AUSTRIAN
OMBUDSMAN BOARD

Annual Report

of the Austrian Ombudsman Board
to the National Council and the Federal Council

2021

Monitoring Public Administration

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Preface

In 2021, the Austrian Ombudsman Board (AOB) – as many other institutions – was affected by the COVID-19 pandemic in various different ways. Numerous citizens contacted the AOB not only with concrete complaints regarding public administration in Austria, but also with a wide range of questions and uncertainties surrounding the constantly changing coronavirus rules. In total, more than 23,600 people contacted the AOB, which is a 32% increase compared to 2020. A total of 11,516 investigations were initiated. In all cases the AOB made every effort to listen to citizens' concerns and assist by providing information.

During times of crisis and uncertainty, help and support are particularly valuable for tackling challenges. In its monitoring and controlling capacity, the AOB is an important source of support when problems or misunderstandings arise during interactions with public authorities. In many instances, the AOB was able to investigate actions by authorities and act as an intermediary between the individuals involved and the administrative authority in question, so that successful solutions were found.

Because of pandemic-related constraints, in-person meetings, consultation days, admission of visitor groups and events were not possible to the usual extent. As was the case for all federal authorities and for many companies, most people were working remotely from home during the lockdowns. Nonetheless, by switching to different communication channels, it was possible to stay in touch with the general population, for example via phone-in consultation days, online chats and digital events.

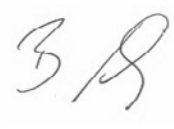
This Annual Report to the National Council and the Federal Council provides an overview of the AOB's work. *Ex-post* control activities during 2021 are covered in this Volume 1, which also has a separate chapter on the activities of the Pension Commission. Volume 2 covers Preventive Human Rights Monitoring, including areas where human rights are threatened or have already been violated. The two volumes in combination provide a comprehensive picture of the AOB's activities.

In this volume we portray problems faced by the general population when dealing with the authorities, and tell some of the human stories behind the complaints. Investigative proceedings reveal weaknesses and erroneous developments in public administration, on the one hand, and can pave the way for improvements on the other. Some changes may necessitate new work methods or changes to work processes, while others may require action on the part of legislators. These basic conditions often govern the extent to which public administration can successfully remain service-oriented and efficient, and it is the AOB's declared goal to play its part in that regard.

2022 is an anniversary year for the AOB and an opportunity for us to take stock of our performance over a fairly long period: we will be celebrating 45 years of the AOB's existence, 10 years of our mandate to protect and promote human rights, and 5 years of our mandate to protect victims of children's homes.

We would like to thank our hard-working employees for their commitment and flexibility, thanks to which the AOB has been able to fulfil its function to the usual extent during these difficult times. We also wish to thank the federal ministries and the other federal, regional and municipal bodies for the good cooperation and the trust they have placed in us.

Werner Amon



Bernhard Achitz

Walter Rosenkranz

Vienna, March 2022

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Introduction

The Austrian Ombudsman Board (AOB) is an institution that protects citizens' rights. One of its central tasks is to monitor public administration. It receives complaints from anyone who has encountered problems with an Austrian authority, which might involve a failure to act, a legal opinion that conflicts with the relevant legislation, or perhaps simply a case of impolite treatment. The AOB's mandate also covers *ex-officio* investigations if it suspects there has been a case of maladministration.

Good public administration requires monitoring

Since everyone comes into contact with authorities on many occasions during their life, everyone has direct experience of how public administration functions. Good public administration treats people with respect, makes comprehensible, lawful decisions and performs its work promptly. Effective monitoring is essential for guaranteeing that work is performed in a service-oriented, efficient manner, to prevent negative outcomes, or at least to ensure that corrective action can be taken.

Significant increase in the number of complaints in 2021

Monitoring public administration in Austria is one of the most important tasks of the AOB and is the main focus of Volume 1 of this Annual Report. The report provides an overview of the approximately 23,600 complaints received during 2021. We also report on problems, which citizens encountered in interaction with the authorities and which, following investigations by the AOB, turned out to be cases of maladministration.

COVID-19 pandemic places additional burdens

This field of AOB's activities is of particular significance in light of the COVID-19 pandemic. Over the past two years, many people have found themselves in economically and socially challenging situations. They have had to rely on support from the state to fend off emergencies or at least mitigate them. Moreover, because of the pandemic, there has been an increase in the need for information and support regarding the new COVID-19 regulations. The crisis has also meant that existing weaknesses in the system have come under further pressure. Financial bottlenecks and staff shortages in health care and the care sector, in the justice system and in the police have had additional impact on the persons involved. It is important to take those background factors into account when dealing with citizens' complaints.

If a particular matter has not been addressed and decided upon in a suitable manner, it is the AOB's task to uphold the individual's rights. In many cases, the AOB can achieve an outcome where an unlawful action on the part of the authorities is rectified, or an acceptable solution is found for the individuals concerned. By giving an account of cases of maladministration, we also aim to raise awareness within public administration about how to apply laws correctly and in a manner that is oriented to citizens' rights.

This can smooth the interaction between citizens and public administration and build trust in the rule of law.

Objective: improvements in public administration

Monitoring of public administration goes beyond merely investigating individual complaints. An individual case may help provide a basis for general recommendations or legislative changes and can thereby improve the way public administration functions. The AOB hopes that its work may help encourage administrative authorities and legislative bodies to make necessary changes.

Chapter 1, the "Performance record", provides a short summary of the various different areas of activity and key figures for the AOB's work in 2021. It also gives insight into the financial aspects, human resources, public relations work and international activities of the AOB.

Chapter 2 covers the activities of the Pension Commission, which since 2017 has handled compensation for victims of children's home under the Pensions for Victims of Children's Homes Act (Heimopferrentengesetz). This means the AOB also provides support for processing of claims from individuals who suffered abuse and violence as children or teenagers. Until now, a total of 2,281 claims from uncompensated individuals were submitted; 310 new claims were received in 2021.

Legislative recommendations

Chapter 3 presents results and focal points of investigative activities as part of the monitoring of public administration. Just as in previous reports, the subject matter is organised by departmental responsibilities. They cover investigative proceedings, which are based on individual complaints as well as results from investigative proceedings, which were initiated *ex officio*. Given the large number of cases, it was not possible to cover all cases of maladministration in detail. The focus is therefore on topics, which often gave rise to complaints or involved a large number of individuals. The goal is to describe cases of maladministration and also to make concrete recommendations for improvements. On the last pages, there is also a table of legislative recommendations, to provide an overview.

1 Performance record

1.1 Monitoring public administration

Every complaint counts

The basis for the AOB's activities is Austria's Federal Constitution. Under the Constitution, any citizen is entitled to contact the AOB regarding an alleged case of maladministration. The AOB is obliged to address every permissible complaint and to make an assessment of whether an official decision was lawful. The persons concerned must then be notified regarding the outcome. If the AOB suspects a case of maladministration, it can act on its own initiative and open ex-officio investigative proceedings. Moreover, the AOB is authorised to request that the Austrian Constitutional Court verify the legality of regulations issued by a federal authority.

32% increase in complaints relative to 2020

In 2021, a total of 23,633 persons contacted the AOB with a complaint. That represents a daily average of 95 complaints per working day. The AOB initiated official investigative proceedings for about 49% of the complaints (11,516 cases), of which 8,684 complaints related to federal administration authorities, and 2,832 to regional and municipal administration authorities. In 5,187 of the cases, no investigative proceedings were initiated, either because there were insufficient indications of maladministration or because the proceedings before the authority had not yet been concluded. A total of 6,930 complaints involved matters that were beyond the scope of the AOB's investigative mandate. In those instances, the AOB provided information about the legal position and supplied the persons with sources of further advice.

Performance record 2021		
Monitoring institutions and facilities		16,703
of these investigations initiated	11,516	
of these processed without investigation	5,187	
Complaints outside the investigative mandate		6,930
TOTAL complaints handled		**23,633**

Investigations in the federal administration

Federal administration 8,684 investigations

The AOB's investigative activities relate to the entirety of public administration and thus cover all authorities and departments that implement federal legislation. In addition to direct and indirect federal administration, the AOB's mandate also covers private-sector

administration. In total, the AOB conducted 8,684 investigative proceedings relating to the area of federal administration.

Social welfare and health accounted for one third of all investigations

As in previous years, social welfare and health accounted for the largest proportion of investigative proceedings, namely around one third (31.5%). There were numerous complaints regarding COVID-19 measures and health insurance matters. As before, there were a large number of complaints regarding persons with disabilities.

Internal security accounted for a fifth of all complaints

Over one fifth (22.3%) of all investigative proceedings related to internal security: in this area 1,934 investigative proceedings were initiated. A large proportion of the complaints related to immigration and asylum law as well as the police. There was a significant increase relative to 2020 in complaints about residence permit proceedings. By contrast, the number of investigative proceedings regarding the length of asylum proceedings underwent a further decrease.

1,220 investigations in the area of justice

Following a sharp increase in 2020, complaints relating to the judiciary remained at a similarly high level. A total of 1,220 investigative proceedings were initiated in this area in the year under review, i.e. 14% of all investigative proceedings. A large number of complaints related to the duration of court proceedings and the execution of sentences.

Investigative proceedings in federal administration	Number of cases	in %
Federal Ministry of Social Affairs, Health, Care and Consumer Protection	2,739	31.5
Federal Ministry of the Interior	1,934	22.3
Federal Ministry of Justice	1,220	14.0
Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology	524	6.0
Federal Chancellery	843	9.7
Federal Ministry of Labour	400	4.6
Federal Ministry of Finance	357	4.1
Federal Ministry of Agriculture, Regions and Tourism	261	3.0
Federal Ministry of Education, Science and Research	206	2.4
Federal Ministry of Digital and Economic Affairs	126	1.5
Federal Ministry of European and International Affairs	35	0.4
Federal Ministry of Defence	33	0.4
Federal Ministry of Arts, Culture, the Civil Service and Sports	6	0.1
TOTAL*	**8,684**	**100**

*an additional ten cases did not fall under the responsiblity of a specific ministry; they are kept as files to be handled by the AOB Chairperson.

Investigation within regional and municipal administration in 2021

Regional and municipal administration: 2,832 investigations

In addition to the federal administration, the AOB also monitors regional and municipal administration in seven of the Laender. Only the Laender of Tyrol and Vorarlberg have set up their own regional Ombudsman offices. In total, the AOB carried out 2,832 investigative proceedings of regional and municipal administration in the year under review. The most populous Land, Vienna, accounted for the largest proportion of investigative proceedings (40%), followed by Lower Austria (19.1%) and Upper Austria (12.8%).

Land	2021	in %
Vienna	1,133	40.0
Lower Austria	542	19.1
Upper Austria	363	12.8
Styria	311	11.0
Burgenland	171	6.0
Salzburg	160	5.7
Carinthia	152	5.4
TOTAL	**2,832**	**100**

Investigative focal points in the *Laender*

In terms of content, most of the complaints related to social affairs such as the needs-based minimum benefit system, youth welfare and matters relating to people with disabilities. These areas accounted for 25.5% of all investigative proceedings. Around one fifth of complaints (19.6%) related to regional planning and building law. Problems regarding citizenship law and traffic police as well as municipal affairs also gave rise to frequent complaints.

Investigative proceedings in federal administration	Number of cases	in %
Needs-based minimum benefit system, youth welfare, persons with disabilities, basic level of social services	721	25.5
Regional planning and housing, building las	554	19.6
Citizenship, voter register, traffic police	440	15.5
Community affairs	399	14.1
Health care system and veterinary sector	163	5.8
Finances of the *Laender*, regional and municipal taxes	158	5.6
Education system, sports and cultural matters	109	3.8
Regional and municipal roads	93	3.3

Trade and industry, energy	49	1.7
Agriculture and forestry, hunting and fishing laws	47	1.7
Nature conservation and environmental protection, waste management	42	1.5
Offices of *Land* governments, public services and compensation law for regional and municipal employees	38	1.3
Transport and traffic on regional and municipal roads (excl. traffic police)	18	0.6
Science, research and the arts	1	0.0
TOTAL	**2,832**	**100**

Complaints resolved in the federal and regional administrations in 2021

Around 15% of complaints were justified

In total, 12,353 investigative proceedings were completed in the year under review, of which 10,516 were initiated in 2021, and 1,837 in previous years. In 1,834 cases, maladministration was found. In other words, one in seven complaints that led to investigative proceedings was justified. A total of 4,470 complaints proved to be groundless in the AOB's opinion, and 6,049 cases were outside the AOB's sphere of responsibility.

86 *ex-officio* investigative proceedings

Under the Austrian Federal Constitution, the AOB can initiate investigative proceedings ex officio if there are concrete grounds to suspect maladministration. The members of the AOB invoked this right in 2021 and initiated 86 ex-officio investigative proceedings.

Resolved investigative proceedings in 2021	
Maladministration	1,834
No maladministration	4,470
Complaints outside AOB mandate	6,049
TOTAL	**12,353**

Citizen-friendly communication

Easy to contact; online complaint form popular method

The large number of complaints can be attributed to the fact that the AOB is very familiar to the general population and widely accepted. The fact that the AOB is easily reachable by citizens plays an important role, as has especially been the case during the COVID-19 pandemic.

As a citizen-friendly service and control institution, the AOB is easy and straightforward to contact: complaints can be submitted in person, by telephone or in writing. An online complaint form, available on the AOB homepage, can also be used. In 2021 a total of 2,705 persons used the

online form, which is an increase of almost 60% relative to 2020. A toll-free service number can be used to submit complaints to the AOB information service by phone. In 2021 this contact method was used 11,020 times, a 36% increase relative to 2020.

During consultation days, citizens in all of the Laender have the opportunity to discuss their concerns directly with the ombudspersons. Citizens made extensive use of this opportunity. In the year under review, 112 consultation days with 927 consultations were held; of this figure, 23 were telephone consultation days. The decrease compared to 2020 (2020: 128 consultation days) was due to coronavirus constraints. As shown in the table below, Vienna accounted for the largest proportion of the consultation days.

Consultation days 2021	
Vienna	52
Upper Austria	20
Lower Austria	16
Styria	8
Burgenland	5
Salzburg	4
Carinthia	3
Vorarlberg	2
Tyrol	2
TOTAL	**112**

1.2 Activities on the Pension Commission

Applications for pensions for victims of children's homes

In July 2017, the AOB took on new responsibilities: an independent Pension Commission was set up to handle applications for pensions under the Pensions for Victims of Children's Homes Act (Heimopferrentengesetz). The Pension Commission is responsible for individuals who suffered violence in a home, foster family, hospital, psychiatric institution or sanatorium between 1945 and 1999 and who have not yet been designated as victims. The same applies to individuals who were victims of violence in a private facility, assuming that a referral was made by a child and youth welfare facility.

The Pension Commission, chaired by Ombudsman Bernhard Achitz, consists of twelve experts from different disciplines. It assesses whether the prerequisites for granting a pension are met and submits appropriate

proposals to the AOB. Clearing meetings are held beforehand between applicants and the team of experts, and extensive research is conducted to evaluate whether the claim is justified. Regular meetings are held by the Pension Commission to deal with the claims in detail and to assess whether the applicants' descriptions of events are credible. The Pension Commission then submits a proposal to the AOB requesting a decision. Based on the proposals from the Pension Commission, the AOB issues a founded, written recommendation to the competent decision-maker about whether the respective applicant should be granted a pension for victims of children's homes.

310 applications for pensions for victims of children's homes

In the year under review, a total of 310 applications for pensions for victims of children's homes were submitted directly to the Pension Commission or were forwarded to the Pension Commission from other places. In addition, the office of the Pension Commission responded to 340 enquiries from individuals seeking information from the AOB about pensions for victims of children's homes and how to apply.

212 proposals submitted to the AOB

A total of 186 persons were invited to clearing meetings to discuss their claims; 159 clearing reports were completed in the year under review. The Pension Commission met ten times during 2021. It issued 212 proposals to the AOB; in 192 cases it recommended that a pension for victims of children's homes be granted, and in 20 cases it recommended that a pension not be granted. The AOB issued 212 written analyses and recommendations to decision-makers, of which 192 were positive.

1.3 Preventive human rights monitoring

Measures for prevention of violation of human rights

Since 1 July 2012 the AOB has been fulfilling its mandate of protecting and promoting human rights in the Republic of Austria. The objective is to prevent human rights violations by way of monitoring and control visits carried out on a regular basis. The monitoring and control mandate covers public and private institutions and facilities where the freedom of persons is or can be restricted. In such facilities, individuals are at particular risk of suffering abuse or inhuman treatment. The seven commissions work on the AOB's behalf to perform comprehensive regularly scheduled monitoring of correctional institutions, police stations and police detention centres, retirement and nursing homes, psychiatric departments and child and youth welfare facilities. To prevent exploitation, violence or abuse, the AOB also monitors facilities for persons with disabilities. The AOB and its commissions also monitor authorities that are authorised to exercise direct administrative power and coercive measures, for example during demonstrations, large-scale events, manifestations or forced returns.

UN human rights instruments

The AOB's constitutional mandate to protect human rights as National Preventive Mechanism (NPM) is based on two legislative acts of the United

Nations: the UN Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and the UN Convention on the Rights of Persons with Disabilities.

Since 1 July 2021: seven expert commissions

Monitoring is performed by AOB's seven expert commissions. In addition to the existing six regional commissions, effective 1 July 2021 a separate Federal Commission for the enforcement of penalties and measures was set up, i.e. a commission entrusted with the monitoring of facilities of the penitentiary system as well as forensic institution all over Austria. The commissions have unlimited access to all institutions and facilities, and receive all information and documentation required to fulfil their mandate. Each commission consists of a chairperson and members who are appointed by the AOB in accordance with international standards and duly reflect gender balance. They are from different ethnic backgrounds, and are multidisciplinary. The commissions report their findings to the AOB.

570 monitoring visits

In the year under review, the commissions carried out 570 preventive monitoring visits in Austria: 541 were at institutions and facilities, and 29 on police operations. As a general rule, the monitoring visits were unannounced, to ensure as true and accurate a picture as possible. Only 18% of the monitoring visits were announced in advance. Lower Austria and Vienna accounted for the largest proportion of the visits, which is attributable to the high number of facilities in those Laender.

Preventive monitoring in 2021		
Land	Monitoring visits in facilities	Observation of police operations
Lower Austria	158	3
Vienna	125	6
Styria	59	3
Tyrol	57	10
Upper Austria	46	1
Salzburg	28	4
Burgenland	26	1
Carinthia	24	1
Vorarlberg	18	0
TOTAL	**541**	**29**
of which unannounced	*451*	*18*

The commissions felt compelled to criticise the human rights situation in 351 cases (i.e. 63% of the monitoring visits). The AOB performed assessments of these cases based on the commissions' observations and contacted the relevant ministries and supervisory authorities to bring about improvements. As a result, numerous cases of maladministration

or endangerment were prevented. In addition, the outcomes of these monitoring visits generated a large number of AOB recommendations on how to protect human rights at the relevant facilities.

Human Rights Advisory Council provides AOB with advice

The Human Rights Advisory Council supports the AOB in an advisory capacity. It assists the Austrian NPM in fulfilling its mandate to protect and promote human rights and consists of representatives from NGOs and federal ministries. The AOB regularly asks the Human Rights Advisory Council for its opinion on various issues relating to preventive measures for protecting human rights and to draft recommendations for the National Preventive Mechanism. In the year under review, results from the Human Rights Advisory Council's work were discussed with the AOB members at five plenary meetings and two extraordinary meetings.

A detailed account of the AOB's activities as National Preventive Mechanism (NPM) can be found in the separate report.

1.4 Budget and personnel

As shown in the cash flow statement, in 2021 the AOB had an available budget of EUR 12,431,000. According to the operating statement, EUR 12,534,000 was available. In the following, only the cash flow statement is explained because it represents the actual cash flow (see Federal Budget Statement 2021, section 05, AOB).

As shown in the cash flow statement, personnel cost expenditures accounted for EUR 7,293,000 and payments for operating material expenditures amounted to EUR 4,145,000. The operating material expenditures included for example payments for the commissions and the Human Rights Advisory Council, expenditures for statutory obligations regarding remuneration of members of the AOB, expenditures for the Pension Commission and its clearing activities, internships, printing, supply of energy and other expenditures.

In addition, the AOB had to make payments stemming from transfers, mainly for the pensions of former members of the AOB and widows of former members of the AOB, in the amount of EUR 924,000. And finally, EUR 43,000 was available for investment activities and EUR 26,000 for advances on salaries.

In order to fulfil the responsibilities incumbent on the AOB since 1 July 2012 under the Act on the Implementation of the OPCAT (OPCAT-Durchführungsgesetz), a budget of EUR 1,450,000 (unchanged compared to 2020) was planned for 2021 for payments for the commissions and the Human Rights Advisory Council. Of this amount, around EUR 1,305,000 was budgeted for reimbursements and travel costs for the members of the commissions and around EUR 85,000 for the Human Rights Advisory

Council. Roughly EUR 60,000 was available for workshops attended by the commissions and by AOB employees working in the OPCAT sector as well as for expert opinions.

For expenses relating to the Pension Commission set up on 1 July 2017, in accordance with Section 15 of the Pensions for Victims of Children's Homes Act (Heimopferrentengesetz), and for its clearing activities, a budget of EUR 200,000 was available in 2021 (unchanged compared to 2020).

Budget of EUR 12.431 million

Federal Budget Statement: funds for AOB in millions of euros Cash flow statement 2021/2020		
Expenditures	**2020**	**2021**
Staff expenditure	7.088	7.293
Operating expenditure	4.151	4.145
Transfers	0.924	0.924
Investment activities and advances on salaries	0.079	0.069
TOTAL	**12.242**	**12.431**

90 permanent positions

According to the federal personnel plan, as of 31 December 2021 the AOB employed a total of 90 persons in permanent positions (2020: 89 permanent positions). With part-time staff, persons working with reduced weekly hours, internships and staff posted from other local and regional authorities, an average of 100 persons work at the AOB. The 61 members of the (since July 2021) seven commissions, the 34 members and substitute members of the Human Rights Advisory Council, and the 11 members of the Pension Commission pursuant to the Pensions for Victims of Children's Homes Act (2020: 12 members) are not included in the aforementioned staff headcounts. 12).

1.5 Public relations

Information and support

The AOB runs an ongoing public relations campaign to keep citizens, the world of politics, experts, and national and international organisations informed about its tasks, activities and approaches. One of the key goals is to keep the population informed as best as possible if they have problems with Austrian authorities, and to draw attention to the challenges involved in upholding human rights. Along with its annual reports, the AOB employs public relations methods such as a comprehensive online presence with a regular newsletter and the ORF television programme Bürgeranwalt ("Advocate for the People"), which is broadcast weekly.

In addition, in 2021 the Ombudspersons were available for numerous interviews, media events and background talks. Press releases, press dossiers and press conferences kept journalists informed about all of the

AOB's current agenda, though some press conferences were held online due to the COVID-19 pandemic.

AOB Website

Over 200,000 visits to the website

Comprehensive information about the AOB can be found on our website www.volksanwaltschaft.gv.at. The website includes news on investigative proceedings, along with wide-ranging basic information, publications, reports, statements on draft laws, as well as reports on events and international activities. Citizens make frequent use of the website. In the year under review, there were over 200,000 visits to the website, a 30% increase relative to 2020. The online complaint form was particularly popular: in 2021 it was used 2,705 times for submitting complaints.

ORF TV programme Bürgeranwalt

One of the most important communication platforms for the AOB is the weekly ORF television programme Bürgeranwalt ("Advocate for the People"). Since January 2002, the AOB has been informing the public about ongoing investigative proceedings on a regular basis. In the studio, the ombudspersons discuss citizens' cases directly with the individuals involved and with representatives from the relevant authorities. This approach often successfully solves the problem in question.

