to about 50-60 % of the salary the worker previously received, and is capped at a gross salary of about EUR 3 400/month (2022).

In this sense, the family time bonus as an allowance during paternity leave is usually lower than the (average) sick pay or illness allowance, depending on the individual worker's former salary.

The family time bonus is payable by the healthcare provider for a period of 28, 29, 30 or 31 days within 91 days after a child's birth. Caveat: these rules regarding time periods slightly differ from the time period rules in the Paternity Leave Act! In any case, the family time bonus can only be received while on leave, so it is up to the worker to make sure their applications for paternity leave and family time bonus overlap.

5.7.3 Protection against unfavourable treatment and dismissal (Article 16 of the Recast Directive)

Article 16 of Directive 2006/54 is implemented by Paragraph 7 of the Paternity Leave Act.

5.7.4 Case law

Austrian authorities are very strict when examining the conditions under which the family time bonus is granted. Up until 2022, it was common to deny the family time bonus to fathers if any of its conditions was not met even for a short amount of time. For example, if the child or the mother had to spend some days at the hospital due to one of them falling ill, this was considered enough to void the 'common household with the child' requirement for the father, thus denying the entitlement to the family time bonus altogether.[157]

However, in 2022, the Supreme Court reversed its previous jurisprudence, allowing for the allotment of an aliquot of the bonus for the responding days in which all conditions had been met.[158]

[156] See Paragraph 3 Family Time Bonus Act (*Familienzeitbonusgesetz*), BGBl. I Nr. 53/2016.
[157] OGH 19.05.2021, 10 ObS 71/21w, ECLI:AT:OGH0002:2021:010OBS00071.21W.0519.000.
[158] OGH 29.03.2022, 10 ObS 161/21f, ECLI:AT:OGH0002:2022:010OBS00161.21F.0329.000.

5.7.5 Table on paternity leave

Table 4: Paternity leave

Who is entitled?	Duration	Possibility to share paternity leave?	Payment or allowance	Qualifying conditions for allowance
Fathers and partners of the mother in a same-sex relationship	1 month	No	Yes, EUR 22.60 per day in 2022	Shared household with the child

5.8 Parental leave

5.8.1 Implementation of Directive 2019/1158 (Articles 3, 5, 8, 20(1) and 20(2) WLB Directive)

See Sections 5.6.1 and 5.6.2.

5.8.2 Parental leave in national law (Article 5(1) and (4) WLB Directive)

See Section 5.6.2.

Parental leave is structured as an unpaid full-time leave period during which the employment contract remains intact, but dormant; 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.

Caveat: parental leave is legally distinct from childcare benefits (*Kinderbetreuungsgeld*), which can be applied for by a parent during parental leave.

5.8.3 Individual nature of the right to parental leave and transferability (Article 5(2) WLB Directive)

Both parents have the right to parental leave independently. Parents need to coordinate the allocation 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 by any parent in up to three parts with a two-month minimum duration for one of those parts. However, both parents may not be on leave together, with these exceptions: When the parents first switch (meaning one of them is finishing parental leave and the other one is starting it), they may take one month of parental leave at the same time (which shortens the overall duration by one month).

As mentioned, parental leave has to be distinguished from childcare benefits (allowance during parental leave): here, two months of benefits are non-transferrable.

5.8.4 Period of notice (Article 5(3) WLB Directive)

Mothers have to let employers know of their intention to take leave (and the length of the leave) until the end of their maternity leave. Fathers (or co-parents) need to let employers know three months ahead of the expected due date of their intention to take paternity leave, as well as of its length; the fathers and co-parents need to inform their employer eight weeks after the birth at the latest (which usually coincides with the end of the maternity leave).

It is possible to inform the employer of the intention to prolong the leave three months ahead of the previously planned end of the leave (or two months ahead, if the leave was originally planned for less than three months).

5.8.5 Postponement of parental leave (Article 5(5) WLB Directive)

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

5.8.6 Forms of parental leave (Article 5(6) and (7) WLB Directive)

See Section 5.6.2.

5.8.7 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Article 5(8) WLB Directive)

There is no provision for special rules and exceptional conditions for parents of children with a disability or long-term illness in the context of parental leave. For older children, there are unpaid leave arrangements in cases of severe illness (*Familienhospizkarenz*).[159] In these cases, parents may also be eligible for a special care benefit (*Pflegekarenzgeld*).[160]

Likewise, to the knowledge of the author, there are no special provisions for parents who have a child with disabilities.

5.8.8 Paid parental leave (Article 8(1) and (3) WLB Directive)

See Section 5.6.2.

Parents of children who are legal residents in Austria are eligible for childcare benefits (*Kinderbetreuungsgeld*). Childcare benefits are paid by an individual's healthcare provider. In terms of national legislation, this payment is not part of social security, but rather a non-contributory benefit, financed by the State Fund for Family Burdens (*Familienastenausgleichsfonds, FLAF*) and general revenue.[161]

Since 2017, there have been two different systems of childcare benefits: income-related childcare benefits (*einkommensbezogenenes Kinderbetreuungsgeld*) and the so-called childcare benefits account (*Kinderbetreuungsgeldkonto*), a non-income-related form of childcare benefits. In principle, individuals can choose between the two systems. However, only one system can be chosen per child; for instance, it is not possible that the mother chooses one system and the father another.

For both systems, there are a number of conditions. The applicant needs to reside legally in Austria, in a household together with the child, and be entitled to family allowance (*Familienbeihilfe*), see below. While receiving childcare benefits, the additional earnings of the applicant may not exceed a certain amount. Importantly, the receipt of childcare benefits depends on the timely completion of mandatory medical examinations for the child.

Income-related childcare benefits: individuals who have been employed or self-employed for 182 days before the birth of a child (maternity leave counts as work) and made contributions to the pension and healthcare insurance providers can apply for income-related childcare benefits. These amount to about 80 % of the income of an employee

[159] Law Amending the Labour Contract Law (*Arbeitsvertragsrechts-Anpassungsgesetz, AVRAG*), BGBl. No. 459/1993, Paragraphs 14 to 14c.
[160] Federal Care Allowance Act (*Bundespflegegeldgesetz*), BGBl. Nr. 110/1993, Paragraphs 21c to 21f.
[161] Childcare Benefits Act (*Kinderbetreuungsgeldgesetz*)*, KBGG*, BGBl. I Nr. 103/2001.

(about EUR 2 000 per month maximum) or a daily allowance of EUR 61.25 (2023) for self-employed individuals. Since income-related childcare benefits are meant to compensate the individual for the loss of earnings during parental leave, the limit for additional earnings while receiving benefits is EUR 7 800 per year.

Income-related childcare benefits can be received for 12 months after the birth of a child or a total of 14 months if both parents make use of it.

Childcare benefits account: in contrast to income-related childcare benefits, the childcare benefits account provides parents with a lump sum that can be received for at least 365 days and up to 851 days after the birth of a child. Within this range, any number of days is possible. Depending on the number of days that are chosen, the daily allowance ranges between EUR 35.85 (for the shortest possible period) and EUR 15.38 (for the longest possible period).

In this system, it is possible to have additional earnings of up to EUR 18 000 per calendar year.

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.

Both systems have a 'partnership bonus' (*Partnerschaftsbonus*): if both parents make use of childcare benefits in an approximately equal way, each parent receives a bonus of EUR 500.

Caveat: the entitlement period for childcare benefits and parental leave need not necessarily coincide.

5.8.9 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.[162]

If an employer has employed a substitute for an employee on parental leave, they may not replace the original employee with the substitute at the end of the leave, even if the substitute does excellent work.[163]

[162] OGH 8 ObA 33/10y.
[163] OGH 25.06.2014, 9 ObA 50/14i, ECLI:AT:OGH0002:2014:009OBA00050.14I.0625.000.

