

Ombud for Equal Treatment, Activities and Recommendations 2012/2013 at a Glance

Imprint

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Ombud for Equal Treatment

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1 The top Items on the Agenda of the Ombud for Equal Treatment



Equal protection against discrimination on all grounds in all areas of the Equal Treatment Act through levelling up of legal provisions.

Equal protection against discrimination on all grounds throughout Austria through appointing Regional Ombuds responsible for Part II and Part III of the Equal Treatment Act and through providing adequate resources and equipment to the regional offices of the Ombud for Equal Treatment.

Equal opportunities for persons affected by discrimination in the judicial enforcement of their rights through:

- providing the Ombud for Equal Treatment with the necessary legal powers and financial resources to participate in Court proceedings;
- adjusting the rules governing equal treatment proceedings to match the rules dealing with labour law and social law proceedings, according to which the opponent's legal costs do not have to be paid when a case is lost;
- reviewing the manner in which legal assistance can be provided by interest groups in equal treatment proceedings with a view to addressing the over emphasis currently placed on prospects of success;
- reconsidering the extremely low compensation payments awarded for the personal damage suffered as a result of the discrimination a person experienced.

Adequate resources provided to the Ombud for Equal Treatment to fulfil any new responsibilities that may be assigned to the OET in connection with the transposition of Directive 2014/54/EU.

2 Advice and Assistance by the Ombud for Equal Treatment

2.1 Core Areas of Consultation regarding Part I of the Equal Treatment Act (equal Treatment of Women and Men in employment and occupation)

Sexual and gender-related Harassment

Persons affected by sexual or gender-related harassment seek information and support at an earlier stage than in the past.

Employers succeed only rarely in providing adequate relief. A lot of effort is required to maintain the employment relationship. In concrete cases the Ombud for Equal Treatment therefore offers measures to raise awareness in the respective companies, which are readily accepted.

When taking advantage of the consultation and support services of the Ombud for Equal Treatment, the persons affected are often threatened with retaliatory measures, e.g. by bringing action for withdrawal or an injunction, or even by instituting proceedings for slander.



Establishment of an Employment Relationship

Many consultations issues deal with discrimination in establishing an employment relationship. Criteria of social gender and gender-stereotype images play a major role in personnel selection processes. Many women report that they are asked questions about pregnancy, family planning and childcare in job interviews.

Gender-stereotypical images influence men and women in their career choices. If women try to get a foothold in non-traditional jobs, they are often considered to lack technical knowledge or adequate physical strength. Lacking sanitary facilities for women are also used as an argument for rejecting them.

Men contact the Ombud for Equal Treatment when they are told in telephone or written communication by potential employers that only women are eligible for recruitment. Besides lacking sanitary facilities or changing rooms for men, the homogeneity of female teams is mentioned as a reason for excluding male applicants.

Equal Pay

Consultations that deal with discrimination in fixing pay involve a lot of effort when circumstantial evidence for substantiating discrimination has to be gathered. Comprehensive and complex investigations are required to describe the situation of disadvantaged—mostly female—employees as compared to their male colleagues. If the person affected provides inadequate information, it has to be obtained from works councils, employers or other employees based on the right to information of the Ombud for Equal Treatment in accordance with Section 5, para 4 of the Federal Act on the Equal Treatment Commission and the Ombud for Equal Treatment. The transparency rules, which were incorporated into the 2011 Amendment of the Equal Treatment Act, provide guidance on collecting circumstantial evidence in cases of pay discrimination, i.e. information provided by social insurance institutions as well as information regarding the income reports of companies.

Equal value of jobs held by women and men is an issue that is addressed only very rarely in legal proceedings. This is due to a lack of discussion on the one hand; on the other hand, the persons affected often face a system which has been implemented over a long time so that the elements of discrimination can be identified only with great difficulty.