Bürgeranwalt: 2,000 cases discussed

An example includes the TV programme from 10 April 2021, which marks a milestone of 2,000 cases. The subject matter of this broadcast was a blocked sewer with four adjoining properties. The neighbour in whose garden the access route to the sewer was located was refusing to grant the drainage company access via her property. The other three neighbours in the adjoining properties were in despair over the backed-up faeces in their homes. Thanks to the AOB's efforts, the District Authority became involved. Ultimately, the blockage was cleared.

Problem-solving

This was far from the only case where a solution was found via the TV programme. In recent years, the outcomes have been very positive: cases featured by the AOB on Bürgeranwalt relating to an individual problem with an authority have almost always been fully resolved in the citizen's favour, or at any rate significant improvements have been achieved.

Audience figures: 423,000 housholds

Bürgeranwalt is broadcast every Saturday evening at 6.00 p.m. on ORF 2. Deaf and hearing-impaired viewers can watch the programme in Austrian sign language or via ORF TELETEXT (page 777) with subtitles. The programme is also available on the ORF TVthek for one week (via http://tvthek.orf.at/profile/Buergeranwalt/1339 or via the AOB website). The studio discussions with the Ombudspersons are always popular with viewers. In 2021 the average audience figure was 423,000 households, which corresponds to a market share of around 26%.

The AOB‘s reporting methods

Constraints due to coronavirus

The AOB presents reports about its activities to the legislature at regular intervals. However, in 2020, because of the pandemic, parliamentarians were unable to discuss the reports to the Diet of Carinthia and the Diet of Vienna until early 2021. According to plan, the Annual Report 2020 was presented to the National Council and the Federal Council, and the respective report was sent to the Diet of Vienna. The AOB also presented its reports on Monitoring of Public Administration in the Laender of Upper Austria, Salzburg and Burgenland. Due to the COVID-19 pandemic, in 2021 it was once again not possible for parliamentarians to discuss all reports in person. To some extent, the AOB had to rely on web-based technology when presenting outcomes from investigative proceedings. This meant that the Ombudspersons participated in committee meetings in Salzburg, Upper Austria and Burgenland via video conference, due to a sharp rise in coronavirus infection figures.

Explanatory vido on „How to submit a complaint“

According to study conducted by market research company IMAS in spring 2020, in general people are very satisfied with the AOB’s work. Thanks to our active public relations work, particularly the ORF television programme Bürgeranwalt, citizens are mostly familiar with the AOB. The study also indicated that the AOB’s image is very positive. The majority of survey respondents view the AOB as citizen-friendly and feel that the AOB works hard on citizens’ behalf and performs very useful work.

Addressing the younger generation

However, according to socio-demographic analyses conducted as part of the study, there are significantly more reservations about the AOB among the younger generation. This may be because younger people are less familiar with the AOB. That knowledge deficit, especially about the AOB’s methods and approaches, is seen as one of the main obstacles to contacting the AOB.

One-minute explanatory video about the AOB

To counteract this knowledge deficit, an explanatory video has been made, aimed at familiarising the younger generation with the AOB and its activities. The video, entitled “How to submit a complaint to the AOB”, was presented to the media in autumn 2021, and is available via the AOB website. It has been made available to schools for use during civics classes and is being used during online presentations, internal AOB events, and external events.

Lecture series focussing on violence against women

Lecture series „One in Five“

Every year, to counteract taboo and silence around the subject of violence against women, the Centre for Forensic Medicine at the Medical University of Vienna, in conjunction with the Association of Austrian Autonomous Women’s Shelters and the AOB, organises an interdisciplinary lecture

series entitled “One in Five”. The goal is to encourage students across various disciplines to engage with the topic of violence as they prepare for professional practice and also in their research, and to help address the health problems that afflict victims of this form of violence.

The AOB has been using the lecture series to help move the subject of protection against and prevention of violence further up the political and social agenda, to point out deficits, and to initiate educational and staff development programs in the legal, health care and social professions geared to eliminating such violence.

Subject: Perpetrator work oriented to protecting victims

To draw attention to the wide range of challenges involved, each year the lecture series has a different subject topic. In 2021 the topic was once again “Perpetrator work oriented to protecting victims in cases of violence against women and children”.

Due to the COVID-19 pandemic, in autumn 2020 the lecture series could not be held at the Medical University of Vienna, and instead was held in May 2021 with a limited number of participants. In view of the high level of interest in the aforementioned topic, the organisers decided to keep that as the subject in autumn 2021. The focus was therefore once again on the men who perpetrate acts of violence against women and children, and on perpetrator work oriented to protecting victims.

Seven lecture days were held with speakers from various organisations, including advice centres for children and men, facilities for protecting victims, the police, and the AOB. The subject matter covered various forms of violence, methods for protecting against violence, violence prevention methods, the impact of gender roles and images of masculinity, and re-socialisation measures for perpetrators.

The lectures were also made available by the speakers in text form and can be downloaded from the Centre for Forensic Medicine website.

Kick-off event available via live stream

Once again, the lecture series began with a kick-off event, which was held on 25 November 2021 at the AOB. To ensure that lectures were accessible to as broad an audience as possible in times of rising coronavirus infections, they were once again made available via live stream. Representatives from various professions discussed their activities relating to violence against women, victims and perpetrators, and explained what can be done within individual professional disciplines to help reduce this form of violence. They also drew attention to basic underlying deficits, which must be tackled by politicians and legislators.

As before, the event drew a wide audience, with more than 300 people watching via live stream. By the end of the year, a total of 570 people had watched the event via the AOB website.

1.6 International activities

1.6.1 International Ombudsman Institute (IOI)

Since its founding in 1978, the International Ombudsman Institute (IOI) has had a successful history as the sole global network for Ombudsman institutions. In September 2009 the AOB took over the IOI General Secretariat.

12th IOI World Conference

A meeting of all Ombudsman institutions worldwide is held every four years. Because of the COVID-19 pandemic, the conference that had originally been planned for 2020 had to be postponed by one year.

The 12th IOI World Conference was finally held in May 2021 as a virtual event. Despite the difficult conditions, the Irish hosts ensured that the event was very professionally run, under the overarching title "Giving voice to the voiceless".

500 delegates from 130 member institutions

A total of 500 delegates from over 130 member institutions participated in the two-day conference. The focus was on vulnerable groups, namely the elderly, persons with disabilities, asylum seekers, children and adolescents, inmates in correctional institutions, persons in psychiatric institutions, and the homeless. They often are unable to speak on their own behalf and are therefore particularly reliant on support from Ombudsman institutions. Plenary meetings and workshops addressed the special challenges facing such individuals during the COVID-19 pandemic.

Outgoing President Peter Tyndall

In his capacity as IOI Secretary General, Ombudsman Amon played a central role, including chairing a workshop entitled "Challenges for Ombudsman institutions". In his closing speech, Amon drew attention to the achievements of outgoing IOI President, the Ombudsman of Ireland Peter Tyndall, under whose presidency the IOI has achieved greater recognition from the UN General Assembly and the Council of Europe.

IOI General Assembly

At the IOI General Assembly, the IOI By-Laws were reformed to ensure that the IOI becomes an even more transparent, democratic and inclusive organisation. Secretary General Amon gave members a detailed account of the IOI's achievements over the past four years, with particular focus on the support it provides for Ombudspersons who work under difficult conditions or are exposed to threats and risk.

UN Resolution on the role of Ombudsman institutions amended

Another important topic discussed by IOI members was the UN Resolution on the Ombudsman institution, adopted by the UN General Assembly in December 2020. As noted in the last report, that expanded resolution has helped ensure that the Principles on the Protection and Promotion of the Ombudsman Institution (the Venice Principles adopted by the Council of Europe in 2019) have become established as international standards. Since

then, the IOI's UN working group has been working on raising awareness among the international community about the UN resolution and the Venice Principles, so that they become more visible and to draw attention to their significance for Ombudsman institutions worldwide.

IOI has been granted international institution status

The resolution will help foster relations between the IOI and the UN and strengthen the IOI's role as a partner in implementation of the UN human rights agenda. As a next step, the IOI intends to apply for observer status at the UN General Assembly. That has been one of the IOI's strategic goals for some time, and in 2021 a further step was taken towards achieving it: following Amon's intensive talks with the competent Austrian minister Alexander Schallenberg, effective January 2022 the IOI has been granted "other international institution" status (Sonstige Internationale Einrichtung) as defined in Austria's Act on Headquarter Locations (Amtssitzgesetz). That new status will drive key projects forward and will help in the process of establishing further ties with the UN.

Board of Directors meeting in New York

In parallel with these encouraging developments, Amon travelled to New York in November to meet with potential cooperation partners at the UN and to hold talks with Austria's Permanent Mission to the UN and the Austrian Cultural Forum New York about possible support for an IOI Board of Directors meeting to be held in May 2022. Following initial talks with the United Nations Institute for Training and Research (UNITAR), a cooperation agreement between the IOI and UNITAR is currently in the preparation stage.

Training and continuing education despite the pandemic

As part of the aforementioned consciousness-raising work, the IOI, in conjunction with the African Ombudsman and Mediators Association (AOMA), held a webinar during which Ombudsman Amon gave a speech in which he mentioned in particular the new UN resolution. He pointed out that "the new resolution sends a message at the international level about strengthening independent Ombudsman institutions, and will raise awareness about the key role we play in protecting and promoting human rights".

Collaboration with African Ombudsman Association

To keep international interaction going during the COVID-19 pandemic, the IOI also organised webinars on various topics, working jointly with the African Ombudsman Research Centre (AORC). In addition to the webinar on the UN resolution mentioned above, a webinar on strengthening the Ombudsman mandate was organised at which Ombudsman Amon emphasised the importance of the Venice Principles. Other topics addressed within the scope of this cooperation included the role of Ombudsman institutions in the monitoring of places of deprivation of liberty, systematic investigative proceedings and dealing with difficult complainants.

Working with the media: second online event

The IOI also used a proven online format, which had been successfully offered to members in 2020. As part of a practice-oriented training course

about working with the media, participants from Africa, Asia, Europe, the Caribbean and North America took part in a joint video event. Seasoned BBC journalists made their expertise available to the individual groups. Participants learned how to prepare properly for interviews, acquired techniques for conveying core statements and found ways to avoid "journalistic traps". The material learned during theoretical units was put into practice in 45-minute individual sessions with short mock interviews.

Conference on refugees and migration in Cartagena

As pandemic-related conditions improved somewhat during the summer, Ombudsman Amon was able to participate in a conference on "Refugees and migration", held in Cartagena by the Ombudsman of Columbia. Amon met with Colombian President Iván Duque and took the opportunity to present the IOI and explain the benefits of IOI membership to Latin American colleagues.

Focus on Latin America

There were further opportunities for interaction with Ombudsman institutions in the Caribbean and Latin America during a meeting of the Ibero-American Federation of Ombudsmen (FIO), which held its general meeting in the Dominican Republic, and the annual general meeting of the Institute of Latin-American Ombudsman (ILO), at which IOI President Chris Field gave the opening address.

Ombudsman of Thailand celebrates 21st anniversary

On the occasion of its 21st anniversary, the Ombudsman of Thailand held an online event entitled "The role of the Ombudsman during and after the COVID-19 pandemic". The conference was an opportunity for Ombudsman institutions from all over the world to share experiences and discuss specific challenges relating to the pandemic. In his speech, Secretary General Amon drew particular attention to vulnerable groups and emphasised Ombudsman institutions' special responsibility for providing support.

Israel conference in collaboration with IOI

To celebrate the 50th anniversary of the Ombudsman of Israel, an online conference was held in close collaboration with the IOI, focussing on the rights of older people and increasing life expectancy. Ombudsman Amon gave the opening address, congratulating the Ombudsman of Israel on its many successful years of work.

IOI mourns death of former Secretary General

Sadly, in August 2021 the international Ombudsman community learned of the sudden death of former Ombudsman and IOI Secretary General Günther Kräuter. The death of the former Secretary General and honorary life member came as a shock for the IOI. Among IOI members he was known as a level-headed diplomat who worked tirelessly for the IOI, contributing a wealth of ideas and tremendous energy. "The numerous words of sympathy from all over the world reflect the very high esteem in which Günther Kräuter was held among IOI members", said Secretary General Amon.

1.6.2 International cooperation

United Nations

Global Alliance of NHRIs (GANHRI)

As a National Human Rights Institution (NHRI), the AOB is an accredited member of the Geneva-based Global Alliance of National Human Rights Institutions (GANHRI).

Re-accreditation process for AOB

On the basis of the Paris Principles – the international standards for NHRIs – GANHRI members regularly undergo a UN-approved accreditation process with various accreditation levels. In the year under review, the AOB applied to GANHRI for re-accreditation. The process was initiated by submitting a detailed statement concerning compliance with the Paris Principles. The AOB's submission is currently being analysed and evaluated by the Sub-Committee on Accreditation, with initial results from the re-accreditation process expected in March 2022.

European NHRI network (ENNHRI)

As an NHRI, the AOB is also a member of the European Network of National Human Rights Institutions (ENNHRI) and took part in the annual general assembly, which was held online due to the pandemic. Activities included the election of the European members of the GANHRI Bureau and the European member on the GANHRI Sub-Committee on Accreditation.

ENNHRI Rule of Law Report 2021

NHRIs play a vital role in protecting and promoting human rights, democracy and the rule of law. As an NHRI, the AOB was invited to contribute to the annual ENNHRI Rule of Law Report, which consists of reports from European NHRIs on the situation regarding the rule of law and highlights trends in Europe and the specific situations in individual countries. In 2021 the main focus was on coronavirus containment measures.

Rights of migrants on Europe's borders

In June 2021 an expert from the AOB took part in an online meeting organised by the ENNHRI. The meeting focused on the role of NHRIs in monitoring and protecting the rights of migrants on Europe's borders and analysed how the relevant authorities can best achieve their objectives at a national and regional level.

Right to truth as a basis for an independent life

Working in conjunction with the Office of the UN High Commissioner for Human Rights, the ENNHRI also organised a webinar on "Institutionalisation of individuals and the right to truth", in which an expert from the AOB also took part. Topics included the right to truth as an instrument for de-institutionalisation and for maintaining an independent life for persons with disabilities. There was particular emphasis on the impact of the COVID-19 pandemic on individuals in institutionalised environments.

Conference of State Parties to the UN CRPD

The 14th session of the Conference of States Parties to the UN Convention on the Rights of Persons with Disabilities was held in hybrid format. The overarching topic was findings from the pandemic and implications for how to meet the needs of and uphold the rights of persons with disabilities.

Various working groups tackled the question of protecting persons with disabilities in humanitarian crisis situations, living independently and being included in the community as well as the challenges of the COVID-19 pandemic. Experts from the AOB took part at this conference.

European Union

EU Commission's 2021 Rule of Law Report

In 2021 the AOB contributed to the EU Commission's annual Rule of Law Report, which provides an overview of the rule of law within the EU. The chapters on individual countries are based on qualitative assessment by the EU Commission, taking into account challenges, positive aspects and practical examples.

Visit of Director of EU Agency for Fundamental Rights

In July 2021, Michael O'Flaherty, Director of the Vienna-based European Union Agency for Fundamental Rights, paid a visit to Ombudsman Amon. The EU Agency for Fundamental Rights advises on human rights issues, working in collaboration with national and international institutions, in particular the Council of Europe. The AOB, the Human Rights House of the Republic of Austria, works hard to identify potential human rights violations at their point of origin and to prevent them. One of Ombudsman Amon's responsibilities is therefore to cultivate ongoing interaction with the EU Agency for Fundamental Rights.

Fundamental Rights Forum 2021

The Fundamental Rights Forum, organised by the EU Agency for Fundamental Rights, was held once again in 2021. As COVID-19 restrictions had been loosened somewhat, it was possible to hold the two-day event in hybrid format – online and also on site in Vienna. At this year's forum, the main topics were the future of young people in the EU and Europe's roadmap out of the pandemic. Over 140 discussion sessions and workshops were held, covering a broad range of human rights topics such as the development and impact of AI, climate change, refugees and discrimination.

The IOI made a valuable contribution to the success of the event by organising a working group. Ombudspersons from the Basque Country, Greece and the Netherlands held discussions on the topic of "Migration, refugees and asylum". Discussion centred on key challenges, comprehensive protection for refugees' rights on the EU's external borders and successful integration of those individuals into our societies.

European Ombudsman visits AOB

Ombudsman Amon also received a visit from European Ombudsman Emily O'Reilly, who visited the AOB while in Vienna for the aforementioned event. Emily O'Reilly and her team tackle maladministration within EU institutions with great success. Amon and O'Reilly particularly praised the good collaboration and networking that takes place within the European system.

Council of Europe

Support for NHRIs

In April 2021, the German Presidency of the Committee of Ministers of the Council of Europe organised an event in connection with the Council of Europe's recommendations for developing and supporting effective, pluralistic, independent NHRIs. Podium discussions were held to talk about strategies for closer collaboration among NHRIs, government authorities and the Council of Europe. At a non-public meeting, the attending NHRIs discussed strategic priorities based on Council of Europe's recommendations. Ombudsman Amon attended this online meeting, in his capacity as the Ombudsman responsible for the AOB's international agenda.

Council of Europe's Commissioner for Human Rights

In December 2021, the Council of Europe's Commissioner for Human Rights, Ms. Dunja Mijatović, paid a visit to the AOB in Vienna. The focal point of the visit was information-gathering about women's rights and equality issues, as well as the reception and integration of refugees, asylum seekers and migrants. In this context, Ombudsman Rosenkranz and Ombudsman Achitz outlined some of the current cases of maladministration and problem areas. Human Rights Commissioner Mijatović gave an account of the challenges relating to migration at the European level. Ombudsman Amon reported on his activities as Secretary General of the IOI, in particular on the IOI's plan for closer ties with the UN.

Other events and bilateral contacts

Lithuanian ambassador

Lithuanian ambassador Donatas Kušlys paid a visit to the AOB and met with Ombudsman Amon. Amon reported on international activities and emphasised that the AOB is a reliable partner for protecting human rights and strengthening the rule of law.

Iranian ambassador

Iranian ambassador Abbas Bagherpour paid a visit to the AOB and held a meeting with Ombudsman Rosenkranz, which coincided with the start of Rosenkranz's term as Chairperson of the AOB (rotating chairmanship). Discussions focused on options for collaboration with the Iranian Ombudsman institution, which is a member of the IOI.

Russian ambassador to the UN in Vienna

At the end of the year, Ombudsman Amon paid a courtesy visit to the Russian deputy ambassador to the UN Daniil Mokin in Vienna. The topics discussed included the project request submitted by the Russian commission on human rights, which as an IOI member has expressed interest in hosting the next IOI World Conference in 2024.

National Preventive Mechanism (NPM)

As National Preventive Mechanism (NPM), the AOB and its commissions are always interested in active exchange of know-how. For further details, see the volume on the activities of the National Preventive Mechanism.

2 Pensions for victims of children's homes

Children and young people who have suffered abuse under state care

For decades, numerous children and young people were mistreated and abused in children's homes and foster families. Violence during early years is very detrimental to health and the later social and working life of those affected. Pensions for victims of children's homes are a symbolic form of compensation from the State for victims of physical, mental or sexual abuse.

One of the AOB's most important tasks since 2017

Since July 2017, the AOB, working on behalf of the Ministry of Social Affairs Service (Sozialministeriumservice) and the pension agencies (Pensionsversicherung), has been responsible for assessment of claims for children's home victim pensions. Since then the Pension Commission has assessed a total of 2,281 claims. Reported abuses have included corporal punishment to a child's naked body, psychological abuse where the child was submerged in cold water as punishment for bedwetting, and serious sexual abuse and rape. The impact in later life is very clear, and has been corroborated in numerous scholarly studies. Recently a report on the conditions in curative education in Carinthia and the abuses perpetrated by Dr. Franz Wurst, former chief physician at Klagenfurt Regional Hospital, was written by Ulrike Loch et al. on behalf of the Land of Carinthia. In addition, a study concerning children's homes operated by the Lower Austrian non-profit organisation Volkshilfe NÖ was conducted by Michael John et al. on behalf of Volkshilfe NÖ.

For many individuals who lived in children's homes when young, the clearing process can be somewhat overwhelming, following decades of having to suppress the truth. For many of those who describe what they endured, the process can be highly emotional and traumatic as they come to terms with the past, causing tears and significant physical agitation. It is therefore helpful if clearing experts provide support, to ensure that the injustices suffered are duly acknowledged by a public institution.

Victims of violent abuse before 1999

The pension amounts to EUR 347.40 per month (2022 figure) and is paid gross for net. Individuals who, between 10 May 1945 and 31 December 1999, suffered violent abuse in a children's or youth home (full boarding school), in a hospital, psychiatric institution, sanatorium, a comparable institution or in a private institution of that type (assuming that a referral has been received from a child and youth welfare facility), or in a foster family are eligible for the children's home victim pension.

Children's home victim pensions: payable as additional pension

The pension is payable to men over the age of 65 and to women over the age of 60. If, under the relevant social insurance regulations, a person is already receiving an own pension, civil service pension, rehabilitation allowance, or

in cases where due to incapacity for work an orphan's pension continues to be payable, a children's home victim pension is payable for the same duration as the aforementioned benefits.

Also entitled are recipients of the needs-based minimum benefit who are incapacitated for work over the long term, and individuals who after turning 18 or completing their school education or vocational training are incapacitated for work, are covered by public health insurance as a dependent (child or grandchild), and are not drawing a pension.

Individuals who do not fall into any of these categories are not entitled to a children's home victim pension until they turn 60/65. In such situations they can apply for a pension entitlement to be determined. The prerequisites for entitlement will then undergo assessment, but the pension will not be paid out until pensionable age has been reached.

2.1 Overview of key figures

Around 1,860 applications processed

Since 2017, the AOB has resolved 1,200 applications via the clearing procedure carried out by the Pension Commission and around 660 applications via a clearing procedure handled by a victim support centre.

310 new applications

In 2021, the Pension Commission was instructed by decision-makers to assess a total of 310 applications. Among those applications there were 48 decision requests. A total of 70 applications were submitted directly to the AOB; 43% of the applications were submitted by women, 57% by men. That represented a one percentage point increase in applications by men relative to 2020. Around 8% of the individuals concerned (23 applications) were supported under adult guardianship. In 2020 that figure was around 4%.

Around 340 questions about children's home victim pensions were answered

In 2021, the AOB once again received numerous questions about children's home victim pensions. The AOB responded by providing comprehensive information about claims and helped in problem solving. Around 70 requests were received in writing, 266 by telephone. Information was provided about the prerequisites for a claim, help was given with claim submissions, and delays in the processing of compensation and pension claims were resolved.

212 applications processed to completion by AOB

The Pension Commission met ten times in 2021. A total of 212 claims were discussed and ultimately submitted to the AOB for a decision. In 20 cases, the AOB recommended that the application be turned down; 192 applications were approved. Most of the applications that were turned down related to individuals who had lived in private homes. In other cases, the Pension Commission experts deemed that the events that had occurred did not constitute offences as defined in the Austrian Criminal Code (Strafgesetzbuch). A small proportion of the applications were deemed not credible.

In 38 cases, the Pension Commission did not initiate an assessment process, because the applicants had already received lump-sum compensation (13), or had withdrawn their application (16), or were unwilling to cooperate in proceedings (8). One individual died before proceedings were completed. A total of 107 cases were handled by a victim support centre, with the granting of lump-sum compensation by the institution operator or the child and youth welfare and protection authorities.

A pool of 38 external clinical psychologists worked on cases; 186 applications were forwarded for clearing, and 159 clearing reports were completed during the year.

In 2021 the individuals involved described 220 locations in which acts of violence had occurred. Most of the individuals (85%) suffered violence in a home or boarding school, 10% in a foster family, and around 5% in a medical facility.