5.8.10 Table on parental leave

Table 5: Parental leave

Duration and period	Possibility to share parental leave?	Flexibility (e.g. full-time, part-time, piecemeal?)	Payment or allowance?	Qualifying conditions for payment or allowance?
Up to the child's second birthday (with all labour law protections); up to 12-14 months (income-related benefits); up to 851 days after the child's birth (benefits account).	Yes, but not at the same time	Full-time, possibility to take different instalments	Allowance	Yes: same household as the child; entitlement to receive family allowance (*Familienbeihilfe),* which requires Austria to be the 'centre of life' *(Lebensmittelpunkt);* for the income-related benefits: uninterrupted employment for 182 days prior to birth + yearly earnings may not exceed EUR 7 800; for the benefits account: yearly earnings may not exceed EUR 18 000.

5.9 Carers' leave

5.9.1 Carers' (or care) leave in national law (Articles 3(1)(c), (d) and (e) and 6 WLB Directive)

In Austria, there are several constructs regarding the care of relatives. Austrian law makes a difference between care (*Pflege*) and supervision (*Betreuung*), e.g. of a child. Care implies that someone cannot take care of themselves.

Care Leave (*Pflegefreistellung*) is regulated in Paragraph 16 of the Vacation Leave Act (*Urlaubsgesetz*), BGBl. Nr. 390/1976. For employees of the public sector, different laws apply, namely the Act on Contractual Public Employees (*Vertragsbedienstetengesetz*)[164] and the Public Service Law for Tenured Public Servants (*Beamten-Dienstrechtsgesetz*).[165]

Workers have the right to take up to one work week (usually five days) of paid leave to care for the following individuals living in the same household:[166]

- children, grandchildren, great-grandchildren, etc. (direct line);
- parents, grandparents, great-grandparents, etc. (direct line);
- adoptive and foster children;
- biological children of spouse or long-term partner (same or different sex); and
- spouse or long-term partner (same or different sex).

Biological, adoptive and foster children not living in the same household are also covered.

[164] Act on Contractual Public Employees (*Vertragsbedienstetengesetz 1948*), BGBl. Nr. 86/1948.
[165] Act on Public Service Law for Tenured Public Servants (*Beamten-Dienstrechtsgesetz 1979*), BGBl. Nr. 33/1979.
[166] A law reform entering into force in 2023 eliminates the 'same household' requirement for public servants and other employees in the public sector. 2. *Dienstrechts-Novelle* 2022, BGBl. I Nr. 205/2022, 29.12.2022.

Care leave to supervise certain individuals is also possible under certain circumstances. It covers, among others, children under 10 years old who have to stay in a hospital, one's own children (living in the same household or not), and the spouse's or partner's children (in the same household, if no one else can supervise them).

If the leave is used up, a worker may be entitled – under certain circumstances – to an additional week of care leave. Should this also not suffice, they are entitled to take vacation days.

Apart from this, employees can negotiate unpaid leave or a change of their working hours (*Pflegeteilzeit*) with their employers, in cases of extended care for terminally ill relatives (*Sterbebegleitung*) or seriously ill children (*Familienhospizkarenz*), or for taking care of relatives with increased care requirements, for instance by making arrangements for transfer into long-term care (*Pflegekarenz*). In these cases, the permissibility of employment contract termination during the leave period is limited.[167] Usually, there are federal benefits available in case of unpaid leave (up to 55 % of the previous income, the rate of unemployment benefits).

5.9.2 Payment or allowance

One to two weeks of leave per year are paid in full. After this, it is possible for the employee to take (paid) vacation time.

There is the possibility to take unpaid leave (up to four weeks per year) to care for a relative.

5.9.3 Case law

N/A.

5.9.4 Table on carers' leave

Table 6: Carers' leave

Purpose(s) of leave	**Maximum period of leave**	**Compensation?**	**Beneficiaries (persons taken care of)**	**Other relevant information**
Care for relatives in the same household and/or children	1-2 weeks (paid)	Yes	Children. And/or the following individuals living in the same household: - children, grandchildren, great-grand-children, etc. (direct line); - parents, grandparents, great-grand-parents, etc. (direct line)	Since 2023, the 'same household' requirement for employees in the public sector has been eliminated.

[167] Paragraphs 14 to 14d and 15 of the Law Amending the Labour Contract Law (*Arbeitsvertragrechtsanpassungsgesetz, AVRAG*), BGBl. No. 459/1993.

			- adoptive and foster children; - biological children of spouse or long-term partner (same or different sex); and - spouse or long-term partner (same or different sex).	

5.10 Time off for *force majeure*

5.10.1 Time off for *force majeure* (Article 7 WLB Directive)

Often, leave due to *force majeure* (*höhere Gewalt*) is deduced from Paragraph 1155 of the Civil Code.[168] It stipulates that if reasons that are attributed to the sphere of the employer prevent the worker from working (i.e. floods, fire, etc.), then the employee has the right to paid leave.

During part of the COVID-19 pandemic, this leave was extended to expressly contain certain COVID-19-related circumstances. These stipulations have already expired.

Similarly, the worker has the right to receive salary if they are prevented from working due to certain issues that are attributed to their own sphere, but that they have no control over according to Paragraph 1154b of the Civil Code (which is also partly reflected in Paragraph 8 of the Act on Employees in the Private Sector (*Angestelltengesetz, AngG*), BGBl. Nr. 292/1921).

Section 5 of Paragraph 1154b of the Civil Code contains an unspecific entitlement to salary if the worker is prevented from work for important reasons attributed to their sphere, if they are free of fault, and if the obstacle lasts for a relatively short time.

'Important reasons' include, *inter alia* (as developed by jurisprudence), funerals, public duties such as jury duty, but also important family-related duties that might not be covered by care leave or other provisions.

'A relatively short time' has been interpreted in the past as meaning up to one week; however, each case has to be examined individually.[169]

5.10.2 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.[170] 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.[171]

[168] Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), JGS Nr. 946/1811 idF BGBl. I Nr. 175/2021.
[169] Krejci, H. (2000), § 1154b ABGB, in: Rummel, P., Kommentar zum ABGB (3rd edition), para 40.
[170] OGH 22.10.1997, 9 ObA 259/97x, ECLI:AT:OGH0002:1997:009OBA00259.97X.1022.000; OGH 16.02.2000, 9 ObA 335/99a, ECLI:AT:OGH0002:2000:009OBA00335.99A.0216.000.
[171] OGH 15.12.2009, ObA 28/09x, ECLI:AT:OGH0002:2009:009OBA00028.09X.1215.000.

5.10.3 Table on time off for *force majeure*

Table 7: Time off for *force majeure*

Purpose of time off	Maximum period of time off	Compensation?	Other relevant information
Very diverse – funerals, family-related events, jury duty, etc.	Not specified, but usually understood to mean up to one week	Yes – full salary	N/A

5.11 Flexible working time arrangements (FWA)

5.11.1 Right to adjust working patterns (Article 3(1)(f) and 9 WLB Directive)

Paragraphs 15h to 15o of the Maternity Protection Act[172] and Paragraphs 8 to 8h of the Paternity Leave Act[173] contain the right to reduce working time (*Elternteilzeit*) and/or change working patterns for the parents of children up to the age of seven (or upon entering school),[174] if the work contract of the parent has lasted for at least three years in a company with more than 20 employees. If these conditions are not met, parents have the right to parental part-time work up to the child's fourth birthday.[175]

Employees can approach their employers with a detailed proposal concerning the amount of working time and the required working pattern during a regular work week. In companies with more than 20 employees, this proposal cannot be simply rejected by the employer. They can, however, provide a counterproposal 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 companies, the employer can reject the proposal, and it is then up to the employee to enter a court brief, stating reasons why this rejection is not justified.