Pregnancy and the Reconciliation of Work and Family

Discrimination on grounds of marital status, i.e. due to the fact that employees have children and childcare duties, is an issue which is addressed very frequently in the consultations with the Ombud for Equal Treatment. Case scenarios are for example the termination of employment relationships, non-extension of fixed-term employment contracts after an employee notified the employer of her pregnancy, deteriorating working conditions due to negative reactions to the employee's care duties or the assigning of de-qualifying tasks to employees returning from parental leave.



2.2 Core Areas of Consultations regarding Part II of the Equal Treatment Act (equal Treatment in Employment and Occupation irrespective of Ethnicity, Religion or Belief, Age or sexual Orientation)

Consultations relating to different Grounds of Discrimination

Most consultations with the Ombud for Equal Treatment deal with discrimination on grounds of ethnicity, followed by age-related discrimination, religious discrimination, discrimination on grounds of sexual orientation and belief. The majority of cases deal with discrimination in establishing or terminating employment relationships, discrimination relating to other working conditions or harassment.

Age Discrimination

At present the Equal Treatment Act does not provide comprehensive protection against age discrimination in all spheres of life—but only in employment and occupation. The inadequacy of current legal standards is for example reflected in the health sector, where older persons are discriminated against but have to come to terms with the fact that specific incidents do not fall within the scope of the definition of “discrimination” and that they are consequently not sanctioned.

Non-discriminatory Job Advertisements

Expert opinions prepared on behalf of the Ombud for Equal Treatment are an important step to clarify the question—both in terms of content and concept—which requirements or wordings in job advertisements give rise to discrimination on grounds of ethnicity, age, religion or belief. A survey on administrative court decisions dealing with discriminatory job advertisements is available on the website of the Ombud for Equal Treatment.

Discrimination on grounds of Belief

The Ombud for Equal Treatment is frequently asked whether the activities of works councils fall within the scope of the definition of “belief” of the Equal Treatment Act, regardless whether the members of the works council have ties with political parties or not. So far no court decision has been issued to clarify this question. The Equal Treatment Commission also has not had any opportunity to present its views on this question.

Citizenship as an Element of Ethnicity?

The Ombud for Equal Treatment is often faced with particular situations giving rise to the question whether the criterion of citizenship is an element of ethnicity and whether it should therefore fall within the scope of protection of the Equal Treatment Act—except for sovereign regulations dealing for example with the right of residence. This issue is also intensively discussed in the working groups of the European Network of Equality Bodies as well as with experts of NGOs. It will be clarified at least partly by Directive 2014/54/EU on freedom of movement for workers, which has to be implemented in Austria by 2016.

2.3 Core Areas of Consultation regarding Part III of the Equal Treatment Act (equal Treatment irrespective of Sex or Ethnicity in other Areas)

Admission Policies and Pricing of Bars and Discotheques

Many consultations with the Ombud for Equal Treatment in the context of Part III of the Equal Treatment Act address the pricing and admission policies of bars and discotheques.

The complaints about entrance fees presented to the Ombud for Equal Treatment are based on unequal treatment on grounds of sex. Men complain that the entrance fees for women are lower or that women do not have to pay any admission at all. Moreover, bars offer flat rates for beverages that are more expensive for men. Some discotheques even offer free alcoholic “welcome drinks” exclusively to women. When persons are forbidden to enter premises they often perceive this only as discrimination on grounds of ethnicity although all these cases affect exclusively men. The Ombud for Equal Treatment has repeatedly found that these practices constitute discrimination. However many bars and discotheques continue to adhere to their discriminatory admission and pricing policies.



Legal Expenses Insurance and Court Proceedings

The procedures before the Equal Treatment Commission are free of charge. In court proceedings the persons feeling discriminated against have to bare the cost risk if they lose the case.

In cases of discrimination affecting Part III of the Equal Treatment Act there are no institutions granting legal protection. Most persons considering to initiate legal proceedings after the Equal Treatment Commission held that discrimination had occurred will depend on their legal insurance to cover the costs of the court proceedings. Based on the experience of the Ombud for Equal Treatment, this is, however, often explicitly excluded from the scope of the insurance contract.