Reports of physical mental and sexual abuse

Over 80% of the reports contained descriptions of psychological abuse. Measures such as being locked for hours in a dark windowless room meant that in some cases the individuals are still to this day unable to sleep in the dark. A total of 70% of the applications related to physical abuse which in many cases was described as "normal". In many homes and many children's homes, blows to the fingers and ears were employed systematically. Around one third of the applicants were victims of sexual violence.

2.2 Proceedings conducted by AOB's Pension Commission

Acting on behalf of the pension agencies and the Ministry of Social Affairs Service, the AOB performs assessments of applications and issues recommendations. The Pension Commission then initiates a clearing process or forwards the applicants to the victim support centres for clearing and payment of a lump-sum compensation.

Clearing meetings held on AOB's behalf

The purpose of the clearing process is to capture the applicants' accounts of their experiences in writing. The Pension Commission is in ongoing contact with external clearing experts who conduct meetings on the Pension Commission's behalf. In the year under review, this interaction between the Pension Commission and clearing experts continued in full compliance with COVID-19 measures.

Clearing reports and all available documents relating to the case, such as files from the Youth Welfare Office, undergo assessment by the Pension Commission. The group of experts draw on their own expertise, reports submitted by other individuals affected and abundant scholarly material about out-of-home care and curative education. Documents are supplied

to the Pension Commission by the relevant authorities, offices and their archivists, and also by private operators. In most cases, this collaboration functions smoothly, with no grounds for complaints. All documents are anonymised by the office of the Pension Commission and then submitted for assessment by the Pension Commission.

AOB recommendation

Based on a proposal from the Pension Commission, the AOB issues a detailed recommendation. The decision-makers then reach a decision on the basis of that recommendation. If the applicant wishes to contest the decision, they may bring legal action in court within the subsequent four-week period.

2.3 No children's home victim pension despite incapacity for work

Violence in a residential setting

The AOB is frequently contacted by individuals who are not entitled to a children's home victim pension and are seeking support from the AOB. This includes victims of violence in the Catholic Church. Individuals who for example have suffered violence perpetrated by a priest during religious instruction or at church can receive financial help from the Foundation for Victim Protection of the Catholic Church, but are ineligible for a children's home victim pension. They are only eligible if the violence was perpetrated in a residential setting (in a home or in a foster family).

Furthermore, individuals who are registered with Public Employment Service Austria as seeking work are not entitled to a children's home victim pension, even if they are long-term unemployed. A children's home victim pension does not become payable until the individual starts to draw a pension or reaches the statutory pensionable age. The only exception is for persons with disabilities who either were never able to work and are covered by public health insurance as dependents, or for individuals who due to long-term incapacity for work receive long-term payment of needs-based minimum benefits. For these claims, the level of disability is irrelevant.

No pension and no children's home victim pension despite incapacity for work

As pointed out in the Annual Report 2020, there is a group of children's home victims who – despite incapacity for work and without being registered with Public Employment Service as unemployed – are not entitled to the children's home victim pension until they reach statutory pensionable age. This problem applies to men and women who are not entitled to an own pension due to a lack of contribution months and, because of their spouse's household income, do not receive needs-based minimum benefit payments despite no longer being able to work. These individuals are no longer in gainful employment, but have to wait until they reach the statutory pensionable age to receive a children's home victim pension. If they were single, they would be entitled to long-term payment of needs-based minimum benefit due to incapacity for work and therefore would also be entitled to payment of a children's home victim pension. In the AOB's

opinion, this differentiation between children's home victim individuals who are single and those who have a partner does not seem fair. The AOB therefore recommends that the legislator eliminate this unequal treatment.

2.4 No lump-sum compensation for victims of federal institutions

Many individuals who are entitled to a children's home victim pension can in addition apply for lump-sum compensation and psychotherapy costs. The AOB provides all applicants with comprehensive information about possible compensation and refers them to the relevant offices. Individuals who receive lump-sum compensation are automatically entitled to a children's home victim pension.

Compensation only possible in certain cases

The AOB has received complaints that not all children's home victims can apply for lump-sum compensation and therapy costs. In particular, in cases where Viennese institutions and facilities or federal facilities are involved, financial compensation is not provided. The Federal Ministry of Justice stopped paying compensation in 2014, and the Federal Ministry of Education, Science and Research stopped paying in 2017.

The Land of Upper Austria only compensates individuals who have suffered violence in Land youth homes or foster families. Individuals who have suffered violence in privately operated homes are ineligible, even if there was a referral and costs were borne by the public care system. The AOB also received complaints that children who were victims of violence in sanatoriums have not received compensation from the Land of Upper Austria. The situation is similar in Salzburg. If a child was transferred by the Land of Salzburg to a home in another Land, the regional government of Salzburg does not pay financial compensation.

No compensation from the City of Vienna or Federal Government

The AOB therefore strongly urges that the City of Vienna and the Federal Government should resume paying compensation for victims of violence in their homes and boarding schools, for example federal boarding schools, institutes for the deaf and the Kaiserebersdorf educational institution, and should make it possible for therapy costs to be borne via non-bureaucratic routes.

The Evangelical Church provides a good example of how the question of compensation can be handled in the victim's interest. A Hungarian refugee child completed an apprenticeship in a facility in Carinthia in the 1970s. The claim for a children's home victim pension was rejected, as the apprentices' home was operated by a foreign association under private law and the child and youth welfare services were not involved. In terms of the facility and the operating association's religious orientation there were close ties with

the Evangelical Church, which therefore had no hesitation in paying at least one-time compensation for the violence suffered at the boarding school.

2.5 Lack of compensation for victims of abuse at medical facilities

Since July 2018, individuals who suffered mistreatment and abuse as children and adolescents at medical facilities have been eligible to apply for a children's home victim pension. However, only a small fraction of these people additionally receive compensation and therapy costs reimbursement from the facility operator. At present, compensation is only being paid to individuals who suffered abuse in the curative education department at Klagenfurt Regional Hospital (Dr. Wurst) or at Innsbruck Regional Hospital (Dr. Novak-Vogl). At the beginning of 2021, Vienna Health Association (Wiener Gesundheitsverbund) resumed payment of compensation to victims who suffered abuse in Pavilion 15 of Otto Wagner Hospital (Steinhof).

No compensation for violence in children's sanatoriums

Aside from the cases involving the three aforementioned facilities, victims of abuse in hospitals are not entitled to compensation. However, the AOB is frequently contacted by individuals who report having spent lengthy stays of several months, or in some cases over two years, in sanatoriums for children. The treatment was in some instances for tuberculosis or for convalescence, e.g. at a paediatric/lung disease facility, or in a psychiatric hospital for children suffering from impairment. Examples include: Lilienfeld in Lower Austria (responsible: City of Vienna), Gugging (Lower Austria), Hermagor Convalescence Facility (Carinthia) and Gmundnerberg (Upper Austria). Individuals reported of similar abuses and circumstances as were suffered in children's homes. For example, threats of violence were used to force children to finish their food, bedwetting was punished with blows to the ears or cold showers, or as punishment the children were not allowed to get out of bed.

Since the sanatoriums in question were mainly Land facilities, the AOB suggests that the Laender should also pay compensation to victims of violence in medical facilities.

3 Monitoring public administration

3.1 Labour

Introduction

Increased number of complaints

In 2021 the AOB initiated 384 investigative proceedings relating to Public Employment Service Austria (Arbeitsmarktservice). This was an increase relative to 2020 (300 investigative proceedings), but was within the normal range given the long-term average. In many instances, Public Employment Service was willing to accept the AOB's involvement in cases where legal action was still an available option. In cases in which, based on suggestions and objections from the AOB, open proceedings culminated in an administrative notification that brought a positive outcome for the party bringing legal action (e.g. a preliminary decision regarding a complaint), it was deemed that maladministration had not occurred, as Public Employment Service was deemed to have brought the case into conformity with the law via ordinary legal remedies.

Good cooperation with Public Employment Service

As in previous years, collaboration with Public Employment Service was excellent. Requests for statements regarding complaints were answered promptly and in detail by Public Employment Service. If, during the AOB's investigative proceedings, infringements of legal regulations were found, or if the AOB identified shortcomings in an individual case, Public Employment Service usually responded quickly and in the interests of the individuals involved.

In 2021 there were no particular areas where complaints were especially frequent. Complaints covered the entire range of Public Employment Service's activities. They related to public power prerogatives such as blocking of payments or reclaimed payments, problems in the way unemployed individuals were treated, or assistance and aid.

3.1.1 Failure to duly uphold suspensory effect in cases where legal action was taken

These cases involved the applicability of a "standstill period", or sanctions in the form of blocking of unemployment benefits or emergency financial aid.

Administrative notification must be used

Under the Austrian Unemployment Insurance Act (Arbeitslosenversicherungsgesetz), individuals who end an employment relationship voluntarily and/or without valid grounds are subject to a four-week standstill period (Section 11 of the Unemployment Insurance Act). Accordingly, the claim to unemployment benefits or emergency financial aid does not begin

immediately at the end of the employment relationship, but rather after a four-week standstill period. Under Section 10 of the Unemployment Insurance Act, if a reasonable employment relationship has been culpably thwarted, a temporary six-week block is placed on payment, and in repeat cases an eight-week block.

Legal action has suspensory effect

To impose a standstill period or place a block on benefit payments, Public Employment Service Austria has to use an administrative notification. That administrative notification can be contested via legal action in the form of a complaint. The complaint has suspensory effect, which means that during legal proceedings benefits must continue to be paid. If the standstill period or block is legally upheld, paid benefits can be reclaimed from the unemployed individual or offset against ongoing payments. If, in an individual case, Public Employment Service wishes to waive suspensory effect, it must use a separate administrative notification.

Public Employment Service failed to duly uphold suspensory effect

In 2021 Public Employment Service repeatedly failed to duly uphold suspensory effect. In these cases, payment of benefits initially ceased, despite the fact that legal action had been taken in a timely manner.

An unemployed person from Upper Austria contacted the AOB because the relevant regional office of Public Employment Service had imposed a standstill period from 19 May to 15 June 2021, based on an administrative notification dated 15 June 2021. The unemployed person took legal action by submitting a complaint in a timely manner on 21 June 2021. However, as of the beginning of September 2021, the unemployed person had not received any letters about benefit payments for the rump month May or for the entire period since June 2021. When the AOB contacted the regional management of Upper Austrian Public Employment Service, within a few days suspensory effect was deemed applicable and the arrears were paid.

In another case, based on an administrative notification dated 17 September 2021, Public Employment Service imposed a standstill period from 14 August to 10 September 2021. Although legal action was brought in a timely manner, as of the beginning of October 2021, payments had not been received for the period following 14 August 2021.

In the case of an unemployed individual from Styria, a block had been placed on emergency financial aid. The block had been placed by Public Employment Service's regional office for the period from 9 August to 19 September 2021, based on an administrative notification dated 27 August 2021, and contested via legal action dated 3 September 2021. The unemployed individual stated that as of the beginning of October 2021, his benefits dating from August 2021 had still not been paid. After the AOB intervened, Public Employment Service ensured that the case was brought into conformity with the law.

The AOB's summary of these cases is as follows: in individual instances, it may be justifiable to argue that suspensory effect, which is set forth in law, should not be applicable. Nonetheless, in such instances, a separate administrative notification (including clearly stated grounds) should be used if the goal is to waive suspensory effect.

3.1.2 Gathering of health data

Questionnaire about employment potential

The AOB was contacted by a Styrian woman in connection with occupational reintegration organised by a Public Employment Service Austria's regional office. Her complaint was about a "questionnaire for determining employment potential". The questionnaire, which she received from a service provider working on behalf of the Public Employment Service's regional office, gave the impression of being mandatory. She was worried that if she refused to complete the questionnaire, payment of her benefits would be blocked.

Comprehensive set of questions about health and capacity for work

The eleven-page questionnaire included a set of questions about "health behaviours" and a long section about "capacity for work"; it was these sections that were considered problematic. In particular, there were numerous questions about a wide range of medical diagnoses (a total of 51). The respondent had to answer on whether a particular diagnosis was based on the individual's own assessment (!) or on an existing medical diagnosis. There were also questions as to whether and when the respondent was regularly taking medications.

The woman had doubts as to whether the questionnaire was lawful, and whether it would be to her disadvantage if she refused to fill out the questionnaire.

Refusal to answer questionnaire sanctionable?

The AOB made the following points to the regional management of Public Employment Service Styria: it ought to be impermissible for a refusal to answer the health questions to lead to a sanction in the form of a temporary block, and furthermore, it was impermissible to convey an impression that there was any (statutory) obligation in that regard.

Medical assessment should be conducted by a suitable medical facility

Section 8 of the Austrian Unemployment Insurance Act (Arbeitslosenversicherungsgesetz) contains details about appropriate procedures in cases where an unemployed person has doubts about their capacity for work, and about how to clarify whether particular activities might jeopardise the individual's health. Section 8 (2) of the Unemployment Insurance Act states that assessment must be based on medical examination at an Austrian Pension Agency medical centre, that a "suitable medical facility" must be involved, and that a facility of this kind must draw up an appropriate medical appraisal. Based on the medical findings, further job placement should then be carried out by Public Employment Service Austria, and suitable training and occupational reintegration measures should then take place.

The AOB pointed out that the service provider is not a facility with suitable medical competencies as defined in Section 8 of the Unemployment Insurance Act. From the AOB's point of view, since the service provider renders services on behalf of Public Employment Service, and also to private-sector companies, there are doubts as to whether the gathering of health data was appropriate.

Public Employment Service: questionnaire was lawful

In its response to the AOB, Public Employment Service argued that the questionnaire was justified: it pointed out that it was a standardised questionnaire for generating the so-called Work Ability Index, and that many operator organisations use the Index to obtain an initial assessment of an individual seeking work as a way to achieve ongoing employment and occupational reintegration. Furthermore, the Work Ability Index is used in companies and organisations to assess psychological and physical ability to work. The Work Ability Index was developed under the auspices of Finnish scholar Juhani Ilmarinen. It provides an individual assessment of the person with regard to their health and performance and does not involve a medical diagnosis. Public Employment Service also pointed out that the service provider has a comprehensive data protection policy in place.

Public Employment Service: questionnaire is voluntary and does not lead to sanctions

The regional management of Public Employment Service Styria argued that using the questionnaire was lawful and appropriate. Nonetheless, it agreed with the AOB that it was not mandatory to complete the questionnaire that it was voluntary to answer questions and generate the Work Ability Index, and that refusal should not result in sanctions under Section 10 of the Unemployment Insurance Act.

AOB called for clear and lawfully correct information

The AOB pointed out to Public Employment Service that they should always make clear to all participants in occupational reintegration activities that the questionnaire is voluntary. In the case of the female complainant in Styria, that had not been made clear and made her anxious and uncertain whether she would receive her benefits, upon which she was reliant.

After the legal position was clarified during the investigative proceedings, the Styrian woman invoked her legal right and refused to answer the health-related questions.

3.1.3 Red-White-Red Card: points system for workers in understaffed professions

An individual from a non-EU country who was intending to establish himself in Austria as a qualified professional contacted the AOB to draw attention to a fundamental problem in the assessment of prerequisites for claiming a Red-White-Red card for qualified professionals in understaffed professions.

Public Employment Service only takes full years of employment into account

Decisions on Red-White-Red cards are made on the basis of a points system. In the case in question, awarding of points was based on the assessment of relevant professional experience. The man seeking work pointed out that Public Employment Service Austria's current implementation approach was to only count full years of employment at a specific employer. Periods of employment of less than one calendar year were not being counted at all. This often meant that if there were several periods of employment, which were either less than one year or not a complete year, those periods of employment were not being taken into account.

The AOB initiated investigative proceedings and contacted the Federal Ministry of Labour, which is the supreme body and supervisory authority with responsibility for Public Employment Service.

Ministry argued in favour of Public Employment Service's approach

The Ministry agreed that Public Employment Service was indeed only awarding points for full years of employment, and that this implementation approach was based on a ruling by the Federal Administrative Court and explanations by legal scholars. The Ministry also stated that as of that time, they were awaiting final clarification from the Supreme Administrative Court and that proceedings were pending. The Ministry noted that the points scheme set forth in Section 12b of the Act Governing the Employment of Foreigners (Ausländerbeschäftigungsgesetz) might lead one to believe that points should only be awardable for full years of professional experience and not for partial periods (i.e. no half points). Nonetheless, the Ministry felt it was still unclear whether months of professional experience at several different employers that did not add up to a complete year should be added up, or whether they should be disregarded altogether. It noted that under Public Employment Service's current implementation, rump years at an employer were not being taken into account and hence only full years were being counted. The Ministry took the view that Public Employment Service's implementation in this regard was "not unreasonable", but said it would wait until a ruling came in from the Supreme Administrative Court.

Distorted picture, in AOB's view

In response, the AOB made the following arguments to the Federal Ministry of Labour: Public Employment Service's implementation approach was not very suitable for adequately assessing actual professional experience. In particular, their approach tended to undervalue the professional experience of people who acquired their experience in a fairly large number of different jobs, and tended to overvalue the experience of people who demonstrated a small number of relevant professional experiences or only one professionally relevant job. From the AOB's point of view, this was all the more true given that most people's working lives consist of jobs for various different employers, and that they thereby gain a richer, more diverse form of professional experience than a person who has only ever worked for one employer.

Not in the spirit of the legislatio and contrary to the principle of equality

The AOB did agree, however, that Public Employment Service's approach was certainly reasonable if one interpreted the wording of the relevant passages in the assessment tables in Appendices A and B of the Act Governing the Employment of Foreigners in an "isolated" manner. At the same time, the AOB also pointed out that approaching the issue in that manner was not in the spirit of the legislation and was leading to unjustifiable outcomes given the constitutional principle of equality under Article 7 of the Federal Constitutional Law.

Supreme Administrative Court ruled that approach was unlawful

In its ruling dated 22 September 2021 (Ro 2021/09/0016), the Supreme Administrative Court of Austria concurred with the AOB. In this ruling, the Supreme Administrative Court was not supportive of Public Employment Service's implementation approach and made the following pronouncement concerning the awarding of points for relevant professional experience:

All demonstrable professional experience relative to the qualifications must be added up: all individual days and months must be taken into account, and it is unlawful to merely count full calendar years. If in the person's entire professional experience there are individual months or days that do not add up to a full year ("residual periods"), they should not be taken into account in the total; only calculated full years should be taken into account.

The AOB asked the Minister of Labour to provide Public Employment Service with a clarification of the legal position to ensure uniform implementation.

3.1.4 Unemployment benefits unlawfully reclaimed before company start-up

A Lower Austrian man who intended to end his unemployment by founding an IT company asked the AOB to investigate an administrative notification regarding a revocation and reclamation of benefits, which had been issued by a Public Employment Service Austria's regional office. Initially he had been granted unemployment benefits effective as of September 2021 and had received payment. Subsequently, however, the unemployment benefits were revoked and claimed back; a notification ending his unemployment benefits effective 1 November 2021 was issued. Furthermore, he was not paid for October. Public Employment Service argued that he had been appointed managing director of a limited liability company on 13 October 2021 and that therefore he was no longer unemployed.

The files indicated that in October the unemployed man had indeed instructed a law firm to draw up various documents for the founding of the company, including articles of association and the minutes of a resolution stating that he had been appointed managing director. He had immediately sent these to Public Employment Service, whereupon it had reached the aforementioned decisions.

The AOB learned that as of that date, the request to enter the limited liability company in the commercial register and the request to list the man as managing director had not yet been submitted. In that regard, neither the limited liability company nor his position as "future" managing director existed yet under the law.

Managing director position to be entered in the commercial register

The AOB pointed out these circumstances to the regional management of Lower Austrian Public Employment Service and argued that in light of Section 12 of the Unemployment Insurance Act, there were no circumstances that would undermine his claim for unemployment benefits. The AOB argued that being employed as a managing director would rule out the possibility of being unemployed; however, in order for that to be the case, the managing director position would have to exist under the law, which would require an entry in the commercial register.

Lower Austrian Public Employment Service responded within a few days and corrected the administrative notification concerning the ending of unemployment benefits. Arrears payments were made. The unemployed man was also included to the company start-up program run by Lower Austrian Public Employment Service.

3.2 Education, science and research

Introduction

206 cases, mostly relating to COVID-19

In 2021 a total of 206 cases relating to the Federal Ministry of Education, Science and Research were handled. 152 cases related to education. There was an increase of over 60% relative to 2020, mainly due to the COVID-19 pandemic. 90 cases, i.e. over half, related to the pandemic. Nearly all the complaints regarding schools' COVID-19 prevention measures were critical of those measures and argued that they were unjustified or at any rate disproportionate.

In terms of subject matter, 115 cases related to school instruction, 17 to public-sector employment law, seven to cultural affairs and 13 to other areas (e.g. support for the arts).

Yardstick for the AOB: Consultational Court rulings

The AOB's investigations of the measures imposed by the Federal Ministry of Education, Science and Research in connection with the COVID-19 pandemic drew on the rulings of the Constitutional Court of Austria. The Constitutional Court accepted most of the measures, in particular mandatory wearing of masks and testing as well as remote instruction. In light of those rulings, the AOB oriented itself to the yardsticks of the Constitutional Court rulings when investigating whether the preventive measures were appropriate. In accordance with its mandate under the Federal Constitution, the AOB investigated whether the measures were correctly implemented.

Further 54 cases related to science and research. Most of these complaints (15) referred to issues of how universities were implementing academic affairs regulations. Ten cases related to educational grants.

3.2.1 Education

Failure to fulfil the duty to cooperate with the AOB

In 2021 there were various significant failures to fulfil the duty to cooperate with the AOB pursuant to Article 148b of the Federal Constitutional Law. Therefore, a separate account of this is provided below.

Ministry failed to ensure transparency in proceedings before Constitutional Court

In order to take into account the rulings of the Constitutional Court of Austria when investigating COVID-19 measures established by the Federal Ministry of Education, Science and Research, the AOB asked the Ministry to provide information about which measures were being contested before the Constitutional Court. The goal was to clarify the extent to which the AOB should wait for outcomes from the Constitutional Court as part of its own investigations. In response, it would have been sufficient to simply supply the AOB with copies of the complaints known to the Ministry, along with

counter-arguments from the department in question. This would not have required very much effort.

Instead, after months of delay the Ministry sent a set of files amounting to over 11,000 printed A4 pages to the AOB, most of which were irrelevant for the aforementioned purpose of establishing clear definitions and boundaries. Nonetheless, the AOB had to read all of the documents to filter out the relevant parts, which naturally took a great deal of time. That slowed down AOB's work in an area of considerable importance to many of the parties involved.

In another case, a teacher submitted a complaint about a series of job applications where he did not get hired. To ensure a proper assessment of whether there were proper grounds for not hiring the teacher, the AOB had of course to investigate whether the selection criteria had been appropriate for each instance where he failed to get the job, and how the criteria were applied in individual instances. Ultimately the teacher's complaint proved groundless.

Vienna Board of Education failed to acknowledge AOB's authority to investigate

Nonetheless, the AOB had to submit five requests for comment in order to obtain the necessary information. As a result, proceedings were delayed for several months. Insofar as the AOB can determine, it was not (primarily) the Federal Ministry of Education, Science and Research that was to blame, but rather the Board of Education of Vienna. The latter were evidently of the opinion that, with regard to confidentiality requirements vis-à-vis the AOB, they were not allowed to send all the necessary information for the assessment of the complaint. Furthermore, to some extent they considered it too time-consuming to answer the AOB's questions. The Board of Education of Vienna was thus misinterpreting the legal position as defined in Article 148b of the Federal Constitutional Law, in particular that under Paragraph 2 thereof it was not required to maintain confidentiality vis-à-vis the AOB.

Lack of IT equipment for distance learning

Challenge of distance learning in technical subjects

School closures and the resulting distance learning were a particularly drastic COVID-19 preventive measure. These measures meant that many teachers were faced with the question of how to handle distance learning. Particularly in technical subjects there were significant challenges, especially as complex formulas and drawings requiring visual aids are often needed in those subjects.

