

Written Submission of the Austrian Disability Ombudsperson on the Occasion of the Second Constructive Dialogue with Austria in its 29th Session

I. Introduction

Established in 2006 under §§ 13b ss of the Federal Law on People with Disabilities (Bundes-Behindertengesetz, BBG) in the course of Austria's implementation of EC Directive 78/2000/EG, the Austrian Disability Ombudsperson is tasked with providing support and advice to victims in cases of alleged discrimination either in the access to and the provision of goods and services or within the administration, as specified in the Federal Law on Equal Treatment of People with Disabilities (Bundes-Behindertengleichstellungsgesetz, BGStG) or in the field of employment under the Law on the Employment of People with Disabilities (Behinderteneinstellungsgesetz, BEinstG). Furthermore, the Austrian Disability Ombudsperson is also tasked with addressing cases of alleged discrimination in the field of private insurance contracts under § 1d of the Law on Insurance Contracts (Versicherungsvertragsgesetz, VersVG).

These provisions effectively constituting a sub-category of the general law of torts, Austrian law stipulates that any claims, before being brought in court, have to be subject of conciliation proceedings in which the Austrian Disability Ombudsperson may act in support of victims of discrimination. Participation in these proceedings being voluntary, official confirmation of the unsuccessful conciliation-attempt is a mandatory prerequisite for further court action. Whereas potential solutions to the dispute in question is open-ended in conciliation proceedings, enforceable legal claims encompass mainly compensatory damages, neither injunctive remedies nor remedial action are provided for under the law.

Since 2017, the Austrian Disability Ombudsperson, amongst others, has the power to bring class actions in cases of widespread discrimination of people with disabilities engendering numerous and substantial consequences for those affected in the access to and provision of goods and services even in the absence of an identifiable victim. Under specific circumstances, both injunctive and remedial actions are possible in class action-cases.

Beside these core competences, the Austrian Disability Ombudsperson is also mandated with investigating issues pertaining to the – structural – discrimination of people with disabilities and to issue according reports and recommendations. The annual report of the Austrian Disability Ombudsperson's activities is presented before the National Council via the Minister for Social Affairs.

The Austrian Disability Ombudsperson is independent and not subject to any administrative orders in the discharge of their duties (§ 13c BBG) and is supported by an office (§ 13e BBG).

This submission will be limited in scope to the Austrian Disability Ombudsperson's main competences, taking into account related problems as they present themselves in the practical work of the Austrian Disability Ombudsperson and her office.

II. General Observations (Arts 1-4 CRPD)

The National Disability Action Plan (NAP) 2022-2030 eventually entered into force in July 2022, more than one and a half years after its predecessor – the NAP 2012-2020 – had expired, and was the result of a multi-stakeholder process, engaging both NGOs representative of people with disabilities, the single Federal Ministries as well as representatives at state and municipal level.

Although the NAP 2012-2020 was subject to evaluation and the new NAP 2022-2030 addresses the shortcomings identified therein, particularly by purportedly optimizing implementation of the CRPD by linking single targets to specific measures, identifying responsible actors and addresses the issues of resources and funding, fundamental structural problems standing in the way of the full realization of the rights of persons with disabilities, as enshrined in the CRPD, persist.

On a general level, Austrian federalism continues to impede a coherent, equal and effective implementation of CRPD-rights, this being evident *inter alia* in the areas of personal assistance outside the context of labor, personal assistance outside the employment-context, de-institutionalization and education. To compound the problem, the states – in violation of the according recommendation in the CRPD's Concluding Observations 2013 (CRPD/C/AUT/CO/1; Concluding Observations) – have taken to developing and adopting State Disability Action Plans, thus engendering further fragmentation of the CRPD's implementation.

Secondly and relatedly, Austria ratified the CRPD under a so-called *Erfüllungsvorbehalt* according to art 50 para 2 Federal Constitutional Law (Bundesverfassungsgesetz, B-VG,), this meaning that CRPD-rights are not directly applicable but subject to transformation into national laws. However, legislature on both federal and state level continues to fail to take all necessary measures to pass laws corresponding to the single rights guaranteed under the CRPD.