Housing Advertisements

In accordance with the Equal Treatment Act, housing advertisements have to use a language which is non-discriminatory with regard to sex and ethnicity since 2011. If the principle of non-discriminatory advertising for housing is violated for the first time, the offender receives a warning of the court. Administrative fines up to 360 euros will be imposed in the event of further violations. Apart from the persons looking for housing, the Ombud for Equal Treatment is also entitled to institute administrative penal proceedings.

In February 2012 the Ombud for Equal Treatment analysed advertisements in regional and countrywide newspapers. The Ombud for Equal Treatment brought action in 13 cases of housing advertisements that were discriminatory on grounds of sex or ethnicity. Almost all proceedings were concluded with a warning.

Family Allowance

As far as access to social protection is concerned, the Equal Treatment Act protects against discrimination on grounds of ethnicity. “Social protection” encompasses all legal systems of social security and benefits granted under these systems, including family allowance. In accordance with the Family Equalisation Act, the parent is entitled to family allowance to whose household the child belongs and who has his/her customary residence and habitual centre of interests in the Austrian federal territory.

In consultations with the Ombud for Equal Treatment difficulties are described in claiming family allowance if one parent or both parents are not of Austrian origin, regardless of the fact whether they hold the Austrian citizenship or not. In most cases interventions of the Ombud for Equal Treatment are successful.

Discrimination in Sports

Complaints in this area mainly deal with lacking training opportunities for girls in some sports such as triathlon or ice-hockey. When girls grow up and can no longer attend training for children, no paid trainers are available for them, whereas young men may continue to use the entire infrastructure. Many young women find themselves forced to discontinue sports. They also report that the financial assistance made available for all young athletes is in reality used almost exclusively for boys. Due to lacking case law, there is no authoritative clarification as to what extent this type of discrimination falls within the scope of protection of the Equal Treatment Act.

Sexual Harassment

Sexual harassment in the context of services deal mainly with sexual assaults by masseurs, doctors, repair workers and driving teachers. If a person using public transport or a leisure facility is harassed, the harasser is usually an unknown person who often cannot be traced and identified.

Dating Agencies — different Fees for Men and Women

Several men lodged complaints with the Ombud for Equal Treatment about the fact that they had had to pay higher fees for contracts with dating agencies than women. There were also complaints about online portals that are available free of charge to women while men are required to pay a fee.

2.4 Multiple Discrimination

Due to the complex interplay between various grounds of discrimination the Ombud for Equal Treatment has been challenged to provide comprehensive support to people. Persons affected by discrimination often perceive or describe only one ground of discrimination. They do not realise that other characteristics could also have given rise to discriminatory acts unless they are asked specific questions. Black men who are not admitted to discotheques base their complaints mainly on racism but do not realise that this could be due to the fact that they are male. Women wearing headscarves often feel discriminated against exclusively on grounds of religion, disregarding the gender aspect. Older workers with a migration background seem to face greater risks of dismissal but often they attribute this only to their age. According to the Equal Treatment Act, multiple discrimination has to be taken into account in the assessment of the compensation for the personal damage suffered.

After providing consultation and support services in the context of multiple discrimination for ten years, the Ombud for Equal Treatment wants to make available the experience gained in the consultation practice to a larger circle of multipliers. The issue “multiple discrimination” has been a thematic focus in the years 2013 and 2014. The Ombud for Equal Treatment has been organising training events, workshops as well as regional information events. Information material focusing on this issue is also available.

3 Information Activities of the Ombud for Equal Treatment

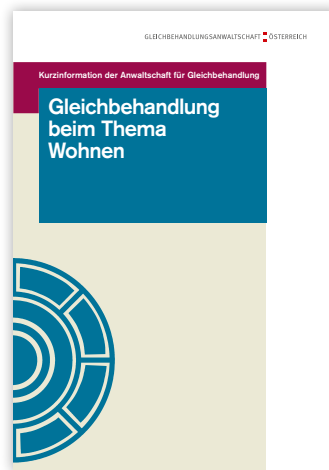
The information material of the Ombud for Equal Treatment has been developed to support events, training programmes and workshops. It is available free of charge and can be downloaded from the Ombud's website.