These were the challenges facing a teacher who found there was a lack of IT equipment at his school, a higher-level technical upper secondary school in Vienna. When contacted about this lack of equipment, the school head teacher told him that the school budget was insufficient for new acquisitions. The teacher therefore used his own money to buy a drawing

tablet, so that he would at least be able to provide an approximation of in-person teaching. According to the teacher's account, other enthusiastic colleagues also took similar action. Since he made the purchase in the interests of his work, he hoped he would receive a refund for the purchase costs from his employer.

Ministry not supportive to enthusiastic teachers

When he received no answer to his request, he contacted the AOB. The AOB consulted the Federal Ministry of Education, Science and Research on the question of which support materials present at the school, or which pedagogical methods, the teacher could have used instead of the drawing tablet to enable him to provide distance instruction.

Despite being consulted several times, the Ministry did not provide a concrete answer. In its last statement, it merely spoke of adequate IT equipment "in federal schools", without addressing the concrete situation at the school concerned (number of devices, actual availability etc.). Hence, the Ministry appears willing to accept poor-quality distance instruction unless teachers show extraordinary commitment and obtain teaching aids using their own private resources.

In the AOB's opinion, the teacher's "self-help" in ensuring high-quality distance learning by buying the drawing tablet was necessary and appropriate. Hence, there was useful performance without request as defined in Section 1037 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), and possibly even emergency performance as defined in Section 1036 thereof. The AOB was critical of the fact that despite the AOB's urging, the teacher was not reimbursed for the relatively low cost of the drawing tablet (EUR 81.98).

Lack of of clarity in interaction with mask-exempt teachers

Conflict between Ministry and Board of Education of Upper Austria

Some people cannot wear COVID-19 protective masks for health reasons; by law, this has to be confirmed in a doctor's certificate. Those people also include teachers. From the start, forward-looking administrators who handle teaching staff should have considered how to interact with the affected persons in a clear, transparent way. In Upper Austria, that was not the case (at least) until the first quarter of 2021.

The AOB became aware of the associated problems from media reports about the dismissal of a primary school head teacher and initiated an ex-officio investigation. It became apparent that there was a fundamental conflict between instructions issued by the Federal Ministry of Education, Science and Research and those issued by the Board of Education of Upper Austria.

According to the Ministry's statement, mask-exempt teachers "cannot be instructed to wear a face mask", and as a result exemption from "performing

activities at the school" was a possibility. The possibility of working from home is offered as an alternative.

„Duty to perform work" at risk of one's own health?

The Board of Education of Upper Austria issued a blanket refusal in response to the possibility raised by the Ministry. The FAQs issued by the Board of Education of Upper Austria seemed even more restrictive. In the AOB's opinion, performing one's work contrary to a doctor's certificate, and thereby jeopardising one's own health, would be unlawful.

The Board of Education of Upper Austria refused to clarify what behaviour had been actually expected of the dismissed head teacher, given that he was mask-exempt. That constituted an infringement of its duty to cooperate as defined in Article 148b (1) of the Federal Constitutional Law. For the AOB, it would have been particularly interesting to know whether the Board of Education of Upper Austria actually expected teachers with physician-certified mask exemption to perform their work at the risk of their own health. As stated above, the Ministry had already made it clear to the AOB that this would be unlawful. From the AOB's point of view, the lack of clarity and the discrepancy between the Ministry and the Board of Education of Upper Austria was unacceptable.

The primary school head teacher took legal action in court to contest his dismissal. As of the date of this Annual Report, proceedings had not been completed. Given that the judicial system must remain completely independent, the AOB cannot make any anticipatory statement about the court decision. Instead, AOB's goal is to draw attention to the problems associated with these proceedings and which in fact go beyond them, including the lack of clarity and the discrepancy between the Ministry and the Board of Education of Upper Austria.

Expressing one's opinion cannot be grounds for dismissal

According to the Board of Education of Upper Austria, the grounds for the dismissal of the head teacher (also) included his "participation […] at the anti-COVID demonstration on 16 January 2021 in Vienna". Here one should duly note the following pronouncement by the Supreme Administrative Court of Austria (ZI. 97/09/0106) about public servants' fundamental right to freedom of opinion:

"A civil servant's right to criticise their own authority must not only be deemed protected by the fundamental right to freedom of opinion, but must also be viewed as a necessary means for optimising administration […] and it is not our task to determine whether the criticism of the complainant […] was objectively correct or incorrect, […] because criticism of alleged maladministration needs to be permissible without the critic being subject to disciplinary action regarding the objective correctness or successful proof of their opinion. […] Aside from that, public institutions such as the government […] must endure criticism to a greater extent […]".

If voicing criticism of schools' COVID-19 measures were to be deemed grounds for dismissing a head teacher that would contravene the above pronouncement. The Board of Education of Upper Austria cited further grounds for the dismissal, however. Ultimately the court will need to reach a conclusive decision on the matter.

Duplicity in implementation of COVID-19 measures?

Emotional reaction to COVID-19 measures

As a result of state COVID-19 measures, society has been facing completely new situations and challenges in which emotional (over-)reactions may arise due to increased stress levels. The task of schools ought to be to de-escalate, but that has not always been successfully achieved.

An example of this arose in a case where there was a serious dispute between a father and school administrators. The man objected to the established requirement that a COVID-19 test was a prerequisite for entering the school. He and his son were not wearing masks, and they were able to present a doctor's certificate that they were mask-exempt. In conformity with the regulations, the father and son were not allowed to enter the school. Subsequently they agreed to take a COVID-19 test as required, to allow the son to attend school.

Unlawful reporting to the child and youth welfare services

The AOB of course welcomes the fact that the COVID-19 rules for schools were being implemented consistently. Nonetheless, this has to be accomplished via proportionate means. When the father and child were reported to the child and youth welfare services, the threshold of proportionality was exceeded, from the AOB's point of view.

Under Section 48 (2) of the School Education Act (Schulunterrichtsgesetz), the prerequisite for reporting a legal guardian to the child and youth welfare services is that they be clearly failing to fulfil their obligations. Reporting a person must not be carried out so to speak experimentally, especially as such reporting and the associated consequences are a very serious matter for the family involved. The breach of duty needs to be "clear and apparent", i.e. the school administrators must be convinced that there has been a breach of duty. The Board of Education of Upper Austria's formulation ("so that experts can assess whether the child's well-being is in jeopardy") in itself raises doubts as to whether the legal prerequisites were met. Moreover, the AOB did not receive reports of any facts, which would have justified such a measure.

Board of Education of Upper Austria misinterpretes parents' rights

Even more problematic were the further grounds for the jeopardy report: according to the Board of Education of Upper Austria, there had been an "instrumentalisation of the son by the father, in order to assert his ideas and beliefs". The Board of Education of Upper Austria reached that conclusion because the father had taken his son with him to demonstrations criticising COVID-19 measures, and the son was distributing anti-COVID

stickers at school. The AOB criticised the Board of Education's point of view.

At the heart of parents' educational rights is the right to pass on values and beliefs to children. Under Article 2 (2) 1st Additional Protocol to the European Convention on Human Rights, those parental rights are protected, including in the area of state education, and respect for parents' "religious and other views" is explicitly required. If parents take their children with them to demonstrations, provided they do so lawfully, it does not create any problems per se in terms of the parents' educational responsibilities. Aside from that, Austrian schools encourage pupils to participate, for example, in Fridays for Future demonstrations (or at any rate they take organisational measures to enable pupils to participate), clearly without any worries about "instrumentalisation".

„Premature mistrust" regarding mask exemption?

There was a further instance of disproportionate implementation of COVID-19 regulations in another case. A woman contacted the AOB because her daughter's class teacher had asked her to explain the precise medical reason for her mask exemption. We do not object to the notion that dubious-looking doctor's certificates should undergo close inspection. However, it is going too far to question such doctor's certificates as a matter of principle.

The Federal Ministry of Education, Science and Research's statement does not contain any suggestions that there were reasonable grounds to doubt that the daughter's doctor's certificate had been issued lawfully. What the AOB criticised was that the class teacher demanded to be told the medical reasons for the mask exemption. Evidently, after the AOB intervened, the head teacher became involved and made it clear that "the school administration is not asking anyone to infringe medical confidentiality obligations". The AOB has duly noted that as being a positive step.

Calculation of years of service for salary payments – implementation of the European Court of Justice ruling on age discrimination

In 2021, of the complaints relating to public-sector employment law, some were regarding corrective changes to the system of calculation of years of service for salary payments, pursuant to the European Court of Justice ruling of 8 May 2019 (C-396/17 (Leitner)). The affected persons were complaining about years of delays in the handling of some proceedings.

Substantial administrative costs

It has to be admitted that the European Court of Justice ruling is presenting (not just) Austria's public-sector personnel administrators with enormous financial and organisational challenges. For around 70% of the teachers at the federal and regional level, years of service have had to be or are being recalculated. With that in mind, the AOB initially asked those affected to be patient about the delays.

In 2021 it was already two years since the European Court of Justice 2019 ruling and the resulting salary reform were enacted. In the AOB's opinion, it ought to be possible at this point to at least provide the affected persons with a time horizon for resolution. For some persons that has not yet been done, which was why the AOB received complaints in this regard.

For example, in 2019 one individual had submitted a request to the Board of Education of Vienna for prior service periods to be taken into account. However, he has still not received a decision. The Board of Education of Vienna has not replied to enquiries about the current status of proceedings.

Notice finally received

After the AOB became involved, the Federal Ministry of Education, Science and Research admitted the delay in proceedings, and drew attention to the increased workload. Eventually the individual concerned receive the desired notice regarding the recalculation of his salary under employment law.

Incompatible test procedures for assessing German language skills

A man resident in Lower Austria reported to the AOB that his son, a native speaker of Rumanian, had been receiving language instruction in kindergarten for years, and that according to the tests he took in kindergarten, his German language ability was certified as adequate. However, after entering primary school, he was placed in a class with German language support rather than an ordinary first-year class. The father considered this contradictory and felt that the decision was misguided.

Different testing methods produce differing results

The AOB investigation (which was broadened ex officio) found that different parts of Austria use different test methods for determining German language ability in kindergartens and schools. As was evident from the complaint, this can produce differing results. The AOB considers this a shortcoming. Instead, when a child transitions from kindergarten to primary school, assessment of German language abilities ought to be carried out using mutually coordinated test methods.

Ministry failed to perform evaluation

Under Section 5 (2) of the Board of Education Act (Bildungsdirektionen Einrichtungsgesetz), school quality should be monitored for example by assessing educational trajectories based on suitably prepared data as part of educational monitoring. To accomplish that, under the Education Documentation Act (Bildungsdokumentationsgesetz) – see Section 1 (1) (4) and Section 15 (1) (1) and (5) – the Federal Ministry of Education, Science and Research is authorised to perform assessments, in particular for quality assurance and to support the schools in their site-specific planning of instruction and support.

Ministry promises to rectify the situation

However, until the AOB became involved, the Ministry had not gathered any data that would have enabled it to evaluate German language support at the transition between kindergarten and primary school. As a result, at present

it is not feasible to make any statements that would be valid Austria-wide about the compatibility of the two different test methods. The AOB considers this unsatisfactory, especially as it causes loss of efficiency in language support at this transition point, which is an important stage in the educational trajectories of children who are non-native speakers of German. The AOB therefore welcomes the Ministry's announcement that in the year ahead it will gather data and perform evaluation to rectify the situation.

3.2.2 Science and research

No admission because tuition fees paid late

In 2021 the AOB received complaints that registering to continue studies is not legally effective if the student inadvertently has paid the tuition fees and the fees for the Austrian National Union of Students after the end of admissions period. This can have significant consequences. It may mean that admission expires, which may result in loss of study credits or in some cases loss of a student grant or family allowance.

Grace period abolished

The amendment of the Universities Act (Universitätsgesetz) 2021 resulted in the abolition of the statutory grace period – which, in the past, followed on after the general admissions period and hence in the winter semester ended on 30 November and in the summer semester on 30 April.

Now, under the Universities Act universities are merely given a basic framework for defining the general admissions period, and in consequence that periods may vary. Whether the abolition of the uniform grace period will lead to an increase in cases of missed deadlines and resulting hardship will become evident in due course

Student grants for second degrees; age limit for obtaining a student grant

Support for a single course of studies

There were several complaints about the prerequisites for obtaining a student grant. Students are only able to receive a student grant if they have not yet completed a degree course or other equivalent vocational training. Under current legislation, it is deemed sufficient that a student can obtain a student grant to enable him/her to undergo vocational training in the form of a single course of studies. The only exceptions are advanced masters' degrees and doctoral degrees. Individuals who did not receive any state support for their first degree or completed vocational training programme were particularly critical of these rules.

Age limit no longer appropriate?

The AOB also received numerous complaints that the maximum age for obtaining a student grant (30 or 35 at the start of studies), as defined in Section 6 (4) of the Student Support Act (Studienförderungsgesetz), is too

low. The persons concerned pointed out the importance of lifelong learning and that in the past the statutory pensionable age has been raised. They argued that graduates pay more in tax during their lifetimes, thereby offsetting the cost of student grants.

All the AOB could do was state the current legal position and suggest that the individuals should apply to the Federal Ministry of Education, Science and Research for hardship support under Section 68 of the Student Support Act.

Complaints relating to COVID-19

AOB only has limited responsibility

Complaints were received about house rules at universities, e.g. that FFP2 masks were mandatory in order to enter university facilities. The AOB pointed out that universities are only subject to AOB control activities insofar as their decision-making bodies exercise public power prerogatives by acting in the capacity of authorities. That is not the case when establishing house rules.

The same applied in the case of a university employee who complained about having to wear an FFP2 mask at work. The AOB was also unable to investigate a complaint where a university had instructed a female employee to present a vaccination certificate if she had one. The AOB informed the individuals affected that employment law conflicts and advice on such matters are handled by the Labour and Social Courts.

3.3 Digitalisation and business location

Introduction

126 complaints

In 2021, a total of 126 cases were submitted to the AOB. Six cases related to questions about the digital Citizens' Advice Service (Bürgerservice), 14 related to surveying offices, and 15 to the Austrian Economic Chamber.

The AOB received 69 complaints concerning plant operating permit law, in particular with regard to neighbourhoods affected by noise, odours, dust and other emissions. Just under one quarter of neighbourhood complaints related to the hospitality sector. A total of 13 cases involved issues arising from the COVID-19 pandemic, six of which were about handling of the Hardship Fund (Härtefallfonds).

By Land, the breakdown was as follows: most of the cases were in Vienna, followed by Upper Austria and Lower Austria. The Laender with the fewest cases were Tyrol and Vorarlberg.

3.3.1 Trade and commerce law

General

Delays due to COVID-19

Because district administrative authorities were busy providing assistance to COVID-19 crisis management teams, there were instances of tardiness once again in 2021. The AOB found delays on the part of the trade and commerce authorities and the appraisals services. Because authorities had to assign top priority to COVID-19 measures, processing and replying to the AOB's enquiries also took longer in some instances.

Farm shops: trade and commerce, or agriculture and forestry?

In 2021 the AOB had to analyse the distinction between trade and commerce on the one hand and agriculture and forestry on the other, in connection with various complaints submitted. Complaints were received about noise from various neighbourhoods near farm shops in the district of Imst and the district of Urfahr-Umgebung. Because the farm shops' product ranges included numerous outside products and processed goods, the question arose as to whether these farm shops should be subject to the Austrian Industrial Code (Gewerbeordnung). The topics raised included the following: the legal relationship between the farm shop operators and other producers, and also the ratio of capital employed in processing and treatment of own natural products to capital employed in agriculture and forestry. The following issues also had to be clarified: what quantities of outside primary products had to be purchased in order to process own natural products, and during which periods and for how long did outside workers have to be employed to process natural products? Imst District Authority informed the farm shop operator that declaratory proceedings

would be a suitable way to reach legal certainty, by assessing the applicability of the commercial regulations according to Section 348 of the Industrial Code 1994.

Noise from ventilation, cooling and air-conditioning systems

Time and again, the AOB receives numerous complaints about ventilation, cooling and air conditioning systems. A person living near a plant facility in Vienna complained that since May 2020 the neighbourhood had been affected by noise from the outdoor unit of a cooling system. Municipal department MA 36 of the City of Vienna had stated that sound measurements would be taken, but it had not done so. It was only after the AOB intervened in March 2021 that a meeting was held in the presence of a trade and commerce technician from MA 36-A. Because of the layout of the relevant part of the plant facility and the proximity to the residential building, the operator suggested that the heat exchanger of the air conditioning system be moved. In March 2021, the operator submitted a request to the trade and commerce authorities for approval for modifications to the plant facility. To eliminate the noise, the existing cooling units have to be removed and replaced by a new compression cooling unit, and the heat exchanger has to be placed on the roof of the plant facility.

Parties in proceedings have a duty to cooperate

If the facts of a case are more easily provable by a party in the proceedings than by an appraisal by the authority, or if the authority cannot obtain certain facts without information from the party, the party has a duty to cooperate. In such instances, the authority must provide sufficient concrete information about what types of evidence are needed to best clarify the unclear points. In the case of a woman living in Vienna who contacted the AOB to complain about amongst other things intrusive odours from an automotive paint shop, it transpired that the only way to determine the frequency, intensity and type of the odours was via a questionnaire to be filled out by her. In the opinion of the official appraiser, there were no other alternatives. The trade and commerce authority therefore asked the woman to record her perceptions of the odours over a period of at least 10 weeks and to present that as evidence. The questionnaire would then be statistically evaluated by the official appraiser. The AOB notified the woman that her cooperation was required in order to gather objective evidence about the odours.

Tardiness on the part of trade and commerce authorities

Intrusive noise

A complaint about unreasonable noise from the music system and footfall noise in a neighbouring hospitality venue was described in the Annual Report 2019 and Annual Report 2020 (volume "Monitoring Public Administration", p. 70 et seq.). It was not until the AOB became involved that the trade and commerce authority took sound and noise measurements in the woman's apartment in June 2020. Based on the appraisal by the official sound and noise expert, a statement by the medical expert dated October 2020 called

for a limitation of the music system sound level and for structural measures regarding footfall, to prevent risk of damage to the woman's health.

Linz municipal authority

Linz municipal authority then issued an administrative notification in January 2021, stating that these additional measures were necessary. The authority stated that the music system sound level must be subject to specified limits and that the flooring must be improved to reduce footfall noise. It also stated that all seating benches must be moved away from the walls. The deadline for fulfilling these requirements was eight weeks after the administrative notification took legal effect. The AOB notified the woman about the actions required and closed the investigative proceedings.

In June 2021 the woman involved contacted the AOB again. She stated that since the end of the COVID-19 lockdown, the hospitality venue had started causing unreasonable noise again, to which she was exposed. She said she suspected that the additional requirements had not been met.

Legally binding conditions not met

That was in fact confirmed by the official sound and noise expert during a follow-up visit at the beginning of August 2021. The venue operator then stated that she would close the hospitality venue at 10.00 p.m. instead of midnight. The requirements in this case ought to have been modified.

Subsequently the venue operator did not submit a request to the trade and commerce authority for approval of a change to her hours of business. The trade and commerce authority therefore initiated substitute performance proceedings, and in September 2021 instructed the official sound and noise expert to prepare a commissioned services order and to contact suitable firms for a cost estimate for the work associated with the proceedings.

Substitute performance proceedings interrupted

In order to prepare the commissioned services order, the official sound and noise expert paid a further visit to the hospitality venue. His impression was that the venue operator was unaware of the consequences of having failed to fulfil the requirements and did not realise what was expected of her. The trade and commerce authority and the official expert took the view that there was "a certain amount of helplessness" on her part. The official expert and the authority therefore offered support in their respective areas of expertise and made it clear that they were available to answer questions at any time. It was hoped that by working closely with the venue operator, the measures would be implemented by Christmas 2021.

At the end of December 2021, the venue operator stated that the work had been completed and the requirements met. She provided photographic evidence. However, it was not evident from the documents that a device had been installed on the music system to ensure it would operate at the prescribed volume. The venue operator was therefore instructed to obtain such a device. Linz municipal authority instructed the official sound and noise expert to check whether the requirements had been met.

It is undeniable that substitute performance proceedings require a great deal of time, due to the numerous procedural steps and deadlines. The AOB is therefore supportive of activities that will improve the noise situation for the neighbour more quickly. The AOB was critical of the authority's assertion that there was "a certain amount of helplessness" on the part of the venue operator. This is especially because, during investigative proceedings over a period of several years, the AOB found that the venue operator was deliberately ignoring administrative notifications and requirements and was seemingly unperturbed by the fact that she was causing intrusive noise that was affecting the neighbour.

Intrusive noise

A man complained that a hospitality venue in the Vienna Woods was causing unreasonable noise, especially late at night at weekends. Despite complaints having been submitted since June 2020, St. Pölten District Authority had not yet taken any action, and had merely told him that the hospitality venue was in possession of the necessary permit from the trade and commerce authority and was being operated in an appropriate manner.

St. Pölten District Authority

The AOB obtained statements of opinion from the St. Pölten District Authority. It learned that in June 2020 the trade and commerce authority had given approval for changes to the hospitality venue. The opening hours had been extended and (wedding) events were permitted, subject to noise requirements regarding the music systems.

It was not until the AOB became involved that the official sound and noise expert performed an evaluation in January 2021. He found that the requirements regarding the music systems were only being partially fulfilled. In spring 2021 the venue operator finally reported that the music system had been deactivated.

Live music events ceased

During the investigative proceedings, the AOB also found that outdoor live music events, which had been held several times in 2020 and had been advertised on the hospitality venue's website (including numerous photos), were not within the scope of the permit. After the AOB became involved, the District Authority took steps under administrative criminal law: it issued a procedural directive dated March 2021 stating that live music events should cease immediately. The man's complaint was justified, as St. Pölten District Authority had for months taken no action.

Intrusive odours

A complaint from the owner of an apartment building whose tenants were affected by unreasonably intrusive odours from a bitumen-sealed roofing membrane plant was described in the Annual Report 2020 (volume "Monitoring Public Administration", p. 73). The AOB was critical of the fact that, notwithstanding voluntary improvement measures carried out by the company, Linz-Land District Authority had for years refrained from any action under trade and commerce law.

Linz-Land District Authority

It was only after the AOB intervened that the District Authority arranged for emissions measurements to be taken in February and April 2021. At that point the official expert for air quality systems determined that the emissions were lower than previously and the action taken up until then had been successful, but the reduction in emissions had not been sufficient.

Improvement measures by spring 2022

The District Authority instructed the operator to take further measures to reduce the odours. In October 2021, the operator, the District Authority and the official expert for air quality systems and chemicals held a joint meeting. According to the company, it was preparing to implement a system with which it would draw off the interior air and feed it into the exhaust air purification system. It was also intending to apply to the trade and commerce authority for approval for an ozonation system. According to initial tests, a 70-80% reduction in odours could be achieved, and the goal now was to conduct "real-life testing". The company intended to automate the task of moving sand in and out of the tower silo systems, which was currently to some extent being performed manually. It stated that it had already held positive planning talks with the building authority about a suitable location for increased chimney height, and that applications would soon be submitted to the building authority and the trade and commerce authority. Implementation of this project was expected to bring a significant reduction in perceivable odours in the neighbourhood. Measurement of odour emissions was to continue. Odour record-keeping logs were to be made available to interested neighbours, to allow them to compare their perceptions before and after implementation of the planned measures. The stated time horizon for implementation of the projects was the end of 2021 to spring 2022.

Noise and vibration

A neighbour contacted the AOB about metalworking operations nearby which were causing noise and vibration. He stated that he had contacted the Bruck/Leitha District Authority regularly since 2014, but it had not taken any action.

Bruck/Leitha District Authority

During the investigative proceedings, the AOB found that the last time the District Authority had conducted a check on the metalworking operations had been in 2014. Since that time, no further site visits or checks by the authorities had taken place. During the preceding seven years, the trade and commerce authority had merely confronted the operator with the neighbour's complaints, obtained statements from the operator and brought them to the neighbour's attention.