In this regard, parental part-time work is an absolute right.

Regarding remote work (home office): Due to the COVID-19 pandemic, legislators have adopted a number of rules on working from home (home office).[176] Neither employees nor employers can unilaterally demand home working; rather, an individual agreement is necessary. The framework for home working can be arranged by individual contract or works agreement. Special rules on work accidents, liability and data protection apply, as well as worker protection rules. The employer is obliged to provide work equipment, or to compensate the employee for the costs incurred by working at home using their own digital equipment.[177]

In this sense, remote work is a relative right.

Apart from this, there is the possibility to reduce working hours due to care obligations (*Pflegeteilzeit*) in order to care for close relatives, if they have been medically evaluated as requiring care of a certain level (in Austria, there are several official levels of care, and the categorization of a patient to a certain level is done by a doctor and has vast bureaucratic consequences – regarding benefits, support by trained professionals, etc.). This type of care part-time work can be requested for at least one month and up to three

[172] Maternity Protection Act (*Mutterschutzgesetz, MSchG*), BGBl. Nr. 221/1979.
[173] Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.
[174] Starting 2023, the age limit for children for employees in the public sector will be eight years.
[175] Starting 2023, the age limit for children for employees in the public sector will be eight years.
[176] BGBl. I Nr. 2021/61.
[177] Zischka, S. (2021) *Home-Office. Arbeitsrechtliche Neuerungen, die Personalisten kennen sollten.* PVP 2021/233.

months per year. However, since 2020, the worker has an entitlement to two weeks of care part-time work per year – this does not have to be agreed upon with their employer.

During care part-time work, the worker enjoys certain protections against dismissal, etc. Care part-time work requires a written agreement with the employer.

In this sense, care part-time work is both an absolute right (for two weeks / year) and a relative right (for up to three months / year).

5.11.2 Relative right (Article 9(2) WLB Directive) to FWA

See 5.11.1.

5.11.3 Absolute right to FWA

See 5.11.1.

5.11.4 Duration (Article 9(1) and (3) WLB Directive) of FWA

See 5.11.1.

Both employer and employee can demand a change / early termination of part-time work once. The request has to be issued in writing, three months ahead of the planned change (or two months ahead of the change if the part-time work lasts less than three months).

5.11.5 Other legal rights to FWA

There is the possibility to reduce working hours due to care obligations (*Pflegeteilzeit*) in order to care for close relatives, if they have been medically evaluated as requiring care of a certain level (in Austria, there are several official levels of care, and the categorization of a patient to a certain level is done by a doctor and has vast bureaucratic consequences – regarding benefits, support by trained professionals, etc.). This type of care part-time work can be requested for at least one month and up to three months per year. However, since 2020, the worker has an entitlement to two weeks of care part-time work per year – this does not have to be agreed upon with their employer.

During care part-time work, the worker enjoys certain protections against dismissal, etc. Care part-time work requires a written agreement with the employer.

In this sense, care part-time work is both an absolute right (for two weeks / year) and a relative right (for up to three months / year).

A lot of collective bargaining agreements (*Kollektivverträge*) / company agreements (*Betriebsvereinbarungen*) contain flexitime arrangements (*Gleitzeitvereinbarungen*). Flexitime can also be arranged with an individual worker in their work contract. If such arrangements exist, the worker has a right to flexitime, meaning that they can freely choose the beginning and end of their daily working time. However, a worker is not entitled to flexitime.

5.11.6 Case law

Regarding parental part-time work: The legislation does not require that a parent actually takes over care obligations for their child in order to be entitled to parental part-time work. However, in 2021, the Vienna Labour and Social Court (*Arbeits- und Sozialgericht Wien*) ruled that since the entitlement to part-time work is meant to be used to care for one's children, a father that did not have care obligations during that time was *not* entitled to it merely on the fact of his fatherhood.[178]

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.[179] 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.[180]

In 2021, the Vienna Labour and Social Court (*Arbeits- und Sozialgericht Wien*) found that a mother who applied for parental part-time work during the COVID-19 pandemic must be given the opportunity to work from home, if the type of employment allows for it.[181]

5.11.7 Table on flexible working arrangements (FWA)

Table 8: FWA, including remote working arrangements, flexible working schedules, or reduced working hours

Right to adjust working patterns	**Workers entitled**	**Absolute or relative right**	**Limited duration and right to return to the original pattern**	**Qualifying conditions**
Yes	Parents / in some cases: family members	Depends	Duration varies; right to return to original pattern: yes	Depending on the type of FWA, there can be different qualifying conditions. For example: flexible/remote working arrangements are dependent on an agreement between employer and employee. Reduced working hours for parents (parental part-time work): Employee must have been with the company for three years (among others); Reduced working hours for care purposes: agreement between employer and employee, etc.

[178] ASG Wien 09.06.2021, 1Cga39/21t, ECLI:AT:LG00021:2021:RWA0000039.
[179] OGH 24.06.2015, 9 ObA 30/15z, ECLI:AT:OGH0002:2015:RS0130178.
[180] OGH 01.07.1987, 9 ObA 36/87.
[181] ASG Wien 16.03.2021, 2Cga33/20s, ECLI:AT:LG00021:2021:002CGA00033.20S.0316.000.

				In Austria, there is not one type of FWA, but several, depending on type of FWA, reason for FWA, etc.

5.12 Legal protection provisions in the Work-Life Balance Directive 2019/1158

5.12.1 Maintenance of rights acquired or in the process of being acquired by the worker (Article 10(1) WLB Directive)

For almost all purposes, maternity leave counts towards all work-related benefits dependent on time of service (such as automatic salary increases based on collective bargaining agreements, etc.).

The same is true, albeit to a slightly lesser degree, for paternity and parental leave. Exceptions are few: for example, trainee lawyers need to absolve a number of years in a law office in order to be able to sit for the bar exam; neither parental nor paternity leave counts towards the training time (but maternity leave does).

Times of unpaid care leave, however, usually do not count towards work-related benefits dependent on length of service.

5.12.2 Right to return to the same or an equivalent job (Article 10(2) WLB Directive)

There is the right to return to the same or equivalent job after parental, paternity or maternity leave.

5.12.3 Status of employment or employment relationship (Article 10(3) WLB Directive)

Individuals who receive childcare benefits during parental leave periods (or family bonus during paternity leave) are insured.

Since parental leave and childcare benefits are not the same, it is, however, possible that a person is on parental leave, but does not receive childcare benefits and is, thus, not insured.

Regarding rent and pension benefits: During parental leave, the person who has cared for the child will be insured (for up to four years per child) – but not based on the (previous) income, but based on a fictitious income (contribution base or '*Beitragsgrundlage'*) of roughly EUR 2 000/month. If the parent works (full or part time) and is the main carer for the child, the insurance payments based on the contribution base is added to their regular pension insurance payments.

However, if the parent does not work, but earned more than EUR 2 000/month, their pension will be relatively lower.

There is the possibility, however, of a voluntary 'pension splitting' with the other parent, by which part of the other parent's pension insurance payments go toward the parent who primarily cares for the child. However, this option is not very popular and seldomly used.

Regarding carers' leave and *force majeure* leave, the individuals are insured – but only if they were insured previous to their leave. Regarding pension benefits: they are calculated based on the federal benefits a person receives during the leave (if the leave is unpaid – in other words, if the employer does not continue payment. If the employer does continue payment, of course, social security benefits remain intact).

Regarding rent and pension benefits: the pension age gap is a serious issue in Austria. In 2021, it amounted to 41 %. Given this fact, there might be an argument to be made that this needs to be addressed further, especially considering the intention of the Directive.

