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Call for written submissions on the draft guidelines on addressing multiple and intersectional forms of discrimination against women and girls with disabilities

About the submitting Organization:

Klagsverband - Austrian Litigation Association of NGOs Against Discrimination - is a civil-society umbrella organization of currently 72 member organizations, working on all different protected grounds of discrimination in Austria. Klagsverband engages in further developing Austrian anti-discrimination law through information and sensitization and – most notably – through strategic litigation. Klagsverband is currently the most active organization in Austria bringing strategic cases of discrimination to court. Besides this, Klagsverband engages in human rights monitoring.

Question 1: Do the anti-discrimination legislation and/or policy frameworks in force in your country recognize disability and the denial of reasonable accommodation as prohibited forms of discrimination against persons with disabilities?

Non-discrimination on the basis of disability is protected by anti-discrimination law in Austria in the field of (private and public) occupation and employment, including vocational training, and access to goods and services, public administration, education and social benefits. The concept of “reasonable accommodations” is not explicitly mentioned in all of these statutory provisions, only a few specific provisions mention it. There is no consistent legal definition in accordance with the CRPD, i.e. that the failure to provide reasonable accommodation amounts to discrimination. The enforcement of rights faces challenges in this regard. Klagsverband brings cases of discrimination to court and found it to be difficult to successfully claim discrimination based on the failure to provide reasonable accommodation. As described in detail below in response to question 2, Austrian anti-discrimination law is characterized by its fragmentation and inconsistency. Discriminations based on disability are covered by different statutory provisions on the federal level – which have the widest relevance in practice – than all other grounds of discrimination such as gender or ethnic origin.

Question 2: Do the anti-discrimination legislation and/or policy frameworks in force in your country recognize the multiple and intersecting forms of discrimination affecting women with disabilities on account of their disability and other factors, such as sex, gender, ethnicity, migration status, origin, socio-economic status, religious beliefs, etc.?

The CRPD is not directly applicable in Austria but requires implementation, therefore, individuals cannot directly invoke the applicable rights under the Convention, for instance Article 6 regarding the protection of women with disabilities.

Provisions under European law also do not provide a sufficient and consistent legal framework to protect from all forms of multiple and intersectional discrimination. Discrimination on the grounds of disability and the failure to provide reasonable accommodation are prohibited under EU law regarding employment and occupation, including vocational training (directive EC/2000/78). The respective EU directives, however, do not provide explicit and sufficient protection against intersecting forms of discrimination. In its ruling C-443/15 (Parris), the ECJ found that EU directives themselves do not provide a legal basis for claims of intersectional discrimination and it needs to be seen how this applies to forms of intersectional discrimination different from the specific case of this ruling.

Austrian anti-discrimination law – in transposing EU-law into national law and going beyond that to some extent – does not explicitly use the term “intersectional discrimination”, but only the term “**multiple discrimination**”. There is no binding definition of this term; at its minimum it covers cases where a person faces several incidents of discrimination or where the grounds of discrimination can be identified separately (“accumulative discrimination”). Whether this term comprehends also intersecting forms of discrimination, i.e. an inseparable combination of various grounds of discrimination, is not fully clarified. Despite individual efforts to further develop case law and doctrine, it needs to be pointed out that the legal provisions are not clear enough, and a gap of protection remains. Consequently, also a gap of awareness exists, for victims of discrimination, perpetrators and probably also in the judicial system.

As has been noted on many occasions of human rights reviews regarding Austria (cf. CRPD/C/AUT/CO/2-3, para 9 and 13; CEDAW/C/AUT/CO/9, para 12), **Austria’s equal treatment and anti-discrimination law is characterized by a very fragmented and inconsistent system**, of different provisions on both federal and state level with differing levels of protection. This bears many challenges – in general and specifically when it comes to intersectional forms of discrimination – in access to legal counseling and examination of a discrimination case, and access to justice.

On the federal level, there are specific statutory provisions for discrimination based on disability on the one hand, and provisions for the other protected grounds of discrimination on the other hand. The Equal Treatment Act (GIBG) protects the following characteristics on federal level in the field of employment and occupation: gender, ethnicity, religion or belief, age, or sexual orientation in the field of employment and occupation, and only gender and ethnicity in the access to goods and services including social benefits. Discrimination based on disability is covered by separate

provisions, i.e. the Disability Employment Act (BEinstG) for employment and occupation and the Federal Act on Equal Opportunities for Persons with Disabilities (BGStG) for the access to goods and services and federal administration. **This causes problems:**

1. There is a significant gap in protection outside employment, since discrimination in access to goods and services on the grounds of sexual orientation, religion and belief, and age are not forbidden in large parts of private economy. This also affects intersectional forms of discrimination involving one of these grounds and disability.
2. There are different procedures for addressing discrimination and different authorities in place. Access to justice is challenging.