Additional requirements

After the AOB intervened, in May 2021 a site visit took place. The official expert for building systems, mechanical engineering and noise protection systems was present during the site visit. It was found that highly intrusive vibrations could be felt at the end of a cutting procedure whenever the authorised, hydraulically operated power shears were not returned to their

uppermost position, due to the fact that the machine had been switched off half way through the lifting process, thereby interrupting that process. After the site visit, the District Authority issued an administrative notification with additional requirements: the operator now has to ensure that when the power shears are in operation, switching them off before completion of the lifting process is not permitted, and employees must demonstrably be instructed accordingly.

3.3.2 Digitalisation

Opted out of electronic delivery

In the year under review, the AOB once again received questions about electronic delivery. A woman complained that she had received a message about delivery of an electronic message, despite the fact that she had opted out of electronic delivery in July 2020.

After contacting the Federal Ministry for Digital and Economic Affairs, the AOB found that the opt-out had not taken place, due to the absence of formal requirements. It was no longer possible to ascertain whether the woman had been notified about this. The standard process included appropriate acknowledgement, however. After the AOB's intervention, the relevant department immediately took action to ensure that the woman was able to opt out via a written letter.

3.3.3 Land Surveying Offices

Property Tax Land Register and Boundaries Land Register

As in previous years, in 2021 the AOB once again had to clarify that area data shown in the Land Register, the Property Tax Land Register and the Boundaries Land Register are not binding. The AOB supplied information about the difference between the Property Tax Land Register and the Boundaries Land Register, and about the fact that civil surveyors are not within the AOB's sphere of responsibility for investigations.

Baden Land Surveying Office

In July 2021 a property owner complained that since August 2020 the handling of ex-officio conversion proceedings by the Baden Land Surveying Office had come to a standstill. She stated that her concerns had been ignored for weeks, no reasons had been given for the delays, and her phone calls had not been returned as promised.

The AOB contacted the Federal Ministry for Digital and Economic Affairs. After viewing documents of the Federal Office of Metrology and Surveying and the Baden Land Surveying Office, the Ministry stated that the Baden Land Surveying Office had in August 2020 issued the administrative notification regarding the conversion and had sent a copy to all parties in the proceedings. It was stated that a document that had been sent to Germany to the owner of the neighbouring lot had been delivered, and that

since it had not been picked up, it had been sent back to the Land Surveying Office. The Baden Land Surveying Office had misfiled the document, and the proceedings were therefore erroneously brought to a halt. It was only after the AOB received the complaint that finally, in August 2021, the conversion of the property was carried out in the Land Register.

The Baden Land Surveying Office apologised for the delay and the fact that the property owner's concerns had not been properly handled following her phone calls. Processes were reorganised and an action agenda for improvements was prepared.

3.3.4 COVID-19

Hardship Fund

The AOB received complaints that the Austrian Economic Chamber had been instructed by the Federal Government to handle the Hardship Fund (Härtefallfonds). The AOB explained that this was a political decision, which did not fall within the AOB's investigative sphere of responsibility. Parties who contacted the AOB were informed that the Federal Government had laid out the guidelines (and the interpretation thereof) for the Economic Chamber and had instructed it to carry out assessment of applications and the disbursement process.

The AOB also had to inform the parties affected that funding would be handled under private law via funding agreements, that the amount of funding was limited by the available budget, and that as a matter of principle there was no actionable legal claim to a funding.

A number of enquiries related to the deadline for submitting applications to the Hardship Fund. The AOB informed applicants that the deadline for the respective disbursement phase could not be extended. Some of the parties affected were unaware that applications to the Economic Chamber could only be submitted online.

Investment bonus for companies

A man contacted the AOB about a COVID-19 Investment Bonus for companies, which had been promised but not disbursed by Austria Wirtschaftsservice GesmbH. After the AOB intervened, the Federal Ministry for Digital and Economic Affairs initiated a further investigation of the accounts. As a result, the outcome was positive for the man, and the Investment Bonus was disbursed.

Delivery of COVID-19 protective masks

After becoming aware of deliveries of poor-quality coronavirus protective masks to retirement and nursing homes and facilities for persons with disabilities, the AOB initiated ex-officio investigative proceedings and contacted the Federal Ministry for Digital and Economic Affairs.

Defective face masks: *ex-officio* investigative proceedings

The AOB found that the poor-quality masks had been procured from a procurement subsidiary of the Austrian Red Cross on behalf of the Ministry, via a central procurement process for medical products and protective equipment, and had been delivered in June 2020. A specified number of masks were obtained from the delivered masks and underwent tests by the Federal Office of Metrology and Surveying, in accordance with the "Test principles for coronavirus pandemic respiratory masks (CPA)" for supply within Austria. The Federal Office of Metrology and Surveying confirmed that the tested masks were compliant with requirements. The OETI certification office (Institute for Ecology, Technology and Innovation) then certified the masks and confirmed that they were also compliant with the abridged evaluation procedure pursuant to a Ministry decree dated 3 April 2020.

In August 2020 the certified face masks were distributed to the regional crisis warehouses of the Laender. In November 2020, the Ministry was informed by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection that an operator in the care and social affairs sector had found that some of the masks distributed in August were defective in terms of their filtration performance.

In subsequent investigations, it became evident that masks with various different production batch numbers had been delivered and mixed up with others. The Federal Office of Metrology and Surveying conducted further investigations and found that some of the masks with a specific production batch number, when checked for permeability, were not compliant with the test principles. All of the masks from the delivery in question were then placed in quarantine storage facilities of the respective Laender.

Criminal investigations

The Federal Government's claim against the supplier is currently in the investigation phase, with assistance from the Finanzprokuratur (the statutory lawyer and legal advisor of the Republic of Austria). According to media reports, the Central Public Prosecutor's Office for Combatting Economic Crime and Corruption (Wirtschafts- und Korruptionsstaatsanwaltschaft) is conducting an investigation into suspected serious fraud inflicted upon the Republic of Austria.

3.4 European and international affairs

Introduction

35 cases

In 2021, the AOB received 35 complaints concerning areas relating to the Federal Ministry for European and International Affairs. Most of the complaints were about administration by Austrian embassies abroad. In that area, most of the cases of maladministration found by the AOB were in visa proceedings. In terms of subject matter, the complainants were critical of the handling of visa proceedings by embassies and of impolite treatment or poor advice from embassy employees. Naturally, it was not possible to verify all of their accounts in retrospect.

3.4.1 Repartiation of female Austrian citizen from Syria

Salzburg woman emigrated to Syria

A married couple from Hallein (Salzburg) contacted the AOB in the hope of obtaining assistance with repatriation of their 26-year-old daughter and her two sons from Syria. Their daughter had fallen under the influence of the terrorist militia Islamic State as a teenager, and in 2014 at the age of 17 had emigrated to "the Caliphate" in Syria. During the civil war in Syria, she had given birth to two sons, now four and six years old. The woman and her two sons are currently in Camp Roj detention camp. Her parents described the poor health of their grandchildren and the shocking living conditions in which they are growing up in Camp Roj. They stated that their daughter deeply regrets her actions.

Fair trial and repatriation together with sons

As an Austrian citizen, the woman hopes to be given a fair trial in Austria. Her two sons, who are also Austrian citizens, urgently require proper medical treatment and ought to be given the opportunity to distance themselves from the terrorist ideologues in the detention camp. As soon as they are healthy again, they ought to have the right to attend kindergarten and primary school in Salzburg. Repatriation of the children only or separation of the children from their mother is not a viable approach for the mother and for her parents.

The AOB several times asked the Federal Ministry for European and International Affairs for an explanation of why the Austrian citizen and her two minor sons, both of whom are Austrian citizens, have not been repatriated from Syria yet, and when their repatriation together might reasonably be expected.

Ministry's replies of a general nature

So far, the replies from the Ministry have not made it possible to reach any firm conclusions about the parents' allegation that their daughter will not get a fair trial in Austria despite her valid Austrian citizenship. To date, the Ministry has merely stated that "every consular case" must undergo "individual assessment". It stated that as part of such an assessment,

the following issues would be considered: "On the one hand, the degree to which the affected person merits protection, and on the other hand the potential risk to public safety and to the life and limb of the Austrian staff handling the case". It also stated the following: "Careful consideration of these factors currently suggests that in cases where an adult, who has made their own decision to enter the region, requires protection. That does not outweigh the potential risk to life and limb of the Austrian staff who would have to be sent to the crisis zone to handle repatriation, and the potential risk to public safety in the event of a repatriation".

One can probably infer from these formulations by the Ministry that as in general the Ministry is ruling out the possibility of repatriating adult female Austrian citizens who have taken their own decision to enter the region, notwithstanding the right to a court decision in civil and criminal matters and the right to fair proceedings and a minimum standard of the rule of law in criminal matters. The AOB is proceeding on the assumption that the Kurdish authorities and courts have neither the financial resources nor the personnel to be able to organise trials for detained foreign suspects.

Outcome remains open

The outcome of the AOB's investigative proceedings remains open, due to the lack of more detailed statements about the assessment of the individual case and the weighing of considerations in the concrete case in question. The AOB takes the view that the Austrian Foreign Ministry, following the precedent set by the German Foreign Office, should make further detailed assessment of the question of repatriation of the former Islamic State fighter and her two sons to Austria. The woman ought to be able to stand trial in Austria, and action should be taken to counteract the radicalisation and serious health risks faced by her children in the detention camp.

3.4.2 No decision on legal remedy – Austrian Embassy in Islamabad

An EU citizen with freedom of movement complained to the AOB about delays in proceedings handled by the Austrian Embassy in Islamabad. He stated that his wife was an Afghan citizen, and at the beginning of March 2020, she had applied for a standard tourist visa (Visa C). In February 2021, the application had been rejected via a decision without preliminary proceedings. Then, in February 2021, his wife had sought legal remedy via a challenge procedure and had submitted all documents. The Embassy had not reached a decision regarding the matter.

File of proceedings lost

The AOB initiated investigative proceedings and asked the Federal Ministry for European and International Affairs to provide a statement and to present the file of the proceedings. Initially the Ministry stated that the delays were due to COVID-19, which meant that the Embassy was not always fully staffed. The Ministry confirmed that the application had been

rejected, and that the challenge procedure had been submitted to the Embassy. Because the challenge procedure did not contain any documentary supporting evidence of the spouse's alleged status as having freedom of movement, the application had been rejected. However, the Embassy had neglected to send the final rejection decision. The Ministry therefore instructed the Embassy to find the rejection decision. The proceedings file could not be found at the Embassy and therefore could not be submitted to the AOB for investigation.

Ministry's review

The Ministry informed the AOB that the Afghan citizen now had the option of either appealing the rejection decision before the Federal Administrative Court, or "reapplying for a visa".

Maladministration by the Embassy

To begin with, the AOB determined that there had been maladministration by the Embassy. Firstly, the Embassy had neglected to reach a decision on the Afghan citizen's legal remedy, which had been submitted in a timely manner. Secondly, the Embassy had been unable to find and present the proceedings file requested by the AOB. As a result, the AOB had been unable to investigate the file contents or the Afghan citizen's allegation that she had submitted all documents.

Ministry was not being realistic

The AOB took the view that given the current situation in Afghanistan, the Ministry was not being realistic when it suggested that the Afghan citizen could "reapply for a visa" at the Austrian Embassy Islamabad. In fact, first of all the Afghan citizen would have to travel under difficult or virtually impossible conditions from Afghanistan to Pakistan in order to reapply for a visa at the Austrian Embassy in Islamabad.

Case took a positive turn

The case then took a turn for the better, as the Afghan citizen was in the meantime evacuated and is currently in Austria. Since her husband is an EU citizen with freedom of movement, she has been able to apply for a residency card now that she is in Austria.

3.4.3 Decision sent to wrong addressee – Austrian Embassy in Skopje

Challenge submitted without power of attorney

The Austrian Embassy in Skopje rejected an application for a standard tourist visa (Visa C), via a decision without preliminary proceedings, which was handed over to the visa applicant in person at the Embassy in January 2020. The grounds in the decision included the statement that the applicant could bring challenge proceedings against the decision within two weeks of receiving it. The challenge was then submitted to the Embassy in a timely manner. However, it was signed not by the visa applicant, but by the Austrian inviter who had submitted an electronic letter of guarantee.

Rejection sent to visa applicant

The Embassy rejected the challenge via a decision stating the following: "[…] because the challenge was not submitted by the applicant or by a

person with power of attorney to represent them". Although the challenge had been submitted by the Austrian inviter (without power of attorney), the Embassy addressed the rejection decision to the visa applicant.

Ministry's legal opintion

After being criticised for this by the AOB, the Federal Ministry for European and International Affairs apologised for the procedural error and stated that the Austrian inviter had "never been informed" about his incorrect party status. The Embassy was therefore instructed to "rectify that".

Decision sent to wrong addressee

In the AOB's legal opinion, it was insufficient to simply "rectify by informing him of his incorrect party status". The Embassy had addressed the rejection letter to the applicant instead of to the Austrian inviter. Under correct procedure, the decision, with the exact same wording, should have been addressed and delivered to the Austrian inviter.

No original signature

Furthermore, given the absence of an original signature beneath the decision, the AOB suggested that the Austrian Embassy in Skopje be alerted to the need for a proper signature on the decision (Supreme Administrative Court ruling dated 24 October 2007, Zl. 2007/21/0216).

3.4.4 Refusal of a tourist visa – Austrian Embassy in Tehran

Austrian husband

An Austrian man contacted the AOB on behalf of his wife, who was living in Iran. He stated that he and his wife had already been married for ten years and had a nine-year-old son. The man was living in Vienna with the son; his wife was resident in Iran.

Contradictory information

For several months, they had been trying to obtain a visitor visa for the wife. Because the wife's German language proficiency was inadequate, municipal department MA 35 of the City of Vienna had advised her to refrain from applying for a residence permit for the time being, and instead to initially enter Austria on a visitor visa. However, the Austrian Embassy in Tehran, which had competency for issuing the visitor visa, repeatedly drew attention to the requirement that the wife must have adequate German language proficiency. It stated that issuing a visitor visa was not possible, and that she should instead apply for a residence permit.

German language proficiency required?

In its statement to the AOB, the Federal Ministry for European and International Affairs pointed out that under the Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz) adequate German language proficiency is a requirement when applying for a residence permit. Since the AOB had already stated in its enquiry to the Ministry that the Iranian woman did not have the necessary German language proficiency to apply for a residence permit and therefore was intending to enter Austria on a standard tourist visa (Visa C), the Ministry's statement about German language proficiency made little sense. A visa provides the right to enter

the country with no specified German language proficiency requirement. By contrast, there is a German language proficiency requirement when applying for a long-term residence permit under the Settlement and Residence Act. The AOB could not comprehend why the woman should not be able to apply for a visitor visa, and therefore asked the Ministry to present the proceedings file.

Outcome from investigative proceedings remains open

The Ministry issued a supplementary statement in which it essentially pointed out that the woman had withdrawn her visa application, and it also presented the file of the proceedings. It was evident from the file of the proceedings that the woman had indeed written to withdraw her visa application (Visa C). The AOB therefore advised her that a further application, which had in the meantime been submitted, should not be withdrawn and that she should wait for further processing to be carried out by the Embassy. If the application were rejected, the woman would first be able to bring challenge proceedings against the Embassy and subsequently bring an appeal before the Federal Administrative Court.

Embassy's legal opinion was wrong

It was evident from a letter from the Embassy contained in the file that the Embassy was of the legal opinion (incorrectly, as the AOB had suspected) that as a general rule entering Austria without German language proficiency is not feasible, even for just a three-month period. The Embassy had stated the following: "Pro domo we wish to point out that unless the applicant submits a German A1 certificate, entry into Austria (under whatever immigration status) is unlikely, as an application under the Settlement and Residence Act is not issuable and, furthermore, as with any visa application (regardless of the assessment of financial resources), the question of return from the country and the actual purpose of travel arises".

Language proficiency not required for tourist visa

In its reply, the AOB explicitly reiterated that by contrast to residence permit applications, there is no German language proficiency requirement for Visa C applications. The AOB took the view that it was unlawful to automatically assume that given their lack of German language proficiency a person would have no intention of departing from Austria. The AOB asked the Ministry for an acknowledgement and asked it to also notify the Embassy about the AOB's legal opinion in the matter.

3.4.5 Misleading information about visa – Austrian Embassy Islamabad

Prospect of a visa

As the AOB learned from Austrian media reports, a young, female, well-respected Afghan researcher had been invited to a research stay in Austria by various leading Austrian institutions. According to the media, the Austrian Embassy in Islamabad drew up a covering letter for the researcher which assured her the issuance of a visitor visa, and notified her that the visa was "ready for pick-up" from the Austrian Embassy in Islamabad.

Embassy rejected visa application

However, according to the media reports, the Embassy in fact rejected the issuance of a visitor visa. As part of its ex-officio investigative proceedings, the AOB asked the Federal Ministry for European and International Affairs for an immediate statement and asked for the proceedings file containing the covering letter from the Embassy mentioned in the media reports. Notwithstanding the fact that the researcher was of course entitled to bring challenge proceedings against the decision without preliminary proceedings to reject the visa application, the AOB specifically asked for an explanation of why the visa application had ultimately been rejected. The AOB also asked for an explanation for the clearly premature and misleading statement that the visa was already available for pick-up at the Embassy.

Covering letter stated that visa was ready for pick-up

In its statement, the Ministry explained the grounds for the rejection of the application. It stated that the outcome of the proceedings was still open. The proceedings file and the covering letter from the Embassy were presented. The documents did indeed contain a statement that a visa for the researcher's entry into Austria was available for pick-up at the Austrian Embassy in Islamabad. The Ministry pointed out to the AOB that the covering letter constituted a letter directed at the authorities of a third country, that a letter of that kind would not establish a subjective right to the issue of a visa, and that it had been drawn up for the sole purpose of enabling the researcher to cross the border into Pakistan.

Covering letter enabled crossing of border

Although the statement that the visa was ready for pick-up was untrue and ultimately gave rise to unrealistic expectations, the Embassy deserves credit for the fact that without the covering letter, the researcher probably would not have been able to travel from Afghanistan to Pakistan to submit a visa application.

German Foreign Office issues visa

According to an Austria Press Agency news release in January 2022, the German Foreign Office became aware of the case and immediately issued a visa for the researcher.

3.4.6 VFS Global: booking of slots online

„No slots available"

In Iran, applications for visitor visas are processed not by the Austrian Embassy in Tehran but by its (private) service partner "Visa Facilitation Services Global" (VFS Global) as an "official partner of the Austrian Embassy in India". An Austrian citizen living in Vienna complained to the AOB that VFS Global was not making any slots available for visitor visa applications. In October 2021, he had submitted an electronic letter of guarantee (i.e. an invitation by a private individual) for his parents-in-law who live in Iran, but had been unable to obtain a slot from VFS Global. He stated that since submitting the electronic letter of guarantee, he had tried several times daily to obtain a slot for the application, but the VFS Global website always showed the message "no slots available". The Austrian man stated to the

AOB that although he had fully expected a long wait period for the actual application, it was unacceptable to find that there were no slots available for the future and it was impossible for his wife's parents to visit them despite the fact that the electronic letter of guarantee had been submitted.

The AOB asked the Federal Ministry for European and International Affairs to provide a statement and to look into why VFS Global, as a service provider for processing of visa applications in Iran, had since (at least) October 2021 no longer offered any slots. The Ministry contested the AOB's assertion that slots were temporarily unavailable at VFS Global and stated that slots were bookable at any time.

Slots available again

Subsequently the Austrian man reported to the AOB that slots had suddenly become available, and attributed this to his complaints to the AOB, to VFS Global and to the Embassy. The AOB was not able to conclusively verify the assertion about the lack of available slots, but welcomed the fact that booking of slots was now (once again) possible.

3.4.7 Tourists whose passports were stolen treated rudely – Austrian Embassy Madrid

Complaint about rude treatment

A man living in Salzburg and his female travel companion had amongst other things their passports stolen during a trip to Spain in August 2021. To apply for emergency passports, they contacted the Austrian Embassy in Madrid. There they felt that they were being blamed for the loss of the documents, and were made to feel they were causing the Embassy unwelcome work. The man and woman were shocked by the rude tone and the lack of sympathy on the part of the Embassy's female employee. Neither the Embassy nor the Federal Ministry for European and International Affairs provided any reply to his complaints regarding the matter.

Conversation clarified the matter

The AOB forwarded the description of events to the Ministry and requested that contact be made with the Embassy to clarify the matter. The Ministry replied to the AOB that the relevant department at the Embassy had been contacted, the female employee mentioned in the complaint had been informed, and that the responsible parties at the Embassy had comprehensively dealt with the matter and the accusations. The AOB duly acknowledged this approach and welcomed it.

3.4.8 Advice in citizenship proceedings – Austrian Embassy in Santiago de Chile

Citizenship application

An Austrian citizen felt that he received bad advice from the Austrian Embassy in Santiago concerning the relocation of his family to Austria. He stated that from South America he had submitted a citizenship application

for his daughter to municipal department MA 35 of the City of Vienna. Since he was concerned that citizenship might not be granted in time for their planned arrival in Austria, he had several times asked the Embassy for advice about a short-term visitor visa. Their plan was for the daughter to enter kindergarten immediately after their arrival in Austria. The Embassy had several times informed him that it would suffice to apply for a residence visa (Visa D). At the same time the Embassy had assured him that the granting of citizenship to his daughter would "definitely take place" before their arrival in Austria.

Granting competency shifted

A few days before their intended date of arrival in Austria (7 September 2021), the Embassy finally forwarded him a message from MA 35. The message stated that the administrative notification about his daughter's citizenship would probably be sent from Vienna on 10 September 2021. The Embassy asked him whether he would be willing to postpone his flight by three days so that he could pick up the original of the administrative notification from the Embassy. However, it did not notify him that if the notification were not picked up abroad and the application were submitted from within Austria, the result would be to shift granting competency from one authority to another. The man replied that postponing the flight would be too inconvenient, as his job was starting at the beginning of October 2021 and they had to move into their apartment in time for that. Since he was unaware that the granting competency would shift from one authority to another as soon as he arrived in Austria, he replied that he would be perfectly willing to "pick up the original of the administrative notification (on 10 September) directly from MA 35 in Vienna".

Planned main residence in Salzburg

When he informed MA 35 about his relocation plan, he was suddenly notified that he would have to withdraw his daughter's citizenship application, otherwise he would receive a negative decision. He was informed that since they intended to have their main residence in Salzburg, and that as of the date of handover of the administrative notification on 10 September 2021 "the main focus of the man's life would no longer be in Chile", MA 35 no longer had granting competency. He was also informed that MA 35 only has competency for applications submitted from abroad or if the main residence is in Vienna. He was informed that he could reapply for his daughter's citizenship from within Austria, but in view of the granting competency rules, he would have to contact the regional government of Salzburg.

Insufficient information

From the description of proceedings presented to the AOB, it was clear that the Embassy had made every reasonable effort to help the daughter acquire citizenship before her arrival in Austria. However, it had not made it sufficiently clear that if the family did not wait until the administrative notification had arrived in Chile, this would mean the granting competency would change and that they would need to re-apply from within Austria.

3.5 Families and youth

Introduction

In 2021, the AOB handled over 400 complaints about benefits relating to families, including disbursement of family allowance, childcare allowance and maternity benefit, which represents an increase of over 40% relative to 2020.

Delays in disbursement of family allowance

The increase was mainly due to the 160 complaints about months-long delays in disbursement of family allowance (see Section 3.5.1). This particularly affected families with multiple children and those who receive higher-tier family allowance and thus often incur substantial expenditures on therapy, care or learning aids.