5.12.4 Prohibition of discrimination (Article 11 WLB Directive)

In Austria, discrimination based on parental status is prohibited and seen as discrimination based on sex.

5.12.5 Protection from dismissal and burden of proof (Article 12 WLB Directive)

During paternity and parental leave, as well as during parental part-time work, parents enjoy a high level of protection against dismissal or termination of work contract. A termination by the employer is only possible with the labour court's consent.

Individuals on carers' leave and *force majeure* leave are not similarly protected. However, an employer may not terminate a work contract because the employee has taken the leave (protection against '*Motivkündigung'* – dismissal based on prohibited motive).

Apart from this, a form of reversal of burden of proof exists in discrimination cases. 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 termination, or that a discrimination decision is based on a genuine requirement.[182]

The burden of proof is not completely reversed in discrimination cases but is lighter than in other civil proceedings.

For a claim of 'dismissal based on a prohibited motive', it suffices to show the credibility of the prohibited motive *(Glaubhaftmachung*). For this purpose, it is enough to prove that the motive was predominantly probable (instead of highly probable). The respondent then has to prove that another motive is not only credible, but indeed more probable for the dismissal than the prohibited motive.[183]

5.12.6 Case law

While general evidence rules in civil procedural law restrict *prima facie* evidence or presumptions of evidence, the Austrian Supreme Court has recognised the reversal of the burden of proof in sex discrimination cases if statistical evidence supports the assumption of indirect discrimination: in such a case, the employer needs to prove that discrimination did *not* take place.[184] Nonetheless, claimants have to observe general rules of civil procedural law and have to offer at least circumstantial proof of discrimination; they cannot rely solely on *prima facie* proof.[185]

[182] Paragraph 2b Maternity Protection Act.
[183] Windisch-Graetz, M. in Neumayr, M. and Reissner, G.-P., ZellKomm3 § 12 GlBG [1.1.2018], Rz 16ff.
[184] OGH 01.12.2004, 9 ObA 90/04g, ECLI:AT:OGH0002:2004:009OBA00090.04G.1201.000.
[185] OGH 09.07.2008, 9 ObA 177/07f, ECLI:AT:OGH0002:2008:RS0123960, and others.

5.13 Evaluation of implementation

In Austria, most of the provisions of the Directive have already been implemented in national law, some provisions are actually more favourable than what the Directive demands; for instance: four months of maternity leave with full pay, and parental leave (high level of pay if income-related version is chosen).

So far, there have been no concrete proposals of an express transposition of the Directive. However, the Minister of Labour stated in an answer to a parliamentary inquiry on 18 March 2021[186] on issues concerning, among other things, the transposition of the Directive, that a transposition proposal was currently being prepared, mentioning explicitly the goal of achieving greater equality between mothers and fathers in sharing care work in line with the Directive's demands. To date, no proposals have been made public.

The following issues may require attention:

- Paternity leave and benefits during paternity leave (family bonus): benefits during paternity leave are very low; plus, leave (and benefits) can only be enjoyed if the father resides in the same household as child and mother. This might be a problem for separated fathers / diverse family constellations (rainbow families, etc.).

  Article 4(3) of the Directive demands that the 'right to paternity leave shall be granted irrespective of the worker's marital or family status'. This arguably includes divorced fathers, who no longer reside with the mother – and thus, usually neither with the child.

  As mentioned, paternity leave is tied to the prerequisite of residing in the same household as the child. The rationale behind this is that fathers (or co-parents) should be close to their newborn when taking the leave – not doing something else.

  However, it stands to question whether in this day and age, with a diversity of family constellations, this requirement is still relevant.

  First of all, it tends to exclude separated and divorced fathers who might very well be willing and able to support their child and their child's mother, regardless of their legal residence. Likewise, other family constellations where co-parents do not necessarily live together (such as rainbow families) are also disadvantaged by this requirement.

  While it might not be advisable in every case to grant paternity leave to a divorced father, the same is true for live-in fathers, as well. An alternative to a strict residence requirement thus might be to tie paternity leave for non-resident fathers to the mother's consent. Another option would be to introduce a similar provision as the one mentioned in paragraph 2(3a) of the Paternity Leave Act,[187] which stipulates – in the context of hospital stays – that the requirement of residence is met if the father spends at least four hours / day on average with care work.

  It is also not clear why the allowance for fathers during paternity leave is much lower than the one for mothers, especially considering that due to gender roles and the gender pay gap, on average, fathers still earn more than mothers within a family. Thus, it might be difficult for a family to only make do with the low amount of the family time bonus. It certainly is not a strong incentive for fathers to take the leave,

[186] Written Answer of Minister of Labour 5016/AB (18.03.2021), in Response to Parliamentary Inquiry 5028/J (XXVII. GP).
[187] Paternity Leave Act (*Väter-Karenzgesetz*), BGBl. Nr. 651/1989.

and it is questionable whether it fulfils the Directive's goal of achieving a fairer share of care work among the sexes.

Moreover, the requirements for receiving the family time bonus are quite strict, since they are modelled according to childcare benefits, rather than maternity benefits.

Lastly, it is not quite clear why the reception of the family time bonus is tied – among other things – on the residence status not only of the father and the child, but also of the mother. As already explained in the context of paternity leave, this disadvantages fathers (or other co-parents) who do not reside with the mother, due to family status (divorce), or for other reasons.

- Childcare benefits during parental leave: while strictly speaking, the demands of the Directive are met, the way that childcare benefits are structured in Austria may present serious disincentives for fathers to take parental leave.

  It might well be possible to live on income-related childcare benefits – however, the cap of EUR 2 000 (net salary) means that this option is less interesting for higher earners. (In comparison: the cap for COVID-19-related short-term work (*Kurzarbeit*) was at EUR 5 670 (gross salary), which amounts to a net salary of roughly between EUR 3 300 and EUR 3 500.)

  The childcare benefits account, however, is certainly not high enough to support a family. Even in the highest variant, a parent does not receive more than roughly EUR 1 000/month.

  Now, if the mother does not meet the requirements for the income-related childcare benefits (i.e. because she is still studying, has been unemployed, etc.), and wants to take parental leave after the end of her maternity leave, then the father is bound by her choice of childcare benefits system. A switch is not possible. This means that even if his income is solid, he has to also make do with the childcare benefits account, instead of the better remunerated income-related childcare benefits.

  This is a real disincentive for fathers and co-parents.

- Flexible Working Arrangements: while parental part-time work is possible in Austria (parents have an absolute right to it under certain circumstances – but only up to the child's fourth, respective seventh, birthday), other flexible work arrangements – especially remote work (home office) or flexible daily work schedules – are not as common, and require the employer's consent. There are no special protections or regulations in the latter cases; these arrangements are as open to parents as to other employees.

  Moreover, the requirement of working for three years for the same employer before qualifying for an absolute entitlement to parental part-time work seems overreaching.

- In Austria, part-time work is female. This is in large part due to childcare obligations, which are still mostly carried out by mothers. This also contributes to a very large pension gap (over 40 %). This issue should be further addressed.

  Protections against termination of contract during leave: Here, there is still room for improvement for procedural guarantees – especially if a dismissal happens after parental leave, but is still based on the fact that the employee took the leave. The same goes for individuals on carers' leave.

- Re-victimisation: in Austria, victims of discrimination often do not search redress for fear of negative consequences – especially if the sector in which they work is small.

- It would be desirable if the competences of the equality bodies were broadened, especially regarding the representation of victims at court. *De facto*, the equality bodies already advise victims of discrimination based on sex, including parental status, on infringements of all relevant laws – even though formally, they are mainly competent in the realm of the Equal Treatment Acts.

  However, equality bodies in Austria do not have the right to represent victims at court. It would be highly desirable that the equality bodies receive that competence (including higher resources in order to carry out these competences).