Regarding the adoption of a social model of disability that would be in line with the CRPD-approach, Austria is still falling short of its international human rights obligations, the heavily medical assessment of disability under the so-called Assessment Regulation (Einschätzungsverordnung, EVO) still providing

the basis for the determination of the severity of a disability at hand as a prerequisite for access to disability-related benefits and subsidies, both at federal and state level. Thus Austria is falling short of the pertaining recommendation articulated in the Concluding Remarks

III. Equality and non-discrimination (Art 5 CRPD)

As already observed in the introduction above, one of the largest impediments in enforcing the rights of persons with disabilities is the lack of injunctive and remedial action in cases of discrimination, this being particularly salient in cases of discrimination through lacking accessibility.

Moreover the court costs, that often outweigh the compensatory damages attainable, are a further factor hindering the enforcement of non-discrimination provisions. The resulting lack of clear jurisprudence consequently leads to legal uncertainty in the application of non-discrimination provisions, making it in turn more risky for individuals to bring legal action. Against this background, effective implementation of the prospective EU-Directive on Binding Standards for Equality Bodies (cf COM(2022) 689 final) currently being negotiated at EU-level and providing for stronger procedural powers of equality bodies in the application and enforcement of existing equality law is of paramount importance in this regard.

In contrast to art 4 (3) CRPD, Austria is currently facing the real danger of a substantive regression in the enforcement of the rights of persons with disabilities by the way Directive (EU) 2019/882, better known as the European Accessibility Act (EAA), is being implemented through the Austrian Law on Accessibility (Barrierefreiheitsgesetz, BafG). While for the vast majority of EU Member States the EAA is a major advancement in the rights of people with disabilities regarding accessibility of goods and services, the situation in Austria is different. Beyond the scope of Directive 78/2000/EC, Austria has been prohibiting discrimination on the grounds of disability not only in relation to employment, but also in the access to and the provision of goods and services since 2006, as outlined in the introductory remarks, lacking accessibility constituting indirect discrimination to be remedied through damages in accordance with the BGStG. The BGStG with its provisions on accessibility, however, declares itself to be subsidiary to other provisions, such as the Law on the Protection of Historic Buildings or building regulations. If full accessibility as defined in § 6 para 5 BGStG due to these provisions cannot be attained, the BGStG requires the greatest feasible approximation to this full accessibility is realized. Conversely, since the Austrian Law on Accessibility provides for a – definitive – administrative finding on the accessibility of electronic devices prior to marketing authorization, this leads to a situation where people with disabilities nevertheless affected by lacking accessibility of such a device, have no

remedy against this lack in accessibility, since the law via an irrefutable *praesumptio iuris et de iure* assumes that no such discrimination can exist under the law, and also the requirement of the greatest feasible approximation does not apply. Thus, people suffering damage due to lacking accessibility of an authorized electronic device have no recourse to legal actions to remedy this noxious shortcoming. Conversely, under the BafG products and services are exempt from any accessibility-requirement if the measures necessary to achieve accessibility caused a fundamental alteration of the basic nature of the service or product in question, while the – inapplicable – BGStG would require the greatest possible approximation to full accessibility.

In effect, Austria has a mixed record with regard to implementing the respective recommendation Concluding Remarks, by broadening class actions on the one hand and still failing, inter alia, to provide for remedial and injunctive actions in discrimination cases on a general basis or facilitating the pursuit of legal action, eg by giving the Austrian Disability Ombudsperson the power to bring action in a client's name.

IV. Awareness-raising (Art 8 CRPD)

The media, playing a crucial role in awareness-raising, still tends to portray people with disabilities in a stereotypical way, either as heroes or victims. While sporting events are conducive to the first, the latter becomes particularly evident eg in the context of the format "Licht ins Dunkel", a charity show aired in Christmas time and being strongly supported by public broadcasting and politics, according to the findings of a study analyzing media representation of people with disabilities in the years 2021/2022.¹

This strongly indicates shortcomings in the effective implementation of the relating recommendation in the Concluding Remarks.