Short summaries

Short summaries provide selected information on specific equal treatment issues. The information offered on four pages is easily understandable. Short summaries on the following issues have been published:



Sexual and gender-related harassment



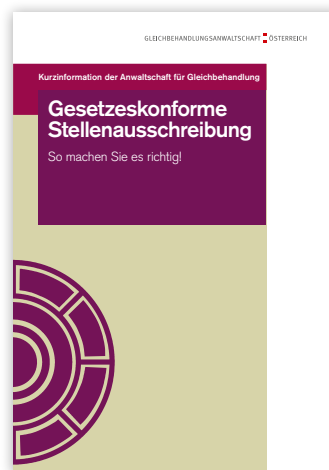
Equal treatment in housing



Equal treatment of trans-gender and intersexual persons



Wearing a headscarf at work



Job advertisements conforming to the law—Do it the correct way!



Age discrimination in employment and occupation

Folders

Folders of the Ombud for Equal Treatment are available in German and English as well as in an easy-to-read version. They provide a brief overview of the rights of persons who are discriminated against as well as the issues covered by the Equal Treatment Act and the consultation services of the Ombud for Equal Treatment.

Information Brochure for Multipliers

To improve the information provided to institutions and NGOs dealing with persons feeling discriminated against, the Ombud for Equal Treatment published a short brochure containing numerous case examples and information on possible action to take.

Information Flyer: Sexual Harassment in Access to Goods and Services

The Ombud for Equal Treatment published an information sheet to inform young women who often face sexual harassment. Its aim is to raise awareness of possible harassment situations as well as the range of consultation services offered by the Ombud for Equal Treatment. The flyer has been sent to advisory facilities and multipliers.

“Freecards”

With the support of an external expert, “Freecards” were developed as a new information medium of the Ombud for Equal Treatment in 2013. These free postcards depict a typical discriminatory situation. Five “Freecards” show discriminatory situations sanctioned under the Equal Treatment Act; the sixth “Freecard” provides a solution to the discriminating situation and shows the same persons in a non-discriminatory context. After the distribution campaign, the “Freecards” were re-printed and continue to be used for information work.

Website: gleichbehandlungsanwaltschaft.at

The website is the most important electronic information medium of the Ombud for Equal Treatment. It offers comprehensive legal information, general information on the Ombud for Equal Treatment and its tasks and relevant news.

Case of the Month

A very common, typical or very severe case of discrimination is described and analysed as the “case of the month” in a special section of the website.



Folder “Stop discrimination”



Information brochure for multipliers



Sexual harassment in access to goods and services

Recommendations

In the past few years the recommendations of the Ombud for Equal Treatment published on the website have proven to be very useful, especially in the context of the amendments of the Equal Treatment Act. The amendments introduced new obligations for enterprises, e.g. regarding pay transparency or protection against discrimination in access to goods and services.

Electronic Newsletter

The electronic newsletter of the Ombud for Equal Treatment is published several times a year and informs on recent developments, important cases and events focusing on equal treatment issues. The newsletter can be subscribed by e-mail or by phoning the Ombud for Equal Treatment.

The Ombud for Equal Treatment at www.help.gv.at

“Help.gv.at“ is an electronic guide to Austria’s public offices, authorities and institutions. Following a recommendation of the Ombud for Equal Treatment, an appropriate format has been developed to treat equal treatment issues in “Help”. The information is updated regularly.

Workshops, Lectures and Training Programmes for specific Target Groups

The Ombud for Equal Treatment tries to meet the demand for lectures, training programmes and workshops on equal treatment issues to the extent possible with the human resources available. The detailed activity report for the years 2012 and 2013 submitted to the National Council provides an overview over the most important target groups of the information work as well as the issues on which the experts of the Ombud for Equal Treatment are frequently invited to hold lectures or conduct workshops.

Information for the Media

Under the title “The Ombud for Equal Treatment brings to your attention...”, journalists have been informed in semi-annual press releases on burning issues dealt with in counselling sessions with clients since 2011. In 2012 the focus was on a case of multiple discrimination which was decided positively by the Equal Treatment Commission.