5.14 Remaining issues

In practice, at the end of parental leave periods, most mothers 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 an important contributing factor to the persistent gender pay gap and gender pension gap in Austria.

Moreover, the fact that childcare benefits can be received for longer (851 days) than the maximum period of legal parental leave (up to the child's second birthday) can be an incentive especially for low-earning women to stay at home for longer than the protections tied to parental leave last.

During the COVID-19 pandemic, the double load of providing for children while working (often from home) has hit women especially hard, as a recent research project found.[188]

In recent years, there have been continuing complaints that both the application process for childcare benefits and the administrative processing of said applications are riddled with hurdles and can take a very long time (up to several months). This is especially true if one or both of the parents work abroad or do not hold Austrian nationality.[189] In February 2020, the National Ombud (*Volksanwaltschaft*) made public that over 30 cases dealing with disbursement delays and unjust rejections were currently pending, claiming that this might amount to a systemic violation of EU law – especially if non-Austrian EU citizens were involved.[190]

[188] Mader, K., Derndorfer, J., Disslbacher, F., Lechinger, V. and Six, E. (2020) 'Genderspezifische Effekte von COVID-19' (Gender-specific effects of COVID-19), research project; summary available at: https://www.wu.ac.at/economics/mitarbeiter-innen/mader-k/genderspezifscheeffektevoncovid-19/.

[189] See, e.g. Mittelstaedt, K., 'Die Schikanen nach dem Kinderkriegen' (The obstacles after having a child), *Der Standard*, 23.08.2020, available at: https://www.derstandard.at/story/2000119510651/die-schikanen-nach-dem-kinderkriegen.

[190] See information from the National Ombud, available at: https://volksanwaltschaft.gv.at/artikel/kinderbetreuungsgeld-irrefuehrung-verzoegerung-gesetzesbruch.

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

6.1 General (legal) context

6.1.1 Issues related to gender equality and social security

None.

6.1.2 Political and societal debate and pending legislative proposals

None.

6.2 Direct and indirect discrimination

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.[191] Case law of the Supreme Court stresses the importance of the general equality principle that forbids arbitrary differentiation between groups of employees.[192] Even if there are different pensionable ages in the statutory pension systems, different ages for benefits eligibility or contribution ceasing earlier for women because of their earlier retirement age are in breach of the equal treatment principle.[193] 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.[194]

6.3 Personal scope

Occupational pension schemes have to be based on a works agreement or, in some cases, on a collective bargaining agreement. Only if such an agreement is in place do the legal rules apply on 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 bargaining agreement without exceptions (such as for part-time work or fixed-term contracts).

The personal scope of the Occupational Pension Schemes Act (*Betriebspensionsgesetz, BPG*)[195] and the Private Pension Fund Act (*Pensionskassengesetz, PKG*)[196] 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*)[197] 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 Act also covers employers themselves and self-employed individuals, albeit slightly different rules apply.

Civil servants and federal, state or communal employees are excluded from the scope of the Occupational Financial Provisions Act.

[191] RIS-Justiz RS0021639, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_19890111_OGH0002_009OBA00513_8800000_011/JJR_19890111_OGH0002_009OBA00513_8800000_011.pdf.
[192] OGH 11.01.1989, 9 ObA 513/88.
[193] OGH 23.04.2003, 9 ObA 256/02s, ECLI:AT:OGH0002:2003:RS0117672.
[194] OGH 21.09.2006, 8 ObA 50/06w, ECLI:AT:OGH0002:2006:008OBA00050.06W.0921.000.
[195] Occupational Pension Schemes Act (*Betriebspensionsgesetz, BPG*), BGBl. Nr. 282/1990.
[196] Private Pension Fund Act (*Pensionskassengesetz, PKG*), BGBl. Nr. 281/1990.
[197] Occupational Financial Provisions Act (*Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz, BMSVG*), BGBl. I Nr. 100/2002.

6.4 Material scope

The material scope of occupational social security schemes covers occupational old-age pensions, disability pensions and survivors' benefits. Occupational pension schemes are meant to complement, not replace, statutory retirement benefits.

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. However, these grounds are usually covered by mandatory statutory insurance schemes, covering practically all employed and many self-employed people with earnings above the social security threshold. The broad coverage of statutory social security makes additional occupational schemes covering unemployment or health benefits superfluous.

Moreover, Austrian employers are required to continue to pay employees' salaries 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).

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.

6.5 Exclusions

With regard to the personal scope, civil servants and federal, state or communal employees are excluded from the scope of the Occupational Financial Provisions Act.

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 state level).

As mentioned, the Supreme Court found that an employer who calculated occupational pensions for female employees according to a more favourable method than those for male employees of the same age, in order to compensate for the gender pension gap, acted discriminatorily.[198] In 2021, the Supreme Court had to consider a similar case that included, among other things, the question of whether it constituted pay discrimination based on sex if an employer made, on average, higher contributions to a company pension fund for their female than for their male employees in 2021. Due to the fact that the limitation period for the claim had already expired, the Supreme Court rejected the review of the case and did not examine the substantive question at hand.[199]

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 157 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

None to the author's knowledge.

[198] OGH 27.02.2019, 9ObA25/18v, ECLI:AT:OGH0002:2019:009OBA00025.18V.0227.000.
[199] OGH 25.06.2021, 8 ObA 95/20h.

6.9 Evaluation of implementation

The implementation meets the requirements of EU law.

6.10 Remaining issues

None.

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

7.1 General (legal) context

7.1.1 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.

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 employers and self-employed individuals is regulated by the Trade and Industrial Social Security Act (*Gewerbliches Sozialversicherungsgesetz, GSVG*) and by the Farmers' Social Security Act (*Bauernsozialversicherungsgesetz, BSVG*) for farmers.

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

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

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

The personal scope of Article 2 of Directive 79/7/EEC is completely covered by national legislation.

7.1.2 Political and societal debate and pending legislative proposals

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.[200] Statutory pensions and pensions for public servants are calculated on the basis of either lifelong 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 income, 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. Hence, calculations that include an employee's lifetime earnings usually disadvantage women.

Conservative and right-wing politicians regularly discuss the elimination of long-term unemployment benefits (*Notstandshilfe*) and the redirection of recipients into the social welfare system, resulting in much lower benefits. This would negatively impact older women and single parents specifically, who are also mostly female. Moreover, this policy change would lead to a widening of the gender pension gap, because welfare recipients are excluded from pension insurance, while recipients of unemployment benefits are

[200] Official pension statistics published by Statistics Austria, available at: 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.

included in statutory pension insurance systems, with contributions being paid by the Public Employment Service (*Arbeitsmarktservice, AMS*).

As mentioned above, the Austrian Public Employment Service (*Arbeitsmarktservice, AMS*) uses an algorithm to help decide which jobs are appropriate for each job seeker. This algorithm includes prognostics on the probability of employment within the near future in its decision matrix. Being a woman is *de facto* a disadvantage on the labour market; thus, being a member of the female sex is considered as a negative criterion by the algorithm.[201] After the Austrian Data Protection Authority (*Datenschutzbehörde*) ordered the AMS to stop the implementation of the algorithm due to data protection concerns in August 2020, the Federal Administrative Court (*Bundesverwaltungsgericht*) repealed this decision in December 2020.[202] The Data Protection Authority has appealed this decision to the High Administrative Court (*Verwaltungsgerichtshof, VwGH*).[203]

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

There is no special provision in the statutory social security regulations concerning gender equality. Apart from the transition period still allowing for different retirement 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 completely covers that of Article 2 of Directive 79/7/EEC.

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' and orphans' pensions with annexed public health insurance.

7.5 Exclusions

Currently, the legal retirement age for women is lower (60 years) than that for men (65 years).