Maladministration found; recommendation issued

There was one complaint where the Federal Minister for Women, Family, Integration and the Media did not fulfil the duty to respond to the AOB's request for information and made statements which did not duly take into account the legal position under Austrian constitutional law, and in doing so called into question the AOB's investigative mandate. The AOB unanimously found that maladministration had occurred and issued a recommendation dated 7 December 2021, which is described in detail in Section 3.5.2.

There were various other cases where the Minister did not sufficiently fulfil the constitutional duty to provide support and information. Requests for statements of opinion were in some instances answered very late or with scarcely any information.

Index-linking of family allowance is against EU law

Effective in 2019, the amount of family allowance and child tax credit for employees whose children are resident in another EU/EEA country was aligned with price levels in the member state in question. During the review proceedings, the AOB took the view that index-linking is not a suitable approach, and pointed out that the exportability of social insurance and family benefits is an underlying principle of EU law, and therefore it is not permissible to directly or indirectly differentiate based on country of residence.

The European Commission initiated an infringement procedure against Austria before the European Court of Justice, and the EU Advocate General's Opinion was brought before the Court. The EU Advocate General took the view that index-linking infringes EU law, as it constitutes indirect discrimination based on citizenship, for which Austria cannot provide any objective justification. He argued that employees from other EU countries who live in Austria must receive the same allowances and tax credits as Austrian employees, regardless of the place of residence of their children. That is because they make the same contribution as Austrian employees to the financing of Austria's social and tax system. The European Court of

Justice judges do not have to concur with the Advocate General's Opinion, but in most cases they do.

Waiting for decision on childcare allowance in cross-border situations

As in previous years, in 2021 the AOB was contacted by numerous families with one parent living or working in another EU country who had waited a long time for a decision on their application for childcare allowance (see Section 3.5.3).

The AOB also had to address the problem that applications for income-related childcare allowance are often rejected without an administrative notification. Another significant area in 2021 was the question of which data relating to higher-tier family allowance must be sent by the Sozialministeriumservice (Ministry of Social Affairs Service) to the Tax Office (see Section 3.5.5).

3.5.1 Months of waiting for family allowance

Waits up to six months

From summer 2021 on, the AOB received over 160 complaints from families who had been waiting for months, in some cases up to six months, for disbursement of family allowance. Those affected were mainly young adults who were about to start or were already in apprenticeships, children with disabilities and young families, especially those with multiple children.

Delays due to pandemic

The long processing times were due to a backlog in processing of applications at Tax Offices. The backlog had arisen because certain time limits regarding family allowance, which had originally been assigned due to COVID-19, had been reached. During the pandemic, family allowance continued to be paid without any assessment, since in some cases it was difficult for applicants to obtain and submit the necessary evidence. According to the information supplied to the AOB, this meant for example that for young adults who were in vocational training or were engaged in a course of studies, no proof of performance had to be submitted to obtain family allowance. Instead, family allowance was disbursed automatically, independently of evidence. According to the Federal Minister for Women, Family, Integration and the Media, in many instances the alternative would have been to stop payment of family allowance, which was not feasible given the pandemic and would also have caused problems with health insurance coverage. This measure was initially assigned a time limit of the end of September 2020, which was then extended to the end of March 2021 due to the continuing pandemic.

Solution based on goodwill and special family allowance

Shortly before the time limit was reached, a solution based on goodwill was implemented: family allowance that had been incorrectly disbursed did not have to be paid back. Furthermore, families who in the past year had stated that they were no longer entitled to family allowance and whose payments had therefore stopped received a special family allowance as a bonus. The legal basis for this was Section 15 of the Family Allowance Act

(Familienlastenausgleich; Federal Law Gazette I No. 58/2021, which entered into force on 1 April 2021): "(1) For persons who, in the period from and including March 2020 up to and including February 2021, were entitled to family allowance for one child for at least one month, the entitlement prerequisites that were fulfilled during that period shall continue to apply directly thereafter for the entitlement period until March 2021 with regard to that child, provided no other person was entitled during that period".

EUR 102 million from the COVID-19 Crisis Management Fund (Krisenbewältigungsfonds) was made available for this purpose. The objective was to provide financial support for those whose claim had ended in 2020 due to changes in life circumstances, e.g. young adults who had entered compulsory military or civilian service after their school-leaving exam, or who after their school-leaving exam did not undergo any further training and were unable to find a job due to the COVID-19 crisis. No application was necessary, and disbursement was carried out automatically.

Huge backlog at Tax Office

After automatic disbursement of family allowance came to an end in March 2021, the Tax Offices had to work through a backlog of claims assessments and had to process around 200,000 replies from applicants. Disbursement of family allowance for these claims was halted from April 2021 on. There were probably also other reasons for the backlog, such as organisational changes at the Tax Offices, namely the mergers as part of Tax Office reform.

Shortfalls of several hundred euros for families

The AOB subsequently received numerous complaints from persons who had been waiting for months for family allowance. In most cases the AOB contacted the competent Minister and requested information about the status of processing, and drew attention to the concrete problems of the persons affected. In some instances, the families had a shortfall of several hundred euros in monthly income and other benefits which depend on receiving family allowance. This pushed numerous families to their financial limits.

A case that exemplified the situation facing many such families was a young family from Tyrol, who appeared on the ORF TV programme Bürgeranwalt ("Advocate for the People") in August. The case showed that when family allowance is not paid, this can have a significant impact on other benefits. Because the mother had not been granted family allowance, since giving birth to her son she had been unable to receive Family Bonus Plus or childcare allowance. The childcare allowance was in turn a prerequisite for public health insurance coverage, which meant she had to be co-insured under her partner's coverage. Had that not been possible, which is for example the case for many single parents, the only alternative would have been expensive self-insurance. The father of the child took the "Dad's Month" off from work, but because family allowance had not been granted, he was unable to receive the family time bonus for fathers. As a result, the

parents were awaiting a total of more than EUR 1,500, according to their own calculations. When enquiries were made to the Tax Office, the employee just hung up the phone.

Impact on other benefits

There are also other types of claim that are dependent on the granting of family allowance and which families have been unable to receive due to the long waiting times. These include annual welfare benefit upon starting school, the multiple-child bonus (granted after the third child), the family bonus for unemployment benefit, benefits from the Family Hardship Fund (Familienhärteausgleichsfonds), student grant (which is reduced by the amount of family allowance received) and the orphan's pension. In order to receive an orphan's pension after turning 18, one must either be receiving family allowance or – without receiving family allowance – be fully and purposefully engaged in training.

Worries about health insurance

Lack of public health insurance coverage caused worries for a woman who had already been waiting for nearly three months for higher-tier family allowance for her daughter. Although she had applied for an extension in May, by August she had still not received any notification from the Tax Office, and a long-scheduled surgery was imminent. After a conversation with the Austrian Public Health Insurance Office, it proved possible to extend the co-insurance of her daughter temporarily even though the family was not yet receiving family allowance, and the surgery was performed as scheduled.

Costs associated with disabilities

Families of children with disabilities were affected particularly badly by the months of delays. Such families have lower family income if one parent has to provide round-the-clock care for the child, and they also incur the costs of therapy, doctor's visits, learning aids etc. For example, in February 2021 a father had applied for higher-tier family allowance for his son (born in 2015), but disbursement did not take place until the end of September 2021. In May 2021, a mother in Vienna applied for the continuation of higher-tier family allowance for her daughter, but it was not until five months later, in September 2021, that the application was processed by the Tax Office and a doctor's examination at the Sozialministeriumservice (Ministry of Social Affairs Service) was scheduled. During that waiting period, she was unable to obtain any information about the status of proceedings, either in writing or by phone.

The situation eased somewhat in autumn 2021. As reported in the media, and as evident from feedback from individuals affected, the backlog was successfully eliminated. However, in the period to the end of the year, the AOB still received new complaints about the long processing times, even though the media had already reported in August that the backlog had been eliminated by up to 90%.

Not enough staff made available

The AOB fully understands that during the COVID-19 year 2020 it was prudent to waive the need to assess claims. Nevertheless, it was

unsatisfactory that after individual assessments were resumed, clearly not enough staff were made available by the Tax Offices, either by providing additional manpower or by reorganising shifts.

Legislative amendments in order to speed up processes

It was often young people who had just turned 18 that were affected by the delays. For these individuals, assessment was required to determine whether there was a claim to family allowance based on a course of study or apprenticeship. To mitigate the problem in the future, legislative amendments were passed at the end of the year: Section 2 (1) of the Family Allowance Act now states that family allowance must continue to be paid for four months after the completion of school education. This ensures that disbursement will continue uninterrupted until the potential start of a course of study.

In addition, processes are to be speeded up for students, as family allowance will be granted automatically during the course of study. This will take place via automated processing of student data under the FABIAN family allowance system. Data such as the start and continuation of a course of study and ECTS points obtained during a semester will be sent to Tax Office Austria. The project, which is a joint project of the Federal Ministry of Finance, the Federal Chancellery and the Federal Ministry of Education, Science and Research, are to be implemented by September 2022.

3.5.2 Families Minister refuses to provide information – AOB finds maladministration

Mother and grandmother of twins contacted the AOB

In October 2020, the AOB was contacted by a mother of twins who was requesting "disbursement of full family allowance". The AOB obtained a statement of opinion from the (at that time) Federal Minister for Labour, Family and Youth concerning the status of proceedings and any necessary further steps. Subsequently, according to the information available to the AOB, custody of the twins was transferred to the woman's mother. Based on various statements made by the grandmother, in September 2021 the AOB asked the Minister to provide information about the current status of proceedings and to clarify what benefits the mother and grandmother would be entitled to, and for what periods, under the Childcare Allowance Act (Kinderbetreuungsgeldgesetz).

Topic discussed on TV Show *Bürgeranwalt*

Minister failed to duly acknowledge AOB's responsibility and authority

In her response, however, the Minister did not duly comply with this request for information. Instead, the AOB was informed that, inter alia, "the present request for information should be considered no longer relevant", because as part of a remedy request the grandmother "has demonstrably received detailed information about the current status of proceedings and the necessary further steps for handling of the case". The remedy request to the grandmother was sent out after the AOB's information request in September 2021, but it was not sent to the AOB, which meant the AOB

was not aware of it. Furthermore, it was alleged that "the administrative procedure in question clearly does [not] contain even the slightest grounds for suspecting maladministration and therefore does not fall within the AOB's general investigative mandate". It was then stated that "given the absence of any relevant connection to the grandmother's claims, and due to existing data protection concerns, it has not been possible to comply with the request for information about the status of proceedings and the mother's benefits claims". It was also stated that the AOB was "aiding and abetting possible data protection infringement by submitting the information request", and for that reason "the data protection authority had been notified about the AOB's approach".

AOB finds maladministration

All three of these statements show a serious failure to duly acknowledge the legal position under the Federal Constitution, and therefore constitute maladministration as defined in Article 148a (1) of the Federal Constitutional Law. The grounds are as follows:

Both the mother and the grandmother of the children contacted the AOB because they had felt badly treated by the authorities in connection with granting of family allowance and childcare allowance. Under Article 148a (1) of the Federal Constitutional Law, the AOB had a duty to investigate these assertions. To fulfil its investigative mandate under the Constitution, the AOB twice asked the Minister to provide the necessary information.

Duty to provide support pursuant to Art. 148b (1) of Federal Constitutional Law

Under Article 148b (1) of the Federal Constitutional Law, all bodies of the Federal State, and therefore all members of the Federal Government, must support the AOB in fulfilling its tasks, allow access to files and provide the necessary information upon request. If an authority that has been asked by the AOB to provide support during AOB investigative proceedings merely sends information directly to the affected party that does not fulfil the aforementioned clearly defined constitutional duty. Based on the governmental practices of many decades, which have never been questioned by any body under the AOB's investigative mandate, and according to unanimous legal scholarship, the AOB has sole responsibility for determining whether an information request should be deemed "necessary" as defined in Article 148b (1) of the Federal Constitutional Law.

Only AOB can assess whether there has been (suspected) maladministration

Furthermore, the Minister's statement that the administrative proceedings in question did not fall within the AOB's general investigative mandate also constitutes maladministration as defined in Article 148a (1) of the Federal Constitutional Law. That is because, under Article 148a (1) of the Federal Constitutional Law, the AOB has sole responsibility for deciding whether and which steps are necessary to process a complaint. That is especially true when it comes to the question of whether, pursuant to Article 148a (1) of the Federal Constitutional Law, investigative proceedings should be initiated to determine whether there has been maladministration in the

case in question. It is a general legal principle under the rule of law and the Federal Constitution that a body, which is subject to investigation by a monitoring body cannot deny the monitoring body's investigative mandate by arguing that everything has been handled correctly in the case in question. That is because this is an assessment, which is, by definition and under the Federal Constitution, the task of the monitoring body and not of the monitored body.

No official secrecy *vis-à-vis* the AOB

Under Article 148b (1), sentence 2 of the Federal Constitutional Law, official secrecy does not have to be maintained vis-à-vis the AOB. It is clearly stated in the Federal Constitution that during investigative proceedings, the body monitored by the AOB cannot invoke official secrecy to justify a refusal to provide information deemed necessary by the AOB under its investigative mandate pursuant to Article 148a (1) of the Federal Constitutional Law. In this context, the term "official secrecy" should be interpreted broadly and, based on the governmental practices of many decades and according to unanimous legal scholarship, it covers "all secrecy obligations which (otherwise) apply to the bodies that are obligated to support the AOB" (Thienel/Leitl-Staudinger [verbatim], in Kneihs/Liehbacher (eds.), Rill-Schäffer - Kommentar Bundesverfassungsrecht, Art. 148b of the Federal Constitutional Law (18th Instalment, 2017) margin No. 10).

Maladministration: claiming data protection concerns

Moreover, under Article 148b (2), sentence 1 of the Federal Constitutional Law, the AOB is subject to official secrecy to the same extent as the body which it has contacted in fulfilment of its duties. That constitutional duty, which the AOB of course fulfils, ensures that the AOB's investigative activities do not lead to infringement of official secrecy. The Minister's statement that providing the information would raise data protection concerns therefore also constitutes maladministration.

AOB issued recommendation

Accordingly, pursuant to Article 148c, sentence 1 of the Federal Constitutional Law, the AOB issued a recommendation that in future cases-relevant information requests from the AOB should, with regard to content, be answered immediately.

The Families Minister took the view that some recommendations were a consequence of misunderstandings. It was argued that the wording of the response to the grandmother's claims had been unclear. With regard to the disclosure of the mother's data, the Families Minister concurred with the Federal Chancellery's data protection officer, who had deemed the disclosure of the information a data breach, as permission had not been given by the mother and the grandmother and the information was not relevant to the complaint. Unfortunately, the Federal Chancellery lacked a proper understanding of the law in this matter. The information was necessary for fulfilment of the AOB's investigative mandate under the Federal Constitution. The AOB needed the requested information in order

to obtain an overview of the complex subject matter. The AOB hopes that this was an isolated case, otherwise the AOB will not be able to fulfil its investigative mandate under the Federal Constitution.

3.5.3 Further wait for lawful cross-border family benefits

AOB has been calling for improvement for the past 14 years

Over the past ten years, the AOB has regularly reported about problems with family benefits in cases where one parent is living or working in another EU country. In the Annual Report 2008, the AOB drew attention for the first time to the fact that these families often have to wait months or years before they receive family allowance or childcare allowance; most recently Annual Report 2020, volume "Monitoring Public Administration", pp. 52 et seq.).

Maladministration found: recommendation issued

Since then, the AOB has been working hard to find a solution, and public health insurance carriers and the competent Minister have been made aware of the cases. A number of statements have been obtained from the EU Commission, which concur with the AOB's criticisms. In autumn 2019 on the ORF TV programme Bürgeranwalt ("Advocate for the People") the problem was discussed with the relevant section head. Subsequently the AOB invited representatives of the Minister and the implementing public health insurance carriers to a round-table discussion.

Courts and Austrian Court of Audit concurre with AOB

Since all of these efforts were unsuccessful, in January 2020 the AOB unanimously found that maladministration had occurred and issued concrete recommendations for rectifying the situation. Several court decisions and a report by the Austrian Court of Audit have concurred with the AOB's criticisms. Nevertheless, there is still no prospect of a genuine solution.

Complaints still coming in

The number of complaints received by the AOB in this regard fell from 40 in 2020 to 25 in 2021. Nonetheless, these numbers are an indication that the problem has not yet been resolved. All of these families, and often single parents as well, have been waiting months and in some cases years for their applications to be processed.

Childcare allowance disbursed after four years

On the positive side, in 2021 a number of those affected received childcare allowance or at least a rejection notice. For example, in 2021 a mother received around EUR 18,000 in back payments for her two children born in 2016 and 2017. However, the purpose of childcare allowance, namely to provide parents of new-born children with a reasonable subsistence level during the period when they are looking after the children and therefore suffer loss of earnings, is not fulfilled if the benefits claims are not disbursed until years later.

Decision received after six years

The mother about whom the AOB reported in October 2019 on Bürgeranwalt received a rejection notice eventually, in April 2021 – over six years after

submitting her application for childcare allowance. The grounds cited by the authority were that the mother had infringed her statutory duty to cooperate as she had not submitted a decision regarding the foreign family benefits. However, the AOB had many times pointed out that the authority had received several confirmations from the Dutch authority stating that the mother did not have a claim there. The woman brought legal action against the decision. At the time this Annual Report was finalised, the court proceedings are still pending

3.5.4 Progress regarding the Mother-Child Booklet

In 2021, once again a number of parents contacted the AOB after having had to pay back a significant portion of their childcare allowance, because they had not sent evidence of the required Mother-Child Booklet medical examinations to the health insurance carrier in a timely manner.

Serious consequences if evidence is not submitted in a timely manner

The medical examinations had been conducted in the proper manner. However, the parents had in many instances quite understandably failed to send evidence to the health insurance carrier in a timely manner. A number of the persons affected reported that they had sent the evidence of medical examinations in a timely manner, but the health insurance carrier had been unable to find them, or a single page was missing. For example in one case, legal action was brought against the return of payment, whereupon the Austrian Public Health Insurance Office (Österreichische Gesundheitskasse) was in fact able to find the evidence, which had been submitted in a timely manner.

If evidence of the medical examinations is not submitted in a timely manner, by law the same sanctions apply as in cases where no examinations were performed: childcare allowance is reduced by EUR 1,300 for each parent. In the AOB's opinion, this is inappropriate and has repeatedly led to hardship cases.

AOB, Court of Audit and Public Health Insurance Office call for change

The AOB also pointed out that in many instances it was unnecessary for the parents to send the evidence of medical examinations to the health insurance carrier. Provided the Mother-Child Booklet examinations are performed by a doctor who has a contract with public health insurance offices, the examinations are charged to the health insurance carrier in any case, which means the health insurance carrier will already be aware of them. The AOB has therefore for a long time been calling for a change (see most recently in the Annual Report 2020, volume "Monitoring Public Administration", p. 56). The Austrian Court of Audit and the Austrian Public Health Insurance Office have concurred with the AOB's criticisms.

Minister intends to address the issue

Until now, the competent Minister has rejected these calls for change. However, some developments do seem to be on the way. In spring 2021, the

Minister informed the AOB that doctor settlement statements can only be obtained from Austrian contracted doctors and not from non-contracted doctors or if the medical examination was performed abroad. That would give rise to exemption clauses for certain groups of individuals. The Minister acknowledged that a balance must be struck between prudent health measures and the need for the parents to submit evidence of examinations, and stated that the issue needed be tackled in order to find a practical solution for all parents.

According to the Minister, in autumn 2020 the procedure was modified: if the evidence has not been submitted by the fifteenth month of the baby's life, a second reminder is sent by registered mail to parents who chose the shorter options and from whom childcare allowance would therefore subsequently be claimed back. This ensures that information about the required evidence of the medical examinations reaches those parents in a timely manner. The AOB hopes that a lasting solution will be found soon.

3.5.5 Tax Office only receives metadata from expert reports

When applications for higher-tier family allowance are submitted, the Sozialministeriumservice (Ministry of Social Affairs Service) has to prepare an expert report concerning the level of disability. The AOB contacted the Federal Tax Court regarding an individual procedure. The court stated that the Federal Ministry of Finance and the Families Minister have a mutual agreement that only the verification of significant disability needs be sent to Tax Offices, and not the expert report. However, the verification of significant disability only contains metadata, and does not contain the grounds for the outcome of the expert report.

Conflict with the legality principle according to the Federal Tax Court

In its findings in 2016 (RV/7106117/2015) the Federal Tax Court has already pronounced that this approach conflicts with the legality principle, as it means that the Tax Offices cannot assess whether an expert report is conclusive and complete, even though an expert report is a conditio sine qua non for tax-law decision-making. The AOB concurs with the court's legal opinion in this matter.

The (at that time) Federal Ministry for Women, Families and Youth was therefore contacted about the matter in 2018. The Ministry's statement of opinion, pointed out that the Tax Offices could request the full version of an expert opinion for clarification purposes if there were grounds for concern about possible contradictions.

In the AOB's opinion, the only possibility of contradictions would be those arising from contradictory information from the applicant or from other findings. Contradictions in the expert report itself, or requests about the

comprehensibility of the expert report (there must be no contradictions or mere allegations), cannot be determined from the metadata.

Minister does not intend to alter the procedure

The AOB therefore obtained a further statement of opinion from the Federal Minister for Women, Family, Integration and the Media. The Minister argued that sending the metadata to Tax Office Austria was in compliance with the law, that there was no obligation to send the entire expert report, and that data protection aspects and limits on processing of particular categories of personal data, including health data, had to be duly taken into account. The Minister also made the following points: expert reports undergo checking as part of quality checks by the Sozialministeriumservice and its medical service, to ensure that the expert reports are conclusive, comprehensible and complete. Further checking by the Tax Offices is not required by law, and in any case would not be useful or prudent, as Tax Office employees do not have medical expertise; and this will continue to be the approach under the new FABIAN family allowance system.

Procedures for family allowance will undergo evaluation

Nonetheless, the Federal Minister for Women, Family, Integration and the Media did state that the procedures for granting higher-tier family allowance for children with significant disabilities will undergo analysis and evaluation, with the assistance of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. The goal will be to make the procedures simpler and more efficient for citizens and tax administrators. All aspects, including those raised by the AOB, will be taken into account in the evaluation.

The AOB hopes that solutions, which duly uphold the rule of law will be found.

3.5.6 Obstacles relating to Family Time Bonus Law („dad‘s month“)

Numerous obstacles to Family Bonus

Implementation of the Family Time Bonus Law (Familienzeitbonusgesetz) – the so-called “dad’s month” – has given rise to numerous complaints. Although fathers are encouraged to look after their children, take parental leave and help to provide care immediately after the birth, it is made unnecessarily difficult for families to obtain the Family Bonus. This bonus is granted if a young father wishes to take four weeks off from work to look after a newly born child. Only if unpaid work such as childcare is shared equally between women and men will true equality become a possibility. The dad’s month is a step towards achieving that. The Family Bonus is EUR 22.60 per day, i.e. around EUR 700 per month. Under employment law, the father is entitled to be exempted from work by his employer. That claim begins at the earliest on the day after the child’s birth and can be invoked until the end of the period during which the mother is prohibited from working. Errors in

filling out the application and the prerequisites for claiming are among the obstacles to disbursement.

Errors cannot be corrected

The birth of a child is often psychologically and physically challenging for parents. It is quite understandable that detailed rules may not be properly understood by affected individuals and there may be errors in filling out forms, even if info sheets explain the various requirements associated with the application. Application forms, which have been filled out incorrectly cannot be corrected later, however.

Delayed hospital discharge causes problems

This applies in particular to the data relating to the joint household requirement. On the application form, a date has to be indicated as the start of the dad's month. However, if the mother and child are discharged from hospital just one day later, the requirement that there be a joint household with the child is not met, which means that issuance of the Family Bonus will be refused for the entire period applied for. Many families have been annoyed to find that filling out the form inattentively can result in complete loss of the due benefit, as opposed to at least pro-rata payment.