As consultations in the offices of the Ombud for Equal Treatment are subject to strict confidentiality, the Ombud for Equal Treatment is not able to provide non-anonymised information on cases of discrimination as it is often requested by the media and occasionally used by NGOs or lawyers for strategic reasons.

The feedback received shows that the cases presented on the website of the Ombud for Equal Treatment under “Case of the Month” are widely used as a source of information by journalists.

4 Proposals of the Ombud for Equal Treatment regarding the further Development of the Equal Treatment Act and the Federal Act on the Equal Treatment Commission and the Ombud for Equal Treatment

Equal Treatment in the Law itself

In the consultations with the Ombud for Equal Treatment the different levels of protection regarding the different discrimination grounds sanctioned under the Equal Treatment Act often cause problems.

At present discrimination on grounds of ethnicity and on grounds of sex is forbidden also in other areas than employment and occupation, while this is not the case with discrimination on grounds of religion or belief, age or sexual orientation. Depending on the ground of discrimination, persons seeking advice in the area of access to goods and services may be granted or refused legal support.



Equal Pay: Transparency Requirements

The obligation of enterprises with more than 150 employees to prepare income reports came into force on 1 January 2014. Larger enterprises must already have submitted their income reports. Consequently the management and works council are challenged to analyse the internal pay system at least once a year. The aim of the legal obligation to prepare income reports is to raise awareness of gender-related pay differences within a company.

This is necessary because for the time being despite clear legal rules and the intensive support of the Ombud for Equal Treatment, many individual court cases dealing with pay discrimination result in a negative ruling.

Legal Definition of “Work of equal Value”

The Equal Treatment Act—as well as the respective EU directives—lack a definition of the term “equal work”. The legal discourse is characterised by a lack of knowledge and discussion. The small number of women trying to achieve equal pay based on the argument of work of equal value have been successful only in very few aspects.

The problems of unequal value attributed to activities performed predominantly by men or by women have not been resolved. This issue has also been addressed in the report of the European Commission on the transposition of Directive 2006/54/EC and the problems of implementing the principle of equal pay in practice.

Burden of Proof

In accordance with the EU directives, e.g. Art. 19 of Directive 2006/54/EC, persons feeling disadvantaged due a violation of the principle of equal treatment have to establish facts from which it may be presumed, that there has been discrimination, while the defendants have to prove that the principle of equal treatment has not been violated. The reversal of the burden of proof has been developed in the case law of the European Court of Justice, especially with regard to pay discrimination cases [(cf. ECJ 17 Oct.1989, Case Number 109/88 (Danfoss), ECJ 27 Oct. 1993, C-127/92 (Enderby), ECJ 31 May 1995, C-400/93 (Royal Copenhagen)]. The EU directives stipulate that if a pay gap is found between men and women in wage systems lacking transparency the employer must—for that reason alone—furnish proof that the intransparent pay system is not discriminatory.

In conformity with the Austrian Equal Treatment Act, a person feeling discriminated against has to substantiate the facts of the alleged discrimination. The employer must then furnish proof that it is more probable that unequal treatment (e.g. unequal pay) was due to another motive but not to one of the grounds of discrimination sanctioned under the Equal Treatment Act. In practice very often less importance is attached to discrimination, notably in legal proceedings. The law does not state that a discriminatory motive must not have played any role in a case but stipulates that another reason must have been “decisive”.

Harmonisation of the Time Limits for asserting Claims in Respect of all Types of Harassment in Employment and Occupation

With the 2013 amendment of the Equal Treatment Act the time limit for asserting claims in the context of sexual harassment was extended to three years. However, other grounds for harassment in employment and occupation are excluded from the scope of the amendment. The considerably shorter period of one year continues to apply to gender-related harassment and harassment on grounds of ethnicity, religion or belief, sexual orientation or age.