However, the Austrian Constitutional Court repealed all provisions concerning different retirement ages for men and women in 1992. In response, the legislator implemented a transition period for raising women's retirement age in the statutory social security schemes, starting in 2024 and raising the retirement age by six months each year.[204] Austria has consequently declared an exception to Article 7 concerning the age for

[201] Greif, E. and Kullmann, M. (2021), 'Algorithmenbasiertes Personalrecruiting Antidiskriminierungs- und datenschutzrechtliche Aspekte' ('Algorithm-based staff recruitment. Anti-discrimination and data protection law aspects'), *ZAS* 2021/13; Wagner, B., Lopez, P., Cech, F., Sekwenz, G. and Grill, M.-T. (2021) 'Der AMS-Algorithmus. Transparenz, Verantwortung und Diskriminierung im Kontext von digitalem staatlichem Handeln' ('The AMS algorithm. Transparency, responsibility and discrimination in the context of digital operations by the state'), *juridikum* 2020.

[202] BVwG 18.12.2020, W256 2235360-1, ECLI:AT:BVWG:2020:W256.2235360.1.00.

[203] *Datenschutzbericht* 2020, p. 39, available at: https://www.dsb.gv.at/download-links/dokumente.html.

[204] 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.

pension eligibility for men and women in the statutory social security systems. This does not, however, apply to the pension systems for federal public servants, who have a uniform retirement age of 65. In 2022, the Supreme Court decided that the age of 65 also applied to a trans* man, even though he had experienced a 'typically female' career development throughout most of his life.[205]

However, it is possible to work after reaching the retirement age.

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

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 onwards, the actuarial differences have been eliminated.[206]

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.[207]

7.9 Remaining issues

None.

[205] OGH 21.06.2022, 10 ObS 29/22w, ECLI:AT:OGH0002:2022:010OBS00029.22W.0621.000.
[206] *Verordnung des Bundesministers für Arbeit, Soziales und Konsumentenschutz zur Festsetzung der Faktoren für die Bemessung des besonderen Steigerungsbetrages*, BGBl II 64/2016.
[207] CJEU, Judgment of 20 October 2011, *Brachner*, C-123/2010, ECLI:EU:C:2011:675.

8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)[208]

8.1 Implementation of Directive 2010/41/EU

Paragraph 1(1) clause 4 of the Equal Treatment Act for the Private Sector has been introduced as a measure for implementing the Directive. It states that the activity of 'the founding, establishment or expansion of an enterprise or company, as well as taking up or expanding self-employed activities' falls under its scope.

8.2 Personal scope

8.2.1 Scope

The personal scope of equal treatment legislation covers all persons who enter business relations as defined in Paragraph 1(1) clause 4 of the Equal Treatment Act for the Private Sector.

8.2.2 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 whether 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 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*). Individuals working under these contracts do not have the same contractual obligations and protections as employees, and usually do not fall into the personal scope of labour legislation, but are nonetheless 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 health benefits. For the purposes of social security legislation, free contractual workers belong to the larger group of employed persons.

8.2.3 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, lawyers or architects). With some exceptions, members of professional associations typically work on a self-employed basis or as entrepreneurs.

[208] See Barnard, C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/2732-self-employed-en.

8.2.4 Recognition of life partners

Under statutory social security regulations, both spouses and life partners (including same-sex partners) can be included in the coverage and consequently entitled to, among other things, survivor's benefits.

8.3 Material scope

8.3.1 Implementation of Article 4 of Directive 2010/41/EU

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

8.3.2 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. Paragraph 1(1) clause 3 states that membership of an employer's organisation or professional association, among others, also falls under its scope.

8.4 Positive action

Not specifically regulated.

8.5 Social protection

The median annual pension for individuals insured under the rules that generally apply to self-employed persons is EUR 25 000 for men and EUR 15 400 for women.[209] None of the statutory pension systems contain any directly discriminatory actuarial factors; the significant gender pension gap is a result of lower income and shorter working careers of women.

8.6 Maternity benefits

Paragraphs 102 and 102a of the Trade and Commerce Social Security Act (*Gewerbliches Sozialversicherungsgesetz, GSVG*)[210] and Paragraphs 97 and 98 of the Farmers' Social Security Act (*Bauern-Sozialversicherungsgesetz, BSVG*)[211] 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 claim maternity benefits for the duration of their maternity leave (EUR 57.89 per day in 2022).

Regarding childcare benefits, the same regulations apply as for employed individuals.

Self-employed individuals are automatically included in the statutory social security system if their annual taxable income surpasses the social security threshold.

[209] Statistical Handbook of the Austrian Social Insurance 2018, Tables 3.13 and 3.18.
[210] Trade and Commerce Social Security Act (*Gewerbliches Sozialversicherungsgesetz, GSVG*), BGBl. Nr. 560/1978.
[211] Farmers' Social Security Act (*Bauern-Sozialversicherungsgesetz, BSVG*), BGBl. Nr. 559/1978.

8.7 Occupational social security

8.7.1 Implementation of provisions regarding occupational social security

See above, Section 6.

8.7.2 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.

8.8 Prohibition of discrimination

Since self-employed individuals fall under the scope of the Equal Treatment Act for the Private Sector, they are also protected by the prohibition of direct and indirect discrimination in Paragraph 5 of the Act.

8.9 Evaluation of implementation

The requirements of Article 10 of Directive 2006/54 and Directive 2010/41 have been met.

8.10 Remaining issues

None.

9 Goods and services (Directive 2004/113)[212]

9.1 General (legal) context

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

Not available.

9.1.2 Political and societal debate

There are regular calls to adapt the level of protection regarding access to goods and services according to the Commission Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final). However, even though a government bill had already been drafted in 2010, there have been no legal developments in this area so far.

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 and ethnicity 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 of the Directive 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.

Paragraph 33 of the Equal Treatment Act for the Private Sector states that providing goods, services and housing mainly for people of one sex is a justifiable exception (see also below, Section 9.5). 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.

9.5 Justification of differences in treatment

Paragraph 32(2) specifies that differences in treatment may be justified by a legitimate goal, if the means to reach it are adequate and necessary.

9.6 Actuarial factors

Following the CJEU C-236/09 ruling in the case of *Test-Achats*, the legislator repealed sex-specific actuarial factors from the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*), adding Section (2) to Paragraph 91 with the wording: 'The factor of sex may not lead to different premiums or benefits for men and women'.

[212] See e.g. Caracciolo di Torella, E. Directive 2004/113EC on Gender equality in goods and services – In search of the potential of a forgotten Directive (2021), European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/5614-directive-2004-113-ec-on-gender-equality-in-goods-and-services-in-search-of-the-potential-of-a-forgotten-directive-1-38-mb.

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.

9.9 Specific problems related to pregnancy, maternity or parenthood

None.

9.10 Evaluation of implementation

The provisions of Directive 2004/113/EC and CJEU decision C-236/09 *Test-Achats* have been implemented.

9.11 Remaining issues

None.

10 Violence against women and domestic violence in relation to the Istanbul Convention[213]

10.1 General (legal) context

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

The organisation Autonomous Austrian Women's Shelters (*Autonome Österreichische Frauenhäuser, AÖF*) compiles statistics, reports and other information materials on violence against women in Austria. According to statistics provided by them, there were 31 victims of domestic murder in Austria in 2020. In the same year, police ordered (alleged) perpetrators to leave their home (*Betretungsverbot*) in 11 495 cases.[214]

In 2018, a study on gender-based cyberviolence was published by the Research Centre Human Rights at the University of Vienna (*Forschungszentrum Menschenrechte der Universität Wien*) and the NGO Weißer Ring, financed by the Austrian Chancellor's Office.[215]

In 2011, the Institute for Family Research at Vienna University carried out a comprehensive study on the occurrence and prevalence of domestic violence in Austria. It contains the best research currently available on these topics.[216]

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

An overview provided by the Austrian Government of measures against violence can be found here: https://www.oesterreich.gv.at/themen/gesundheit_und_notfaelle/gewalt_in_der_familie.html.