V. Accessibility (Art 9 CRPD)

Federalism continues to pose a serious hurdle with regard to implementing universal accessibility throughout Austria.

¹ See *Pernegger*, Menschen mit Behinderung & Inklusion in Österreichischen Massenmedien. Jahresstudie 2021/2022 (2023).

While on the federal level, the BGStG sets out specific requirements for facilities under federal administration to be comprehensively accessible, state legislatures have their own provisions on the accessibility of their public buildings and services.

Moreover, the different building regulations, falling into the legislative competences of the states, provide for different standards for accessibility of buildings within their respective territories.

To compound the problem, accessibility still does not form a compulsory part of architecture curricula just as there is no specialized training on accessible building.

Concerning accessibility of websites and mobile applications, both the federal state as well as the provinces, in transposing Directive (EU) 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies, passed laws on the accessibility of websites and mobile applications within their purview. The Austrian Forschungsförderungsgesellschaft (FFG) is tasked with monitoring the accessibility of websites and mobile applications on the federal level and handles related complaints. One major limitation here, however, is that both federal and state laws provide for extensive exemptions eg with relation to schools. Here, only core information, instead of any content, has to be accessible.

As elaborated above, the recently entered-into-force BafG poses the tangible danger of substantially curtailing the legal enforcement in cases of discrimination due to lacking accessibility within its scope.

Furthermore, the recently passed reform of the Public Broadcasting Act (ORF-Gesetz, ORF-G) threatens to lead to a reduction in accessible media formats, especially in respect of online-content, in practice and legislators failed to take into consideration the multiple concerns raised by organized people with disabilities and other relevant stakeholders active in the disability-sector in the drafting process.

All three points discussed are at odds with the specific recommendation in the Concluding Remarks.

VI. Living Independently and Being Included in the Community (Art 19)

Pertaining to the issue of institutionalization and thus closely related to the problem of work and employment under art 27 CRPD as well as segregation in education (cf art 24), instead of providing for an elaborated system to facilitate the independent living and soci(et)al inclusion of people with disabilities, Austria continues to foster segregation, particularly with regard to people with cognitive disabilities and learning disorders, through its current system of providing for and supporting occupational therapy-facilities, providing both occupation and housing for their inhabitants.

Legislation and administration in this regard falling into the ambit of the states, the current system of occupational therapy, besides the other problems related thereto as delineated below, has a strong potential for engendering strong dependencies, partaking of coercive and exploitative elements, between people with disabilities and their families on the one hand and providers of occupational therapy on the other hand.

Moreover, the amount of personal assistance granted to individual recipients, measured in a set number of hours per month, besides being regulated on state level, still is contingent on a medical-model-assessment of disability. Therefore, both access to and amount of personal assistance diverges, often heavily so, from the actual personal circumstances and needs of those affected.

In this regard the current pilot-project to harmonize personal assistance outside the field of employment facilitated by the Social Ministry is to be marked out as a major stepping stone on the way to creating a uniform system of personal assistance outside the employment-context.²

In sum, Austria, while making improvements, is still not living up to the according recommendations in the Concluding Remarks.

Concerning rental and housing laws, the situation in Austria is split. While since 2022 measures for the enhancement of accessibility in houses, where people with disabilities own apartments (eg the construction of a stairlift), are no longer subject to the active assent of the majority of co-residents, in rental apartments it is still required under the law that any construction-measure altering the original state of the apartment has to be removed, once a tenant moves out.

VII. Education (Art 24)

While Austria in principle has been providing for inclusive education in the field of 'mandatory public education', this concerning children between six and 14 years of age, since the mid-1990s, several problems persist in the area of education for people with disabilities, in contravention of para 43 Concluding Remarks.