Liability for and the Obligation to provide effective Remedy against (sexual) Harassment in other Areas than Employment and Occupation

In accordance with Sections 6, 7 and 21 of the Equal Treatment Act nobody may be harassed or sexually harassed in other labour market areas. These provisions are of great practical importance in re-training and vocational training courses or in the context of job placement services.

However, in accordance with the definition provided in the law, conduct only amounts to (sexual) harassment if third parties are responsible for it, e.g. colleagues or course instructors of a re-training programme. Based on the text of the law, cases in which representatives of the organisation providing the courses were responsible for harassment. At present the further training or vocational training institutions do not have any obligation to provide effective remedy even if they are informed about harassment during a course.

As far as discrimination outside employment and occupation is concerned, there is currently a lack of clear provisions based on which also “third parties” could be held liable as discriminators if their actions correspond to the definition of (sexual) harassment. In accordance with Part III of the Equal Treatment Act, service providers do not have to provide effective remedy.

Effectiveness of the Provisions regarding Job and Housing Advertisements

The Ombud for Equal Treatment takes legal action against discriminatory advertisements, especially when new legal issues have to be clarified, e.g. whether and under which conditions the requirement of a practical experience of a minimum of five years may amount to age discrimination. Proceedings before administrative district authorities and the Independent Administrative Senates show that existing legal provisions are inadequate. A set of measures was therefore taken to make administrative criminal proceedings dealing with discriminatory job and housing advertisements more effective and to ensure comprehensive legal protection.

Expanding the Scope of an Action for declaratory Judgement of the Ombud for Equal Treatment

As an institution responsible for implementing the government’s obligation of ensuring equal treatment, the Ombud for Equal Treatment should have the right to bring action for declaratory judgement in all cases in which the decision of the Equal Treatment Commission does not coincide with the legal interpretation of the Ombud for Equal Treatment. At present an action for declaratory judgment may be brought only in proceedings which were instituted upon request of the Ombud for Equal Treatment. To clarify issues in a legally binding manner, the Ombud for Equal Treatment should, however, be able to bring action for declaratory judgement even in cases where the Equal Treatment Commission declares to lack subject-matter competence for a specific equal treatment issue, while the Ombud for Equal Treatment is of the legal opinion that the issue falls within the scope of the Equal Treatment Act.

Restoring the Expert Function of the Ombud for Equal Treatment in Proceedings before the Equal Treatment Commission in Cases of multiple Discrimination

In accordance with Section 5 para 3 of the Federal Act on the Equal Treatment Commission and the Ombud for Equal Treatment, only one Ombudsperson may participate in and speak at the meetings of the Senates of the Equal Treatment Commission –even in cases of multiple discrimination, which always require the expertise of several members of the Ombud for Equal Treatment. This change in the law was justified by arguing that the number of the members of the Senates of the Equal Treatment Commission had been reduced. The ombudspersons for equal treatment are not members of the Senates but experts with a right to be present and ask questions. Especially in view of this task, it would be important to admit experts for different grounds of discrimination, who are able to take ad-hoc legal measures.