Ad 1.: There are gaps in Austrian Anti-discrimination law. There is no uniform level of protection outside the field of employment and occupation, i.e. in the access to goods and services, education, and social protection. At federal level there is no legal protection against discrimination based on sexual orientation, age and religion or belief. This also affects people with disabilities experiencing intersectional forms of discrimination regarding these grounds. E.g. a homosexual person with disabilities, who is harassed based on both grounds/or due to an intersection of these grounds at a club or restaurant, cannot enforce their rights properly. They can only invoke disability, because there is no protection regarding sexual orientation. At state/regional level anti-discrimination legislation covers all protected grounds, however the scope of application is limited.

Ad 2.: Depending on the reasons for discrimination that are asserted (again, within the scope of federal law, which has the widest scope of application), different institutional counseling centers are involved. Whereas a person who faces discrimination on grounds of disability can contact the Austrian Disability Ombud for advice and support, the same person facing discrimination based on one of the other protected grounds can contact the Austrian Ombud for Equal Treatment (GAW). Both institutions have a different normative base. In case of intersectional discrimination involving disabilities, this challenge can only be overcome by good cooperation of these institutions, but remains a challenge for victims of discrimination. Again, also state/regional level laws foresee separate, specific institutions for counseling and law enforcement. In addition to these national equality bodies, however, in practice civil society organizations and associations, such as Klagsverband, play a pivotal role in identifying and counseling cases of intersectional discrimination without institutional or statutory barriers.

Depending on the grounds of discrimination, also the enforcement of law differs. Victims of discrimination on grounds of gender, age, sexual orientation, religion or belief and ethnic origin, individually or in combination, have access to an optional, free of charge procedure at the Equal Treatment Commission. The Commission examines a case and files a non-binding legal statement or expert opinion on whether discrimination has occurred or not. Alternatively, or after Commission procedure, the persons who have been discriminated against can take their case to court. Also in some state/regional laws, this procedure is available.

In contrast to this regime, as soon as a person claims that they have been discriminated against (also) on grounds of disabilities (individually or in combination with one of the other grounds of discrimination, such as gender), their rights can only be enforced based on the respective laws forbidding disability related discrimination. Thus, whenever there is an intersection with or involvement of “disability”, a mandatory settlement and mediation procedure (alternative dispute resolution procedure) has to be carried out before the case can be brought to court. This also applies for other grounds of discrimination that are asserted alongside disability. In this mandatory mediation procedure, the person who wishes to claim discrimination and the institution or person accused of discrimination meet face to face. Under the guidance of a neutral representative of the Ministry of Social Affairs, an attempt is made to reach an agreement. Only if this attempt to find a solution fails, can the person who has been discriminated against bring the case to court. Also some state/regional provisions foresee a mandatory settlement attempt, before a court claim can be made.

This mandatory settlement procedure is increasingly criticized by victims of discrimination and experts. In particular, it cannot be seen as a suitable and reasonable mechanism for victims of sexual and disability-related harassment, or any discriminatory harassment. Victims of discrimination should be able to choose.

To sum it up, the fragmentation and division of Austrian anti-discrimination law causes challenges in its application, particularly when it comes to multiple and intersectional discrimination.

Question 7: Indicate which remedies are available to women and girls with disabilities facing multiple and intersecting forms of discrimination. Are these remedies accessible, available, and effective?

As stated above in detail (question 2), the grounds of discrimination brought forward by a victim of discrimination decide on the applicable procedural framework.

In cases of multiple discrimination where disability is also a factor, a mandatory mediation procedure needs to be initiated, before a claim can be filed at court. In contrast, this is not provided in the case of other grounds for discrimination. This mandatory settlement attempt is increasingly criticized, in particular when it comes to intersectional discrimination involving disabilities. It cannot be seen as reasonable in many cases, that the victim of discrimination or harassment needs to have a talk with the (alleged) perpetrator. As also noted above (question 2), in cases involving all other grounds of discrimination, except disability, the victim can either appeal to the Equal Treatment Commission or directly file a court claim. If (sexual) harassment is asserted in proceedings before the Equal Treatment Commission, the questioning of the victim generally takes place separated from the harasser.

On a positive note, however, it needs to be pointed out that mediation offers more options for suitable, individual outcomes than court proceedings. For example, it is possible to demand the

cessation of discrimination, such as the removal of a barrier, which is in most instances not available in a claim at court.

The typical remedy in cases of both single-ground discrimination and intersectional discrimination foreseen in Austrian law are **damages** – both material and immaterial. In fact, “multiple discrimination” is mentioned explicitly in the context of damages, as one statutory factor that should be taken in account when assessing a suitable immaterial damage (i.e. higher damages should be awarded in a case of multiple discrimination). As mentioned above, “intersectional discrimination” is not explicitly mentioned in Austrian anti-discrimination law.

Klagsverband and other equality and non-discrimination stakeholders frequently point out that, among others, an injunctive relief needs to be included as a remedy, to provide for an effective law enforcement concerning all grounds of discrimination (cf CRPD/C/AUT/CO/2-3, para 17).