The first of these once again is closely related to the issue of federalism and concerns the provision and availability of inclusive kindergarten-places. Kindergartens falling into the legislative and administrative purview of the single states, inclusive and accessible pre-school education in the or close to a disabled child's place of residence is frequently impossible, due to lacking resources,

² Cf. *BMSGPK*, Richtlinie für die Gewährung von Förderungen nach § 33 des Bundesbehindertengesetzes zur Harmonisierung der Persönlichen Assistenz (BMSGPK-2023-0.214.134) 2023.

material and otherwise. Instead children with disabilities and their parents regularly are allocated kindergarten places in specialized institutions that may be quite remote from where they are living or the parents are working.

Similarly, personal assistance both primary and secondary in education is frequently insufficient to meet the needs of the single pupils with disability and thus accord them equal access to quality public education.

This is particularly salient with regard to inclusive public education outside the mandatory sector, ie concerning children aged 15 to 18. Here, children with disabilities face two distinct difficulties.

Firstly, students with disabilities do not have a vested right to complete an eleventh and/or twelfth year of schooling. Instead, this possibility is only available on a voluntary basis, subject to the available resources and the approval of school authorities.

Secondly, the provision of personal assistance to students ages 15 to 18 used to be contingent on the kind and severity of the disability at hand. Personal assistance could only be applied for in cases of a physical and/or sensory disability, thus grossly excluding eg psycho-social disabilities. Furthermore, the – physical/sensory – disability in question had to reach a certain level of severity, translating into a heightened need for (medical) care and assistance, which in turn again is to be established according to a medical model of disability. This issue was subject to a class action, brought by the Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern, since the Ministry of Education refused to change the law and practice voluntarily. Eventually, the – legally binding – verdict³ found the Ministry of Education to act in breach of the rights of persons with disabilities, as articulated in the BGStG. Implementation of the verdict is still ongoing.

The second strand of criticism relates to the continuing existence of special schools for children with disabilities, the *Sonderschulen*. Besides creating a segregating and exclusionary system of education as a sub-category of society at large, being educated in this parallel system of education frequently serves as a precursor to being deemed ‘inherently unfit to work’ by the Labor Market Service in conjunction with the State Pension Insurance Authority, which constitutes a major problem with regard to the right to work and employment as enshrined in art 27 CRPD and will be further detailed in the dedicated chapter below.

All of the aforesaid is problematic also in light of the specific recommendation in the Concluding Observations.

³ HG Wien, 31.03.2023, 19 Cg 73/21p.

VIII. Work and Employment (Art 27)

In the field of people with disabilities' right to work and employment under art 27 CRPD several systemic issues stand in the way of inclusion of people with disabilities.

Despite people with disabilities being protected against discrimination at all levels of employment, regardless of the disability's severity under the EVO and – under certain circumstances – enjoying a heightened level of protection against dismissal under the BEinstG, labour market data consistently shows that people with disabilities are disproportionately affected by – long-term –unemployment, especially if disability intersects with other risk-factors.⁴

In this context, the Labor Market Service's planned introduction of AMAS, an algorithm classifying unemployed people according to such risk factors, one of them being disability resp health issues affecting job opportunities, threatened to further aggravate the situation by limiting the assistance available to job-seekers but after a protracted legal conflict, going as far as the Supreme Administrative Court (VwGH), could eventually be prevented through the efforts of the Data Protection Agency due to data protection issues.⁵

While subsidies for measures to meet the special needs of employees with disabilities are available, there is no binding and enforceable legal requirement for an employer to take affirmative action for the employment of people with disabilities as such, while access to these subsidies is limited, subject to the medical assessment of the disability's severity under the EVO as well as along the line of legislative and administrative state powers.

A second line of criticism concerns the continuing existence of occupational therapy, which primarily affects people with cognitive impairments. Those affected regularly having already been educated not inclusively in the regular school system but in a *Sonderschule* (see above, sub Chapter VII), upon completing the ten years of education that are compulsory in Austria, these adolescents used to be routinely qualified as 'inherently unfit to work' by the Labor Market Service in collaboration with the State Pension Insurance Authority. While currently a reform is under way to make it impossible for such a qualification to be made until the person in question is at least 25 years of age and to provide for special labor market-related training for those potentially affected, the problem persists that this determination, once made, is irreversible and without recourse to any remedy.