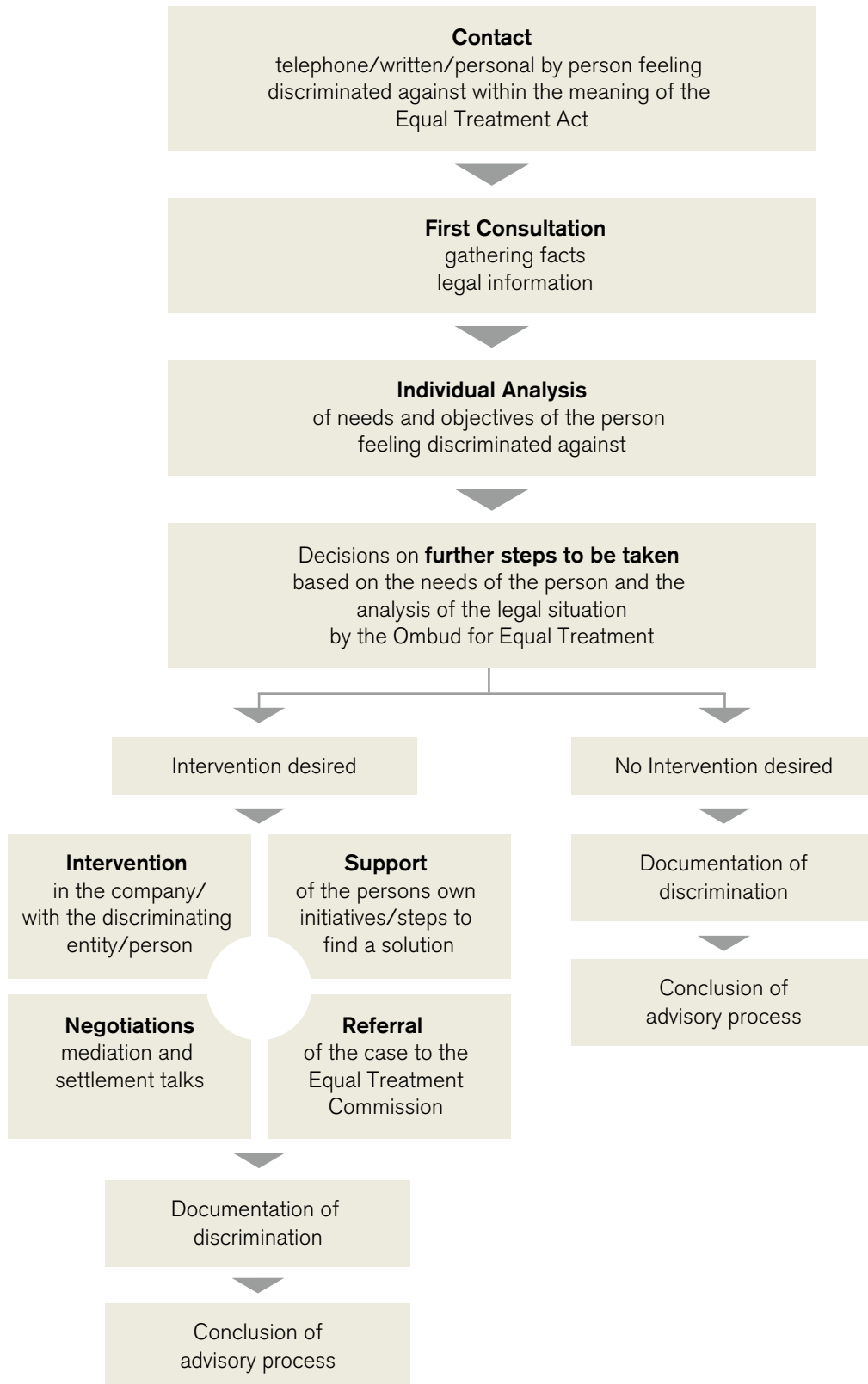
Rules for Decisions on the Competence of the Equal Treatment Commission

If a Senate of the Equal Treatment Commission rejects an application, the way of ending proceedings should be regulated, i.e. by formal dismissal or by declaring the subject-matter inadmissible. It should also be clarified that the applicant should be informed of the reasons for this decision. The Ombud for Equal Treatment gives preference to rules allowing the Senates of the Equal Treatment Commission—and not only the chairpersons and executive bodies alone as it is now—to decide on the termination of proceedings.

A transparent Selection Procedure for appointing the Chairpersons of the Senates of the Equal Treatment Commission

The chairpersons of the Senates of the Equal Treatment Commission do not fulfil their tasks on a full-time basis. Since the Ombud for Equal Treatment considers their office to be equivalent to an executive position in the public service, the Senate chairpersons should be selected through transparent procedures. Currently, it is not possible to apply for this position. Moreover, there are no clear requirements concerning the professional or personal qualifications of possible candidates.

5 Advisory process



Ombud for Equal Treatment

We are an independent state agency that enforces the right to equality and equal opportunities and combats discrimination.

We offer legal advice, support and information.

We provide information on all equality issues. Our advisory service and support is confidential and free of charge.

Ombud for Equal Treatment

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