Legislation is contained in a multitude of different laws, ranging from criminal law, civil law and administrative law to laws on civil, criminal and administrative procedure, among others.

10.1.3 National provisions on online violence including online harassment

There are a number of criminal law provisions prohibiting, *inter alia*, online stalking, harassment (also applicable to online harassment in some cases) and others. In 2021, a legal reform package entered into force, making it easier to prosecute and convict perpetrators of online violence.[217]

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[213] See for more information: Nousiainen, K. and Chinkin, C. (2015), *Legal implications of EU accession to the Istanbul Convention,* European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention; and De Vido, S., Sosa, L. (2021) *Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence*, European Commission, available at: https://www.equalitylaw.eu/downloads/5535-criminalisation-of-gender-based-violence-against-women-in-european-states-including-ict-facilitated-violence-1-97-mb.

[214] Survey: https://www.aoef.at/index.php/studien-zu-gewalt?start=4.

[215] Available here: https://www.bundeskanzleramt.gv.at/agenda/frauen-und-gleichstellung/gewalt-gegen-frauen/gewaltformen/gewalt-im-netz.html.

[216] Kapella, O., Baierl, A., Rille-Pfeiffer, C., Geserick, C. and Schmidt, E.-M., in cooperation with Schröttle, M. (2011) 'Gewalt in der Familie und im nahen sozialen Umfeld. Österreichische Prävalenzstudie zur Gewalt an Frauen und Männern' ('Violence in the family and immediate social environment. Austrian prevalence study on violence against women and men'), on behalf of the *Bundesministerium für Wirtschaft, Familie und Jugend ÖIF*/University of Vienna.

[217] *Hass-im-Netz-Bekämpfungs-Gesetz, HiNBG,* BGBl. I Nr. 148/2020.

The official reporting organisation against online violence, ZARA, backed by government subsidies, advises and supports victims of online violence.[218]

10.1.4 Political and societal debate

The aforementioned reform package has been heavily discussed; there have been no other proposals since then.

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.

In 2017, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), an independent expert group established by the Council of Europe to evaluate implementation of the Istanbul Convention in its Member States, published a baseline report on Austria, based on an official government report, as well as on a report compiled by NGOs.

While the report made positive mention of Austria's general commitment to tackling violence against women in the past 20 years, it also contained a few points of criticism, e.g. concerning the coordination of political and legal efforts to prevent domestic violence, long-term measures to prevent violence such as forced marriage and genital mutilation, and the fact that female and underage asylum seekers were especially in danger of becoming victims of domestic violence. In addition, the report criticised the lack of specially trained law enforcement agents in this regard. Moreover, there were few opportunities for assistance for children who had to grow up in an atmosphere of domestic violence, especially for children over the age of 14. Furthermore, the rate of convictions for domestic violence is low, so trainings for legal practitioners were suggested by the report. A significant point of contention, according to the report, was the grave lack of financial and other resources for intervention agencies and other aid organisations, and anti-violence work in general.[219]

[218] See: https://zara.or.at/.
[219] GREVIO Baseline Evaluation Report Austria, 2017, available at: https://www.aoef.at/index.php/news/337-evaluierungsbericht-des-grevio-komitees-zu-oesterreich.

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

11.1 General (legal) context

11.1.1 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).

11.1.2 Political and societal debate and pending legislative proposals

The Ombud for Equal Treatment (*Gleichbehandlungsanwaltschaft*) has issued a number of proposals to strengthen the protections of the non-discrimination and equal treatment provisions. However, to date, no corresponding proposals have been made by lawmakers or Government. For more details, see Section 11.11.[220]

11.1.3 Gender mainstreaming

As described above, the Inter-Ministerial Working Group for Gender Mainstreaming (*IMAG GM*) was introduced in 2000 to ensure the implementation of gender mainstreaming and gender budgeting measures in all departments.[221] It consists of civil servants from the different ministries. In 2011, the Council of Ministers (*Ministerrat*), an informal panel formed of all cabinet ministers, issued a self-binding resolution (*Ministerratsbeschluss*) on a federal gender mainstreaming strategy. This strategy sought to structurally anchor the *IMAG GM* as a permanent administrative fixture, create a basis for gender-specific data collection and law-making, and establish information and education on gender matters as an important intra-administrative goal. Importantly, it held that gender aspects should be considered when granting subsidies and other federal support.[222]

11.2 Victimisation

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.[223]

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

[220] Website of the Ombud for Equal Treatment, https://www.gleichbehandlungsanwaltschaft.gv.at/Gleichstellungspolitik/Forderungen.html.
[221] Website of the IMAG GM, https://www.imag-gmb.at/gender-mainstreaming/implementierung-in-oesterreich/umsetzung-auf-bundesebene.html.
[222] BKA-F140.240/0058-II/1/2011, 06.09.2011.
[223] OGH 21.12.2011, 9 ObA 118/11k, ECLI:AT:OGH0002:2011:RS0127723; OGH 18.06.2020, 9 ObA 66/20a; OGH 29.04.2021, 9 ObA 19/21s.

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.

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.[224] Likewise, interest organisations such as the Chamber of Labour or unions have standing rights.

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 is granted in cases where legal representation is considered necessary, if the claimant meets certain criteria of financial need.

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*

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.[225] The burden of proof is not

[224] Paragraph 62 of the Equal Treatment Act for the Private Sector.
[225] Paragraph 2b Maternity Protection Act.

completely reversed in discrimination cases but is lighter than in other civil proceedings. While general evidence rules in civil procedural law restrict *prima facie* evidence or presumptions of evidence, the Austrian Supreme Court has recognised the reversal of the burden of proof in sex discrimination cases if statistical evidence supports the assumption of indirect discrimination: in such a case, the employer needs to prove that discrimination did *not* take place.[226] Nonetheless, claimants have to observe general rules of civil procedural law and have to offer at least circumstantial proof of discrimination; they cannot rely solely on *prima facie* proof.[227]

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Sanctions for discrimination are almost exclusively limited to civil law. Individuals who claim to have been subject to discrimination are granted civil compensation and in some cases damages by labour and social courts or 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 sexual harassment).

11.6.2 Effectiveness, proportionality and dissuasiveness

Civil remedies and sanctions cover a broad spectrum. Individuals who are dismissed from work under circumstances that indicate discrimination may sue for a reinstatement of their employment relationship and a 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). During the implementation processes, the existing civil remedies were structured according to the general legal principles and structures of Austrian labour law and civil law, especially tort law.

Thus, claimants can expect either to return to their workplace or to receive severance compensation in cases where both the claimant and the defendant agree to end proceedings with a compromise settlement. The legal right to sue for personal damages in addition to a loss of earnings offers a remedy in cases where the claimant does not wish to return to their 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 according to the claimant's earnings in a specific workplace.[228]

11.7 Equality body

The relevant equality body is the Ombud for Equal Treatment (*Gleichbehandlungsanwaltschaft, GAW*),[229] which consists of three parts that are responsible for handling discrimination complaints. The Ombud can represent victims before the Equal Treatment Commission (*Gleichbehandlungskommission, GBK*). It also

[226] OGH 01.12.2004, 9 ObA 90/04g, ECLI:AT:OGH0002:2004:009OBA00090.04G.1201.000.
[227] OGH 09.07.2008, 9 ObA 177/07f, ECLI:AT:OGH0002:2008:RS0123960, and others.
[228] OGH 05.12.1990, 9 ObA 266/90, and others.
[229] See: https://www.gleichbehandlungsanwaltschaft.gv.at/.

promotes equality and anti-discrimination activities. 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 gender concerning access to goods and services. The Ombud for Equal Treatment has five regional branches.