New born child and parents not in a joint houshold

In one case, a father contacted the AOB after the birth of his daughter. The family moved into a new apartment two weeks after the birth. The child was therefore first registered at the old address. On the day of their move, the father and his wife registered their change of address online. At that point this was not (yet) possible for the new born child, because registration of the child at the old apartment had not been processed by the Registry Office. A short time later the daughter's registration data were corrected by the Municipal District Office. However, this did nothing to alter the fact that the Austrian Public Health Insurance Office refused to grant the Family Bonus, on the grounds that the joint household requirement was not met. The parents were very displeased that the authorities somehow believed that the couple had moved into the new apartment but had left their new born child at the old apartment for two weeks.

In another case, the discharge of a mother and child from hospital after the birth had been delayed because the wife, who had undergone brain surgery during pregnancy, had been advised while in hospital to undergo a further precautionary examination. Since the father and his employer had indicated the original discharge date as the start of family time, the joint household requirement was not met for three days, and the claim to dad's month was rejected.

Family time problematic for the self-employed

There was an even more complicated situation for a father who works part-time for Austrian Federal Railways and is insured by the Insurance Institution of Public-Sector Employees, Railways and Mining. In addition, he works as a freelance photographer and therefore has mandatory insurance with the Social Insurance Institution for the Self-Employed. Family time was meant to start in mid-September 2021. The prerequisite for this was

that he had to sign off from both public social insurance carriers. In the case of the Insurance Institution of Public-Sector Employees, Railways and Mining, this was not a problem. However, he was informed by the Social Insurance Institution for the Self-Employed that he could not sign off until the first of the month. He raised an objection, stating that this did not coincide with his family time. He was then advised to state that family time would begin as of the first of the month, or alternatively to sign off for two months.

In its statement of opinion, the Social Insurance Institution for the Self-Employed made the following arguments to the AOB: under insurance law, reporting suspension of trade for individual days in a month has no effect, as contributions have to be paid for the entire month, which is why applications for suspension of trade are often submitted for an entire month. Furthermore, applying for retroactive effect is also feasible. However, shortly before the birth of the child, the man had taken on assignments and at the beginning of the month had engaged in work, and for that reason retroactive suspension of trade for the entire month was no longer feasible. The father was unable to take time family time, which made him very disgruntled.

Militia service: an obstacle

In another case, in spring 2020, due to the COVID-19 pandemic, a man had been mobilised for duty on the border as militia soldier. In autumn 2020, his application for the Family Bonus was rejected. Being mobilised as militia soldier meant that he had had to interrupt his civilian work. That in turn meant that between the date of returning to work and the birth of his child, he had not worked for a sufficiently long period. A prerequisite for the Family Bonus is continuous gainful employment, while registered for health insurance and pension insurance, for 182 days immediately prior to the start of the claim period. The courts have ruled that militia service is not equivalent to gainful employment (see explicitly Austrian Supreme Court ruling dated 30 July 2019, 10ObS38/19i).

Minister does not intend to alter the procedure

The AOB submitted a request to the Federal Ministry for Women, Families, Youth and Integration for a legislative amendment. However, the Minister replied that the Ministry is not seeking a legislative amendment in this matter.

3.6 Finances

Introduction

In 2021, the AOB received 357 complaints concerning areas relating to the Federal Ministry of Finance. Around one quarter of them were about the Austrian Federal Government's support measures for dealing with the financial impact of the COVID-19 pandemic. The majority were from proprietors of small businesses who had applied for financial support and were having difficulties in obtaining it in a timely manner. They complained that processing times for applications handled by COFAG (Covid-19-Finanzierungsagentur des Bundes GmbH), a company set up in order to provide support for the Austrian economy during the COVID-19 pandemic, were too long and hence were putting the survival of companies in jeopardy.

Switch to Tax Office Austria

The criticisms of the financial authorities' procedures were in many instances about the long duration of procedures and the difficulty of contacting the Tax Offices and caseworkers directly. There was also uncertainty over the switch from the locally competent (domicile) Tax Office to Tax Office Austria.

Another area causing concern is that there remains an unmet need among citizens for adequate information about taxation of (social insurance) pensions from Germany. There is detailed information about this on the Ministry website, but many of the individuals affected, particularly the elderly, were unable to access it.

Most of the enquiries and investigative proceedings were resolved within a few months, thanks to the Ministry's ongoing efforts to provide statements of opinion quickly.

3.6.1 COVID-19 financial support for businesses – Hardship Fund

The purpose of the Hardship Fund (Härtefallfonds) is to provide financial support to cover personal living costs for sole proprietorships, self-employed persons, independent contractors and small businesses affected by the COVID-19 pandemic. According to the guidelines issued by the Federal Ministry of Finance, a prerequisite for claiming financial support is an existing insurance relationship as defined in the Social Insurance Act (Sozialversicherungsgesetz), i.e. the Farmers' Social Insurance Act (Bauernsozialversicherungsgesetz), the Social Insurance Act for Self-Employed Persons in Trade and Commerce (Gewerbliches Sozialversicherungsgesetz), the Social Insurance Act for Self-employed Freelancers (Freiberuflichen-Sozialversicherungsgesetz), or with a

corresponding social insurance institution of the self-employed) and an Austrian social insurance number.

Cross-border commuters not eligible to apply

Persons who are exempt from mandatory insurance pursuant to EEC Regulation No. 1408/1971 and EU Regulation No. 883/2004 and who therefore cannot have an Austrian social insurance number, are not included and hence not entitled to submit applications. This affects in particular cross-border commuters who are in an employment relationship in another EU country and in addition are also entrepreneurs in Austria.

Ministry was unable to present convincing grounds

During the course of the AOB's investigative proceedings, the Ministry did not present convincing arguments to justify this unequal treatment. First, the AOB was informed that it was beyond the Ministry's sphere of responsibility to assess whether there were lawful exemptions from mandatory insurance under the health insurance system, and that it was therefore not possible to issue any statement about whether the pool of lawful applicants for the Hardship Fund was defined too narrowly.

The AOB argued that the issuer of the guidelines should take responsibility for assessing whether the defined prerequisites for claiming financial support were in conformity with EU legislation. The Austrian Court of Audit concurred with this view in its report on handling of financial support within the Hardship Fund ("Härtefallfonds – Förderabwicklung", Bund series 2021/9, p. 54). It recommended that the Ministry should "consistently take the EU legislation into account when defining the prerequisites for financial support as part of the financial support guidelines".

The Ministry then stated that the European Commission had already submitted an enquiry about whether issuance of an Austrian social insurance number for individuals from other EU member countries should be subject to the same prerequisites as for Austrian nationals, and that the competent Austria offices had answered that question in the affirmative. It argued that since the European Commission had not subsequently taken any further steps, one should proceed on the assumption that the rules for the Hardship Fund were in conformity with EU law.

When the AOB pointed out to the Ministry that the problem of cross-border commuters had not been included within the scope of the European Commission's enquiry, the Ministry merely stated that the prerequisite of having an Austrian social insurance number in order to participate in the Hardship Fund was an "essential component of the general targeting of the measure, and an effective instrument in combating fraud". It therefore refused to modify the guidelines for the Hardship Fund.

All that the AOB could then do was inform the affected persons about the possibility of submitting a complaint to the European Commission on grounds of suspected discrimination by the Republic of Austria.

3.6.2 Accounts Register and Accounts Inspection Act

Incomplete reporting by the bank

An heir was critical of the fact that in probate proceedings, the notaries who were functioning as court commissioners were unable to obtain information from the Accounts Register. After the probate proceedings were completed, he had found a savings book of the deceased, which despite a request had not been reported to the court commissioner by the bank (the reasons for this were unclear). He was now wondering if there were further savings books, which had also not been reported.

Under Section 38 of the Banking Act (Bankwesengesetz), court commissioners are entitled to obtain information indicating which accounts, securities accounts or savings books a deceased person held at a given bank, including the deposit amounts. As a general rule, enquiries are submitted not to all Austrian banks but just to those specified by the potential heirs.

Accounts Register: right to information and inspection

The Accounts Register operated by the fiscal authorities lists the accounts, security accounts, savings books and safe-deposit boxes of natural persons and companies in Austria. Public prosecutors, criminal courts, fiscal authorities and tax prosecution authorities as well as the Federal Tax Court have the right to information and inspection, but court commissioners do not.

Ministry of Justice welcomes proposal

In the AOB's proposal to the Federal Ministry of Finance that the group of those entitled to information should be broadened, the following arguments were made: probate proceedings would be speeded up; information from the Accounts Register would also guarantee the completeness of the information indicating which banks held assets of a deceased person; and probate creditors, in particular the persons entitled to mandatory legal portions, would benefit from the additional protection. The Federal Ministry of Justice, which the AOB had also contacted about the matter, welcomed the proposal.

Ministry of Finance refuses to implement the proposal

The Federal Ministry of Finance pointed out that as part of the implementation of the EU 4th/5th Anti-Money Laundering Directive, the Accounts Register is used in particular to prevent money-laundering and terrorism financing. It stated that making probate proceedings easier or tracking down the accounts or security accounts of deceased persons is not the objective, and therefore it does not intend to implement the proposal.

Gaps in the Ministry's arguments

The AOB intends to persevere with its arguments and takes the view that the Ministry's arguments are too limited in their scope. The Accounts Register is also used for purely tax-law purposes, in addition to the prevention of money-laundering and terrorism financing. According to the Ministry's website, the goal is to help ensure uniformity in the tax system and tax justice. The fiscal authorities can therefore obtain information

from the Accounts Register if they have doubts about whether tax returns are accurate, and to uphold the taxation system.

That is also evident from the introductory remarks to the draft version of the Accounts Register and Accounts Inspection Act (Kontenregister- und Konteneinschaugesetz), which states that the purpose of setting up an Accounts Register is to ensure that tax-law procedures are streamlined, economical and appropriate. The AOB therefore takes the view that if the Accounts Register is to be used to speed up tax-law procedures, why should it not also be used to speed up probate proceedings.

3.6.3 Citizens frustrated by differing legal opinions

An Upper Austrian man was faced with the following situation: pursuant to a court decision in probate proceedings, he had been granted the right to retrospectively submit an employee tax assessment request on behalf of the deceased. He contacted the AOB because the tax authorities had rejected the declarations that he had submitted, arguing that he was not entitled to submit such a request. A Lower Austrian woman faced a similar problem.

Tax Office decision caused uncertainty

Under the Non-Contentious Proceedings Act (Außerstreitgesetz), if an estate is indebted, a court can issue a decision to assign the assets to specific individual creditors. In the decision received by the Upper Austrian man, it was explicitly stated inter alia that "Mr N. N. is hereby authorised to submit any requests for assessment of wage tax and income tax on behalf of the estate with the competent Tax Office and to submit the relevant declarations". However, the Tax Office subsequently rejected the employee tax assessment request.

Ministry states that fiscal authorities are not bound by probate court decisions

The Federal Ministry of Finance, which was handling the matter, stated that the fiscal authorities do not consider themselves bound by probate court decisions and that the Federal Fiscal Code (Bundesabgabenordnung) must always be brought to bear on questions of legitimation under tax law.

Under Section 19 of the Federal Fiscal Code, the predecessor's rights and obligations pass to the successor only if there is universal legal succession. That includes the right to submit a declaration concerning an employee tax assessment. In the Ministry's opinion, universal legal succession is only present if the probate court has indicated at least one person as the heir on the certificate of inheritance. However, if an estate is transferred in lieu of payment, there is no devolution of property, and hence there is only singular legal succession.

Different Tax Offices, different arguments

Different arguments were offered by another Tax Office, in its grounds for rejecting the request of the Lower Austrian woman. It stated that the fiscal authorities should duly acknowledge rights granted by a probate

court, but only if the probate court explicitly stipulates that an employee tax assessment request is to be submitted on the deceased's behalf.

AOB requested clarification

The AOB contacted the Federal Ministry of Justice, who stated that the Federal Ministry of Finance's legal opinion on the matter was well known, that there were several cases where the fiscal authorities had argued that they were not bound by probate court decisions, and that there were differing legal opinions on the matter.

According to the Federal Ministry of Justice, it intends to discuss the matter with the Federal Ministry of Finance, but as of the date of this Annual Report there have not yet been any outcomes from the discussions.

3.6.4 Federal Ministry of Finance neglected to send notification about fee increase

Notification about increased fee for residence permit arrived late

Several individuals whose residence permit had to be reissued in 2020, for which they had already paid the specified fees, contacted the AOB because up to ten months later they were notified about a fee increase of EUR 105.70, which they were obligated to pay.

An apology was issued for the late demand, pointing out the following: the authorities with competence for implementation of the Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz) had been unaware of the amendments to the Fees Act (Gebührengesetz). The Federal Ministry of the Interior had not notified them until August 2020 about the fee increase, which had taken effect at the beginning of the year. In December 2020, instructions had been received from the Federal Ministry of the Interior to charge the affected applicants the differential amount.

Amendment to the Fees Act

Under the Tax Reform Act (Steuerreformgesetz) 2020, the Fees Act was amended as well. Effective 1 January 2020, the fee for first-time issuance of a residence permit was increased; the fee for a reissue was also increased. Evidently, during the period shortly before entry into force of the Tax Reform Act 2020, the authorities with competence for stipulating the fees had not been informed by the Federal Ministry of Finance, which is responsible for implementation of the Fees Act, nor by the Federal Ministry of the Interior, which is responsible for implementation of the Settlement and Residence Act.

Ministries claimed that providing information was not their responsibility

The Federal Ministry of Finance took the view that from an organisational standpoint the Federal Ministry of the Interior was to blame, as it is the supreme authority in charge of the settlement and residence authorities. The Federal Ministry of Finance stated that it had been the Federal Ministry of the Interior that had initiated the amendment to the Fees Act and the initiative had been implemented in legal terms in collaboration with the Federal Ministry of the Interior. The Federal Ministry of Finance

had not been notified until August 2020 that the settlement and residence authorities had for months still been applying the old legislation, with fees that were too low. The Federal Ministry of the Interior stated, however, that it had not been informed in a timely manner about the changes and that the Federal Ministry of Finance is responsible for Fees Act matters.

In the AOB's opinion, responsibility for providing timely information lay with the Federal Ministry of Finance, as it is responsible for implementation of the Fees Act. The AOB emphasised that it was unsatisfactory that so much time had elapsed between the date when the Federal Ministry of Finance became aware that incorrect fees had been charged in August 2020, and the date in December 2020 when the instructions were sent to the settlement and residence authorities to retroactively charge the differential amount.

3.6.5 Anger concerning overburdened FinanzHotline

Difficult to reach by telephone

In the middle of the year, the AOB received numerous complaints that it was impossible to reach the tax authorities by telephone, or only after long waiting times (30 minutes or longer). The complainants pointed out that the specific service number FinanzHotline was the only way to submit enquiries or request information, because walk-in appointments at Tax Offices were only possible under very problematic conditions, due to the COVID-19 pandemic.

The Federal Ministry of Finance explained that due to the pandemic, Tax Office service centres were only open for limited hours, and therefore more people were trying to get in contact via telephone. It stated that telephone calls were being received by employees throughout Austria, but that despite every effort, it was conceivable that there would be waiting times during daily business.

The Ministry also pointed out that a "coronavirus hotline" had to be set up for businesses, and as result the tax authorities' personnel capacity for receiving telephone enquiries was stretched to the limit.

Evidently, there was in some respects a causal link between a mass mailing regarding family allowance and the overburdening of the FinanzHotline. Complaints about the difficulty in reaching the tax authorities by phone decreased during the autumn. Nonetheless, the AOB had to inform the Finance Minister that in the interests of service-oriented administration, the tax authorities ought to provide guarantee that they are reachable by telephone without long waiting times.

3.6.6 Long processing times

The AOB received numerous complaints about the tax authorities' long processing times. The individuals affected were particularly unhappy that processing of employee tax assessments was taking longer than the six-month maximum stipulated in the Federal Fiscal Code (Bundesabgabenordnung). Once again, numerous citizens complained that in property sale transactions, there were delays in the tax authorities' processing of tax allocations for new owners. There were also complaints that Tax Offices and the Tax Ombudsman Service were not answering general enquiries, or only doing so after long delays.

The AOB is aware that for some time tax authority employees have been handling large volumes of work, including processing applications for support payments under the COVID-19 Aid Measures Package. Nonetheless, it is important to not fall behind with other general matters and tasks.

3.6.7 Automated employee tax assessment

No notification about employee tax assessment

At the beginning of 2021, a Viennese woman was surprised that she had not yet been notified that processing of her automated employee tax assessment for 2019 had been completed. In 2018, she had been duly notified. She therefore contacted the AOB.

The Federal Ministry of Finance stated that automated employee tax assessment is only carried out if, based on internal calculations, the person has a credit of over EUR 5. In 2019 that had not been the case for the complainant, and therefore no notification was sent.

AOB proposal

According to the section of the Ministry website about automated employee tax assessments, a notification is only sent the first time one uses the system. For subsequent years, the website merely states that no administrative notification is sent if the prerequisites for automated employee tax assessment are not met. However, taxpayers cannot simply guess whether the tax assessment has been carried out. The AOB therefore proposed that a notification ought to be sent if automated tax assessment is not being carried out.

Ministry refuses the recommendation

The Ministry refused, arguing that it would be contrary to the principle of streamlined implementation of legislation. There has been extensive media coverage about automated employee tax assessments as a service provided by the Ministry. The AOB therefore takes the view that the Ministry ought to send a brief notification letter, to ensure clarity for the individuals involved, and there should also be a general note or supplementary information on the Ministry website.

3.6.8 Amended deadline written by hand with no signature

A family from Graz complained that on a Tax Office request for supplementary information, the deadline for submitting the documents had been amended by hand. Aside from the handwritten amendment, there was nothing visibly or demonstrably indicating who had carried out the amendment.

The AOB asked the Finance Minister to ensure that in future, handwritten amendments carried out by tax authority employees on notifications should bear a signature or at least initials. The goal of this is to provide evidence, especially in instances where the purpose of the amendment is to amend a deadline.

3.6.9 Inadvertent failure to correct advance payment amounts

Legal remedy successful, but corrections not made

A Viennese woman received her 2019 income tax assessment, which stated that she owed a large amount of back tax, and also specified her advance income tax payments for subsequent years. In November 2020, her back tax amounts were significantly reduced via a legal remedy, but no corrections were made to her advance payments.

At first, the Federal Ministry of Finance stated the following: under current law, following a preliminary appeal decision, advance income tax payments cannot be automatically amended, especially if the advance payments decision remains uncontested.

It was only after the AOB pointed out that advance payment amendments can be made either by way of a specific request or ex officio that the woman's advance payments were reduced for 2021.

3.6.10 Tax Office forgot to disburse tax credit

The tax credit of a pensioner from Vienna had increased significantly as a result of a Federal Tax Court decision concerning her legal remedies. However, the tax authorities had not sent her the additional amount. The Federal Ministry of Finance admitted the inadvertent failure to disburse the amount and arranged for it to be sent immediately.

3.6.11 Incorrect name in tax authorities' database

A women in Burgenland complained that her last name had been amended in the FinanzOnline database without her knowledge and for no reason. The Federal Ministry of Finance stated that a technical error had arisen

during data matching with information from the Central Civil Registry. As a result, the woman's former last name had been used as her current last name. It had not been possible to rectify the error until the IT department had conducted a considerable amount of research.

The AOB could certainly see that rectifying the error had been a technically laborious task, but pointed out that the amount of time required, i.e. around three months, was too long.

3.6.12 Problem with FinanzOnline computer system

The AOB was contacted by a Lower Austrian woman who had tried to use FinanzOnline to file a submission request against an income tax decision, but had several times received an (inaccurate) error message.

The Federal Ministry of Finance pointed out that the "Amend a decision" function in FinanzOnline is an additional functionality, but unfortunately in some cases cannot be used. It stated that the Lower Austrian woman's technical problem had been resolved. Since the tax authorities have widely advertised the FinanzOnline portal, the AOB takes the view that they should also ensure that the advertised functionalities are always available and usable.

3.6.13 Incomplete instructions for filling out form

Handwritten information outside assigned boxes

On the employee tax assessment form L1, an Upper Austrian woman had written in additional information by hand, outside the assigned boxes. That information had not been duly taken into account in the tax assessment.

The Federal Ministry of Finance pointed out that because the forms are scanned in, the automated data processing system cannot read information that is written outside the designaed boxes, and that the additional manual handling required had necessitated considerable extra effort.

The AOB proposed that appropriate instructions should be added to the set of instructions for filling out the L1 form. The Ministry agreed to check whether that would be technically feasible.

3.6.14 Computer system sent unnecessary letter

The Tax Office sent an administrative notification to a formerly self-employed Tyrolean man instructing him to submit his 2019 income tax return. Since all of his 2019 income had been from an employment relationship, he used FinanzOnline to submit a request to move his tax number into his employee tax assessment. The only response from the tax authorities was a further

letter (this time with a threat of punishment) instructing him to submit an income tax return. He therefore contacted the AOB.

The Federal Ministry of Finance explained that his tax number had promptly been moved as requested, via an internal procedure at the Tax Office. It pointed out that there had been a block on processing at the Tax Office because of the COVID-19 pandemic, and that after the block had been lifted, the further letter had been sent out automatically by the computer system. At the AOB's request, the further letter was deleted from the man's tax file.

Notwithstanding the fact that the problem had been resolved, the AOB pointed out that when computer systems are used, it is important to guarantee correct results to avoid causing extra effort for taxpayers.

3.7 Interior

Introduction

1,934 cases

In 2021, the AOB handled 1,934 cases which were within the Federal Ministry of the Interior's enforcement jurisdiction. A total of 62% related to asylum law, settlement and residence law and immigration policing, 21% related to the police, 5% to the right of assembly, and 1.5% to civil status matters. Other complaints related to services law, gun permits and residence registration (2.7% in total). There were a few cases regarding the implementation of passport law, the Austrian Pyrotechnic Safety Act (Pyrotechnikgesetz), electoral law and association law.

Difficulties in filing submission request via *FinanzOnline*

The AOB initiated 19 ex-officio investigative proceedings, which were based, for example, on media reports, observations made by AOB commissions, information provided by unaffected persons and various individual complaints that were categorised as consisting of comparable subject matter. The topics of the investigations included official acts carried out by the police, federal reception and support services, detention at police detention centres, residence registration, gun permits, the right of assembly and law enforcement officers' salaries. The AOB found maladministration in four cases; three investigative proceedings have not yet been resolved.

Proceedings for obtaining a residence title

Once again, there was a significant increase in complaints about the length of residence permit proceedings. Vienna accounted for most of these complaints. Municipal department MA 35 is the largest settlement and residence authority in Austria. In 2021, a total of 1,077 persons (of which in Vienna: 981) submitted complaints, as compared with 336 in 2020 (of which in Vienna: 283) and 194 in 2019 (of which in Vienna: 134). In other words, the number of complaints in Vienna nearly tripled relative to 2020. For many years now, the AOB has drawn attention (particularly in reports to the Diet of Vienna) to shortcomings in the implementation of settlement and residence law, but the situation continues to deteriorate. In 2021, the competent Vienna City Councillor announced that additional staff will be brought in and organisational improvements will be made.

There was an overall decrease in the number of complaints concerning asylum proceedings. A total of 38 complaints related to the Federal Office for Immigration and Asylum as the authority of first instance; 190 complaints related to the Federal Administrative Court as the court for legal remedies (see chapter 3.7.1).

Domestic violence

There were ten complaints relating to domestic violence, mainly concerning barring orders and prohibitions to enter. On the one hand, there were individuals who had reported about domestic violence and complained that the police had taken insufficient action in this regard, while on the other hand there were individuals who reported domestic violence cases where

the police had taken action wrongly. There was one investigative proceeding that the AOB initiated ex officio.