⁴ Cf AMS, Übersicht über den Arbeitsmarkt – Juni 2023, available under <https://www.ams.at/arbeitsmarktdaten-und-medien/arbeitsmarkt-daten-und-arbeitsmarkt-forschung/arbeitsmarktdaten#arbeitsmarktdaten> [last accessed 07/26/2023].

⁵ Cf VwGH, 18.12.2020, W256 2235360-1.

Once a person is qualified as 'inherently unfit to work' they are unable to receive any form of support from the Labor Market Service and must instead seek employment within the respective occupational therapy system. Other than general labor law, which is a federal matter, this is a matter to be legislated and administrated at state level with no nation-wide minimum standards or guidelines. Neither do the providers offering occupational therapy under the respective state's system pay people working for them regular wages nor are these people covered by health or pension insurance. Instead they receive pocket money (*Taschengeld*) and any further state subsidies they may receive are to be paid directly to the institution. Regarding insurance, they have to continue being insured via their parents, regardless of their age. Thus, people in this system of occupational therapy end up being perpetually kept in the status of 'child' while carrying out work under conditions on the verge of amounting to compulsory labor.

To compound the problem, people in those occupational therapy institutions are not free to choose their residence but must live in an assisted living facility, annexed to and operated by the same corporation as the occupational therapy-provider. Places in these facilities being scarce, providers accord people working and living in these institutions only very limited days off, be it due to health reasons or taking a vacation, and charge substantial sums to maintain their place, should they exceed this number of days.

IX. Recommendations

In light of the aforesaid, the Austrian Disability Ombudswoman would like to make the following recommendations with a view to achieving the full implementation of the goals and purposes of the CRPD:

- Systematic and universal harmonization of the Austrian legal system both on federal and state-level with the CRPD
- Comprehensive implementation of the human rights model of disability in the Austrian legal system on all levels of government, in particular with regard to any support services for people with disabilities
- Improved legal protection against discrimination as such in light of inter- and multi-sectional discrimination and strengthening of the legal status of relevant ombuds-institutions and their capabilities to work in support of victims of discrimination
- Expansion of injunctive and remedial relief within the context of the BGStG

- Extension to the right of associations to bring class actions under the BGStG including legal safeguards for these associations
- Systematic collection of disaggregated data on factors pertaining to disability as such and in intersectional matters in particular as basis for targeted policy-measures
- Holistic and long-term awareness-raising and training of all relevant professional groups within their respective curricula in particular and within society at large, especially with regard to multi- and intersectional issues
- Transparent and adequate funding for the measures provided for in the NAP Disability 2022-2030 on all levels of government, eg through the establishment of a federally organized inclusion fund
- Any legislative measures to implement EU-directives pertaining to the rights of people with disabilities, in line with art 4 (4) CRPD, such as through the BafG or the WZG regarding accessibility, has to result in a meaningful complementation and an effective levelling up of existing national laws and standards in order to fully realize the rights enshrined in the CRPD
- Harmonization of laws on and access to social benefits for people with disabilities between the states and implementation of uniform quality-standards and monitoring, this being facilitated and financed through aforementioned inclusion fund
- Sufficient personal assistance to facilitate independent living of people with disabilities according to a nation-wide standard and adequate and accessible social housing
- Enhanced subsidization of construction-measures to create or enhance accessibility in housing and relinquishment of the requirement to remove according construction-measures upon vacating a rented apartment
- Comprehensive and organized de-institutionalization in a timely manner, while in the interim providing for social security coverage of people active in occupational therapy-structures
- Right to inclusion on all levels of education in the immediate vicinity of a child's/adolescent's place of residence, including the transparent provision of sufficient financial resources, both on state and federal level
- Specialized and comprehensive training of teachers in the provision of inclusive education both during their university-education and after
- Reform to the current system of specialized schooling for children with disabilities with a view to enhancing full labor market-participation of people with disabilities
- Enhancing programs and projects for the inclusion especially of young people with disabilities in the labor market, including provisions for ensuring sufficient resource-allocation