The Equal Treatment Commission hears discrimination cases in three district 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 is competent to conduct inquiries (mostly through witness testimony and analysis of documents) and to issue non-binding legal opinions. It can be approached by the Ombud for Equal Treatment or by applicants directly. If a case examined by the Commission 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 settlements. The Equal Treatment Commission is widely regarded as the expert body concerning questions of equal treatment and legal anti-discrimination matters in Austria.

11.8 Social partners

Austria has a solid system of cooperation between employee and employer organisations, called the Austrian social partnership. The most important organisations are the Chamber of Labour (*Arbeiterkammer*) and the trade unions, organised by economic sectors, on the part of the employees, and the Chamber of Trade and Commerce (*Wirtschaftskammer*), as well as the Federation of Industry (*Industriellenvereinigung*) on the part of the employers. The latter is not, strictly speaking, a social partner, but is usually included in policy consultations and negotiations. The Chamber of Agriculture (*Landwirtschaftskammer*) as an interest group for Austria's farmers is also a social partner, usually siding with the employers' organisations.

The Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*) grants the right to conduct collective bargaining and conclude collective bargaining agreements on behalf of employees and employers. Collective bargaining agreements have the legal status of binding general labour ordinances. Their personal scope applies to all companies and workers/employees in a relevant sector or industry. The competences of collective bargaining agreements are quite extensive. For instance, the principle of equal pay for equal work has been implemented by collective bargaining agreements for many years, resulting, for example, in the elimination of special low-income 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, or positive action. Traditionally, social partners have been involved in policy development and consultations about legislative initiatives. Social partner institutions are regularly invited to submit written expert opinions or participate in negotiations on legislative initiatives by the federal and state governments, stating their policy views on the contents.

Representatives of the social partners are statutory members of the Equal Treatment Commission, participating in its decisions.

Since 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. However, during the COVID-19 pandemic, social partners were significantly involved in the ad hoc negotiation and implementation of labour measures, such as short-time work (*Kurzarbeit*).

11.9 Other relevant bodies

The Austrian Labour Inspectorate is responsible for monitoring the implementation of labour protection rules, such as protective rules for pregnant and breastfeeding workers/employees. However, the Austrian Labour Inspectorate does not have an explicit mandate for equality issues.

There are a number of NGOs working on equality and women's issues in Austria. Most of them are organised in the umbrella organisation *Österreichischer Frauenring*.[230]

11.10 Evaluation of implementation

The implementation of the directives is usually based closely on the directives themselves, with little departure from their framework, except for 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 national legal doctrine, as well as EU law and jurisprudence.

An example is the case law relating to compensation for discrimination in the workplace, especially regarding sexual harassment. The principles of tort law are largely laid out in the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*). Discrimination in the workplace and in 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 does not usually exceed concrete losses incurred by the claimant, e.g. unpaid 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 cases, e.g. severe sexual harassment cases, does the court add an additional amount for immaterial damages for 'the personal impairment suffered' (*für die erlittene persönliche Beeinträchtigung*) to the usual damages. Therefore, labour and social courts have not granted compensation that exceeds more than specific monetary losses, except for in sexual harassment cases, where the amount of additional personal damages is also based on the concrete remuneration and usually does not exceed about three months of average payments.[231]

An exception is the lacking transposition of the Work-Life Balance Directive. In December of 2022, law reform was passed in order to implement the Directive for employees of the public sector (entering into force in 2023).[232] However, no comparable law reform projects have been initiated for the private sector.

[230] See: https://www.frauenring.at/.
[231] OGH 27.08.2015, 9 ObA 87/15g, ECLI:AT:OGH0002:2015:RS0130287.
[232] 2. *Dienstrechts-Novelle* 2022, BGBl. I Nr. 205/2022, 29.12.2022.
[232] Paragraphs 14 to 14d and 15 of the Law Amending the Labour Contract Law (*Arbeitsvertragrechtsanpassungsgesetz, AVRAG*), BGBl. No. 459/1993.

11.11 Remaining issues

The Ombud for Equal Treatment (*Gleichbehandlungsanwaltschaft*) has formulated five central demands[233] in order to increase the protection level for victims of discrimination:

1. Levelling-up of all discrimination grounds (e.g. the level of protection for sexual minorities against discrimination in the access of goods and services should be raised to that foreseen for ethnic minorities).

2. Unification of equal treatment and non-discrimination laws and respective competences: the multitude of different legal acts and provisions makes it difficult for laypersons to understand their non-discrimination rights.

3. A right to bring actions / standing in court for the Ombud for Equal Treatment, as well as an additional budget to pursue claims: this would shift the burden of risks connected to court proceedings from victims of discrimination to the Ombud, which could prevent re-victimisation. It would also enable the Ombud to engage in strategic litigation in order to determine discrimination protection gaps and pursue effective legal guarantees and protections.

4. Increasing the budget of the Ombud for Equal Treatment for monitoring, awareness-raising and educational activities.

5. Expanding and strengthening the Ombud's personal resources, among other things by empowering the Ombud offices in the different Austrian states.

Apart from these main demands, the Ombud has formulated additional suggestions to fortify non-discrimination and equality protections.

However, presently, there are no official governmental or parliamentary proposals to implement the Ombud's demands.

[233] Website of the Ombud for Equal Treatment, https://www.gleichbehandlungsanwaltschaft.gv.at/Gleichstellungspolitik/Forderungen.html.

12 Overall assessment

The overall implementation of the Directives is aiming at thoroughness while taking into account the systemic requirements of existing national material and procedural law.

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 integrate anti-discrimination legislation into the systemic context of the national legislative framework. This may lead to disadvantages for victims of discrimination, such as limited availability of personal injury damages in discrimination cases, and may also limit the effectiveness of discrimination laws.

Likewise, some of the concepts of the directives meet considerable systemic obstacles, e.g. the reversal of the burden of proof. *Prima facie* evidence is not generally accepted within the framework of evidentiary rules in civil cases. Since the implementation of the respective parts of the directives has not been translated into civil proceedings legislation, but has remained within the scope of equal treatment legislation, this has led to considerable systemic restraints. The Supreme Court has had to adapt case law accordingly, requiring claimants to offer at least circumstantial proof of their claim in order to enter the stage of material deliberation in a court case.

While maternity protection against dismissal and against discrimination is well established by case law, neither the Maternity Protection Act nor the Paternity Leave Act contains specific rules against discrimination on grounds of parental leave. 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 in practice. Moreover, as mentioned repeatedly above, the transposition of the Work-Life Balance Directive is seriously lacking.

The implementation of the directives in Austria significantly relies on a soft law approach, which manifests in the role of the Ombud for Equal Treatment and the Equal Treatment Commission. Both institutions only have limited possibilities of taking concrete action against individual or systematic discriminations. The Equal Treatment Commission cannot issue binding opinions, and the Ombud for Equal Treatment cannot represent victims in court cases and does not possess legal standing in its own right. Thus, their actions are of limited effectiveness. The Ombud for Equal Treatment has formulated a number of propositions to strengthen its role and provide more comprehensive protection for victims of discrimination (see Section 11.11).

In summary, the following conclusions can be reached:

- the role of the Ombud for Equal Treatment and the Equal Treatment Commissions for the private sector and for federal civil servants are restricted and thus their actions are of limited effectiveness;
- due to systemic 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 systemic restraints on sanctions, which may lead to them lacking in effectiveness; and
- in practice, parental leave and parenting obligations are responsible for structural and individual discrimination; existing legislation and jurisprudence only offers limited redress for this fact.

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