An above-average number of complaints were about the right of assembly, mainly due to the demonstrations against COVID-19 measures. In total 90 complaints were submitted; however, 59 of them contained similar wording and had evidently been generated online or via social media using templates. These complaints criticised the conduct of law enforcement officers and asked the AOB to preventively intervene in planning and personnel decisions about the large-scale demonstration in Vienna on 6 March 2021.

Complaints about the police

A total of 408 persons complained about the police (2020: 294). Grounds for the complaints included failure to accept reports on the part of the police, poorly conducted investigations, inaction, rudeness, conduct during demonstrations, entries in the Criminal Records Registry and failure to provide information. There were also complaints about arrests, searches, seizures, traffic checks, failure to disclose ID numbers, barring orders and prohibitions to enter (domestic violence), police surveillance and pursuit, and complaints about proceedings under services law (see chapter 3.7.5).

The AOB found maladministration in 18 cases; in 104 investigative proceedings it found no maladministration. In 266 cases, the AOB was unable to deal with the complaint because proceedings were pending, or due to the absence of individual concern, or due to a court decision, or because no comprehensible or investigable account had been provided. In some cases, the investigative proceedings have not yet been concluded.

Allegations of mistreatment

The AOB received 23 complaints about mistreatment or humiliating treatment and initiated an ex-officio investigation. One case of maladministration was found. The table below provides an overview of allegations of mistreatment over the last ten years, which were either submitted to the AOB via individual complaints or underwent ex-officio investigation. The table also shows the number of cases of maladministration found.

Allegations of mistreatment		
Year	Number of complaints	Maladministration found
2021	23	1
2020	9	0
2019	20	0
2018	20	1
2017	10	1
2016	17	1
2015	6	3
2014	11	2
2013	9	0

2012	8	1
2011	7	0
TOTAL	**140**	**10**

Independent investigative authority still not set up

Since the AOB has only a limited mandate, in 2015 it issued a recommendation that an investigative authority independent of the police should be set up to investigate mistreatment allegations against law enforcement officers. The AOB has been observing progress in this matter closely in the subsequent years. In 2018, the Federal Ministry of the Interior, working in conjunction with the Federal Ministry of Justice, issued a new decree concerning approaches for dealing with mistreatment allegations. Under the current governmental programme there are plans to set up an independent investigative authority, and in 2021 the AOB once again gathered information about the current status of implementation (see chapter 3.7.2).

3.7.1 Asylum and immigration law

Federal Office for Immigration and Asylum: length of proceedings

24 complaints about length of asylum proceedings

The complaints about the length of asylum proceedings peaked in 2017, with 2,175 complaints, which was probably a result of refugee and migrant flows in 2015 and 2016. At that time, politicians reacted relatively quickly and brought in numerous additional staff at the Federal Office for Immigration and Asylum. Since then, the number of complaints has fallen sharply, partly because of the decrease in the number of asylum applications. In 2021, the AOB was contacted by 45 persons with complaints concerning the Federal Office for Immigration and Asylum; 24 of them were about the length of proceedings under the Asylum Act (Asylgesetz). Five of these complaints were justified, as the Federal Office for Immigration and Asylum had not duly fulfilled its duty to reach a decision. Some of the cases are described in greater detail below.

Proceedings at a standstill for nine months

A man from Yemen submitted an application for international protection in January 2020. Between February and June 2020, the Federal Office for Immigration and Asylum did not take any perceptible steps towards assessing the man's case. It is true that the special conditions under Section 2 of the Federal Act on Accompanying Measures for COVID-19 under Administrative Law (Verwaltungsrechtliches COVID-19-Begleitgesetz) made decision-making difficult for six weeks. However, that did not justify the delay of over four months. Between January and October 2021, the Federal Office took no further steps in the proceedings. In seeking to justify this, it stated that the political situation in Yemen was precarious and drew attention to the asylum applicant's military background. The AOB

found it unsatisfactory that the proceedings had come to a standstill for nine months.

Surrendered documents could not be found

In another case, where asylum proceedings had begun in 2016, a Russian family had had to surrender their passports and birth certificates. In subsequent appeal proceedings in December 2020, the Federal Administrative Court granted the family members a twelve-month residence permit. The family were therefore entitled to demand that the surrendered documents be returned, but during the eight-month period following the finding, the documents had not been returned. During the investigative proceedings, it was determined that since 2016 the documents had been held in the files of the Federal Office for Immigration and Asylum's Initial Reception Centre East, where initially they could not be found.

Slow proceedings in family reunification case

In a family reunification case, in November 2020 the entry applications of two Syrian women were forwarded to the Federal Office for Immigration and Asylum. It was not until April 2021 that the Federal Office took the first steps in proceedings and invited the father, who was submitting the claim for family reunification, to an interview. The Federal Office did not provide any reasons for the delay of over four months.

Shortcomings in proceedings under the Aliens' Police Act

The Federal Office for Immigration and Asylum not only implements the Asylum Act, it is also responsible for proceedings under the Aliens' Police Act (Fremdenpolizeigesetz). The AOB also found tardiness and shortcomings in the following proceedings:

Application for tolerated status took over two years

In January 2019, a man from Iraq submitted an application for tolerated status. In the proceedings, he did not submit his passport, and during his interviews, he gave conflicting information about its whereabouts. It was not until May 2021 that the Federal Office for Immigration and Asylum notified him about the outcome of the evidence-gathering process and that it was intending to reject his application for a tolerated-status card. For a total of two years, the Federal Office made no perceptible progress in the proceedings.

In September 2019, a Somalian man applied for a tolerated-status card and submitted his statement of grounds shortly after submitting his application. However, although he uploaded the documents via the Integrated Administration of Aliens system, they were not forwarded to the competent Regional Directorate. It was not until March 2020, when an association sent notification of power of attorney and requested that the proceedings be resolved, that the Federal Office for Immigration and Asylum sent a reminder about submission of the statement of grounds; however, after that it took barely any steps. It sent a notification that the matter would be resolved in the fourth quarter of 2021.

Tardiness in issuing alien passports and convention travel documents

A Russian woman submitted an application for a convention passport. Her application was received by the Federal Office for Immigration and Asylum in March 2021. It was not until the end of July that the Federal Office invited the woman to an interview in August 2021. Shortly thereafter, it issued the print order for the document. The decision-making period for issuing a convention passport is three months. The Federal Office exceeded that deadline by more than two months and stated that various challenges resulting from the COVID-19 pandemic were to blame for the delay. The AOB found maladministration because when the proceedings were in progress, decision-making periods had not been extended (as was to some extent the case in 2020) and there were no lockdowns.

A woman submitted an application for an alien passport from Venezuela. The application was received by the Federal Office for Immigration and Asylum in March 2021. It was not until October 2021 that the Federal Office notified the woman concerning the outcome of the evidence-gathering process. Thus, the Federal Office took three more months than the stipulated three-month decision-making period under the Passport Act (Passgesetz).

Documents of a deported man could not be found

Contrary to the assurances given by the staff at the Roßauer Lände police detention centre, when an Afghan man underwent forced return, he was not given back his original documents. He had surrendered the documents at his first interview at Initial Reception Centre West. After unsuccessfully seeking clarification from the Federal Office for Immigration and Asylum and the Vienna Police Department, the man's representative contacted the AOB. During the investigative proceedings, it became apparent that the documents had been incorrectly placed in a different file at Initial Reception Centre West. According to the Federal Ministry of the Interior, the Upper Austria Regional Directorate had not noticed the error until the file was received in May 2021. The AOB welcomed the fact that the documents were quickly forwarded to the man's representative. Nonetheless, the AOB submitted a proposal to the Ministry that Initial Reception Centre staff should be made aware of proper handling of filed documents. If the documents had been filed correctly, the laborious task of trying to locate the documents at various Federal Ministry of the Interior offices could have been avoided.

Request for cancellation of detention order

According to Supreme Administrative Court rulings, if an application is open, every party in proceedings is entitled to receive an administrative notification. That entitlement still applies even if the application is to be "merely rejected". In December 2019, the Federal Office for Immigration and Asylum issued a detention order to ensure that a man would leave Austria after his prison term. In December 2020, the man submitted a request to the Federal Office's Lower Austria Regional Directorate for cancellation of the detention order, which was not provided for by law. He was informed about the legal position but did not receive an administrative notification.

Since he was entitled to have the matter dealt with via proceedings, the Federal Office should have used an administrative notification to reject his request.

Proceedings for obtaining a residence permit

The settlement and residence authorities are responsible for conducting residence permit proceedings. The AOB has repeatedly found delays on the part of the Federal Office for Immigration and Asylum when the Federal Office participates in proceedings in cases where immigration police investigations have to be conducted or statements of opinion have to be issued, for example if residence has to be terminated. Similar problems arise in investigations into suspected fraudulent marriages of convenience with the aim of obtaining a residence permit, which have to be conducted by a Land Police Department. In such cases, Section 37 (4) of the Aliens' Police Act does not stipulate any concrete deadlines. When multiple different authorities are involved, friction arises, which delays proceedings and affects the individuals who have submitted the application.

Federal Office took no action for nearly a year

In February 2019, a Rumanian couple submitted a request to the municipal department MA 35 for issuance of certification of permanent residence. After a long delay, the Federal Office for Immigration and Asylum asked MA 35 to perform a residence termination assessment. After the letter from MA 35 was received by the Federal Office in March 2020, the latter opened residence termination proceedings. In June 2020, the Federal Office notified the couple about the outcome of the evidence-gathering process. In July 2020, their lawyer sent the Federal Office a statement of opinion concerning the outcome of the evidence-gathering process. After that, the Federal Office did not take any discernible steps in proceedings until mid-April 2021.

In January 2020 an American woman applied for a "Red-White-Red card plus" for her minor daughter. MA 35 took the view that the woman lacked the necessary financial resources to guarantee subsistence. In July 2020, it therefore asked the Federal Office to assess residence termination measures. The Federal Office did not respond until August 2021, despite having received several reminders.

Lack of communication between authorities

Delays may be due to poor communication and inadequate communication between MA 35 and the Federal Office. Proceedings are particularly slow if there are also delays in sending reminders.

In June 2020, a female student submitted an application for a "Red-White-Red card plus". In August 2020, MA 35 sent a notification to the Federal Office, since the applicant appeared to lack the financial resources to guarantee subsistence and accommodation. The Federal Office opened residence termination proceedings. In March 2021, MA 35 sent a reminder that a response was needed. One day later, the Federal Office halted the proceedings and informed MA 35 that given the woman's private and family

circumstances, a residence termination order was not going to be issued. Nonetheless, MA 35 was still of the opinion that a response was needed. It was only after the AOB intervened that the Federal Office in July 2021 once again notified MA 35 that the response had already been sent in March 2021. After that, MA 35 continued the proceedings.

No action for one year - no response to reminders

In November 2019, a woman applied for a "Student" residence permit. Because the prerequisites were not met, in February 2020, MA 35 asked the Federal Office to assess residence termination. The Federal Office opened proceedings in March 2020. In April 2020, the Federal Office for a second time sent the woman a notification about the outcome of the evidence-gathering process. However, it did not take any steps in proceedings for over a year, even though a reminder was received from MA 35 in January 2021. Moreover, it did not reply to an MA 35 request for an update on the status of proceedings. MA 35 was very slow in sending reminders, allowing several months to elapse between each reminder. A total of four reminders were sent. The Federal Office pointed out that two of them were not received, either via the Integrated Administration of Aliens system or via the physical files.

Conflicting information from MA 35 and the Federal Office

In March 2020, a man applied for extension of his "Red-White-Red card plus". At the end of September 2020, MA 35 contacted the Federal Office, as the applicant appeared to lack the financial resources to guarantee subsistence. At the beginning of September 2020, the Federal Office opened residence termination proceedings. During the AOB's investigative proceedings, the authorities sent conflicting statements of opinion. MA 35 stated that it had sent reminders in January and June 2021. The Federal Office stated that it had not received the June 2021 reminder. It was not until October 2021 that the Federal Office informed MA 35 that residence termination proceedings had been initiated and therefore the applicant had to be notified (including an opportunity for a statement of opinion).

In spring 2020, a woman applied to MA 35 for issuance of documentation of the right to residence under EU law for herself and her son. Because the prerequisites were not met, in August 2020, MA 35 asked the Federal Office to assess residence termination. Before the end of August 2020, the Federal Office opened residence termination proceedings. By April 2021, MA 35 had still not received any notification from the Federal Office, and therefore sent a reminder requesting an update on the status of proceedings. It was not until June 2021, that the Federal Office invited the woman to an interview, although in the meantime it had not taken any steps in the proceedings and had not responded to the single reminder from MA 35.

Measures for improvement

The Federal Office informed the AOB that various improvement measures have been taken in this area since 2019. The AOB acknowledged that the case described was an isolated case, but nonetheless once again asked the

Federal Office to assess and make further improvements to communication channels with MA 35.

In proceedings regarding extension of a residence permit in November 2020, since the prerequisites for issuance were not met, MA 35 contacted the Federal Office and requested a statement of opinion. Two months elapsed before the Federal Office dealt with the request via the Integrated Administration of Aliens system. MA 35 sent a first reminder in June 2021. In August 2021, the Federal Office informed MA 35 that residence termination proceedings had been opened.

Asylum seekers not provided with sufficient information about COVID-19 rules

In summer 2021, an association contacted the AOB to point out that asylum seekers living in reception conditions under the Basic Provision Agreement had not received sufficient information about the extent of COVID-19 entry bans. The AOB initiated an ex-officio investigation.

As described in Annual Report 2020 (volume "COVID-19", pp. 103 et seq.), the Federal Ministry of Social Affairs, Health, Care and Consumer Protection imposed a ban on entering business premises and other "specified places" to prevent the spread of the virus. From 16 March 2020 on, under Section 2 Part 1 of the COVID-19 Measures Act (COVID-19-Maßnahmengesetz), "entering public places" was prohibited, with few exceptions. Some members of the government announced via the media that people were only allowed to leave the house "for four purposes: to go outdoors, to get fresh air, to take a walk, or for sports activities", even though according to the text of the relevant regulation people were allowed to enter public places "outdoors on their own, with other people from the same household, or with pets" without limits on specified purposes (Section 2 Part 5 of the COVID-19 Measures Regulation – COVID-19-Maßnahmenverordnung).

Constitutional Court ruled that COVID-19 Measures Regulation was unlawful

In its ruling dated 14 July 2020 re V 363/2020, the Constitutional Court of Austria ruled that the limits on leaving the house in Sections 1 and 2 of the COVID-19 Measures Regulation were unlawful, because they went beyond the scope of the legal powers under the COVID-19 Measures Act.

The Federal Ministry of the Interior stated that individuals living under reception conditions had been sent an info sheet about COVID-19 rules in March and April 2020, and that the info sheet had been written based on the unlawful provisions in Federal Law Gazette II No. 98/2020 and the subsequent amendment. The Ministry complied with the AOB's request and prepared an info sheet in English, based on the state of legislation on 27 March 2020.

Failure to mention all the exceptions

The AOB found that in the info sheet, the only exceptions to the ban on entering public places were: fending off danger, or meeting basic everyday

needs. There was no mention of the possibility of leaving the house to provide care or assistance to individuals needing support. The info sheet did not contain any mention of the exception under Section 2 Part 5 of the COVID-19 Measures Regulation, not even the exception publicised by the Federal Government in the media that people could "get some fresh air or take a walk or do sports" outdoors (see Annual Report 2020, volume "COVID-19", p. 103 et seq.).

Inadequate info sheet: infringement of right to free movement

The info sheet failed to provide a comprehensive list of all of the permissible reasons for leaving the house. Moreover, threats were issued that failure to comply with the instructions would mean that pocket money payments would be withheld. The AOB pointed out that the affected individuals were unable to find out what the applicable rules were. It was unsatisfactory that the inadequate info sheet from the Federal Ministry of the Interior published in March and April 2020, which was based on an unlawful regulation, infringed the right to freedom of movement for asylum seekers living under reception conditions (Section 4 of the Basic Law on the General Rights of Nationals and Article 2 (2) of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms).

Asylum – length of appeal proceedings before Federal Administrative Court

190 complaints about the length of proceedings

In 2021 a total of 190 persons submitted complaints about the length of their asylum proceedings; 32 of them were complaining on behalf of themselves as well as on behalf of (one or more) family members. The number of complaints fell relative to 2020 (224). In 167 cases, the AOB found that the Federal Administrative Court had failed to duly uphold its decision-making duty and was thus tardy.

Most of the complaints were from asylum seekers from Afghanistan (63) Iran (35), Somalia (25) and Iraq (24). Other asylum seekers were from Syria, Turkey and various other countries.

„Oldest" proceedings: pending since 215

Four complaints were regarding proceedings from 2021, 21 from 2020, 22 from 2019, and 101 complaints were about proceedings still pending since 2018. A total of 27 complaints related to proceedings pending since 2017. Two people from Afghanistan complained about proceedings still pending since 2015. Despite these very long proceedings, the Federal Administrative Court did not provide any concrete time-frame for resolution of proceedings, nor did it explain the reasons for the long proceedings. In one case, the Court announced that there would be oral proceedings in December 2021, and in the second case, it vaguely raised the prospect of a hearing in 2022 and resolution of proceedings after that.

With regard to the long pending proceedings, the Court informed the AOB that judicial administrators have increasingly been monitoring the resolution of old proceedings, and that the competent court divisions

have been regularly notified about those proceedings and have received the necessary support via administrative measures, if needed. Those cases include proceedings, which were pending before the Court in 2017.

Tardiness complaints taking a long time to process

The AOB has frequently been critical of the fact that tardiness complaints take a long time to process (see most recently Annual Report 2020, volume "Monitoring Public Administration", p. 93). Additional burdens are placed on an asylum seeker if their case remains pending for a very long time: they receive no decision, as compared with those who already have a negative decision from the Federal Office for Immigration and Asylum in their hands and therefore can bring their case before the Federal Administrative Court. There may be tardiness on the part of the Federal Office, and also on the part of the Court, despite the fact that tardiness complaints are supposed to alleviate the situation.

In the Annual Report 2020 (volume "Monitoring Public Administration", p. 94) the AOB drew attention to two cases, which illustrate this problem. In the first of these cases, a Somalian man submitted a tardiness complaint in November 2016. The Federal Administrative Court informed him that he would have to wait for the outcome of criminal court proceedings and stated that resolution could reasonably be expected in summer 2020. Since that did not happen, the AOB once again contacted the Federal Administrative Court. The Court pointed out that a hearing was scheduled for November 2020 and that further steps would be taken after that. The proceedings were finally completed in November 2021, after five years. In the second case, a Libyan man submitted a tardiness complaint, which was received by the Federal Administrative Court in March 2017. The Court initially stated that there was a prospect that proceedings would be completed in January 2020. In June 2020, the proceedings had still not been completed, though (at least) a hearing was planned. In summer 2021, the Court stated that proceedings would probably be completed by the end of 2021. After four years, the proceedings had still not yet been completed.

Years of uncertainty

In another case, the Federal Office for Immigration and Asylum rejected an asylum application in October 2015. The asylum seeker brought an appeal before the Federal Administrative Court, which did not reach a decision until October 2019. The AOB drew attention to these long court proceedings in the Annual Report 2019. In 2019, the Court overturned the Federal Office's decision. In August 2020, the Ethiopian man brought a further appeal against the Federal Office's new decision, and the Court reached a decision on that in May 2021. In other words, the asylum proceedings took a total of just under six years.

Since 2013, the Federal Administrative Court (previously the Asylum Court) has regularly updated the AOB regarding the resolution of proceedings about which complaints have been submitted to the AOB. The table below

provides an overview of proceedings, which have been resolved in recent years.

Resolution of proceedings before the Federal Administrative Court		
Year	Number of complaints	Number of proceedings resolved
2021	189	61
2020	224	138
2019	268	221
2018	220	161
2017	265	164
2016	152	99
2015	238	115
2014	974	450
2013	683	368
TOTAL	**3,213**	**1,777**

3.7.2 Police

Dealing with mistreatment allegations

This year the AOB was again confronted with the issue of how the police and the Federal Ministry of the Interior deal with mistreatment allegations against law enforcement officers. The AOB has already proposed that an investigative authority independent of the police should be set up to ensure that allegations of mistreatment are handled in a manner satisfactory to both sides. This issue was also covered in subsequent Annual Reports (see most recently Annual Report 2020, volume "Monitoring Public Administration", p. 96).

Plan drawn up already in August 2020

The AOB is disappointed that the Ministry has not yet taken any steps towards this goal, but is aware that a working group met at the Ministry in summer 2020 and drew up a plan. Justifying this, the Ministry has pointed out that setting up the Directorate for State Protection and Intelligence (Direktion für Staatsschutz und Nachrichtendienst) – the successor to the Federal Office for the Protection of Constitution and Counterterrorism (Bundesamt für Verfassungsschutz und Terrorismusbekämpfung) – had to be prioritised, and recently also stated that further action will not be taken until "political consensus" has been reached.

AOB has not been invited to participate

The Ministry has not been willing to disclose to the AOB the minutes of the meeting held by the Ministry's experts, nor the aforementioned plan,

arguing that there is no legal basis in the Federal Constitution. Moreover, the Ministry has not taken the AOB up on its offer to become involved and provide its many years of experience in this area.

In November 2021, the AOB asked for information about a possible (partial) agreement at the political level and a schedule showing outcomes and implementation steps. The AOB would also like to know whether the Ministry wants NGOs to be involved in the planning of this independent investigative body. The Ministry has not provided any information about a schedule, but discussions have been held about optimum implementation. Once a concrete draft has been prepared, the Ministry intends to ensure that civil society also becomes involved.

Photos forwarded to the media

Man affected found his photograph in the newspaper

In 2015, acting on a request from the public prosecutors' office, the Regional Office for the Protection of Constitution and Counterterrorism conducted a house search at a man's home. During the search, a photograph of the man that was found on his mobile phone was seized. In his opinion, it was sent by law enforcement officers to a newspaper unlawfully. The newspaper published the photo and alleged a connection with terrorism.

Police reopened investigation

The AOB criticised the fact that although the police had conducted an investigation into how the photograph was forwarded to the media, there was no outcome from that investigation. It was only when the AOB intervened that the police reopened the investigation and submitted a report to the competent public prosecutors' office.

Information about investigation sent to employer

A man employed as a public servant complained that the police had sent his employer an "informational letter" about the fact that he had been the subject of a police investigation. As a result, his employer had opened disciplinary proceedings and imposed a disciplinary fine.

The letter contained information about how the man had driven a motor vehicle under the influence of alcohol, his aggressive behaviour and disturbance of the peace, as well as the imposition of a prohibition to enter. The man contested the allegations against him and took legal action. He was critical of the fact that the police had informed his employer about the criminal proceedings and asked the AOB to investigate the fact that the information had been forwarded.

The Federal Ministry of the Interior explained the conduct of the police by stating several times that the man's employer "had not found out about the police investigation until it had opened disciplinary proceedings". The Ministry stated that the employer had subsequently asked the police to

provide further information, and for that reason, the police had sent the employer the informational letter.

No legal justification for police conduct

When contacted by the AOB, the employer gave an account that contradicted the Ministry's version: it stated that the police, without being asked to do so, had notified the employer about the police investigation, whereupon the employer had asked the police to supply additional information. The AOB asked the Ministry to explain the legal grounds for the sending of the informational letter. The Ministry was not able to come up with any reasonable justification. The AOB then criticised the conduct of the police and designated it unlawful.

Key to door of building confiscated

A woman complained that during an official action on grounds of domestic violence, the police had confiscated not only her apartment key, but also her key to the door of the building.

Excessive measures when imposing prohibition to enter

The AOB investigation confirmed that this was true. As the Federal Ministry of the Interior itself admitted, when imposing the prohibition to enter, the law enforcement officers had taken excessive measures in confiscating the key to the door of the building. The law enforcement officers' action was unlawful in that regard, and the complaint was therefore justified. The Ministry stated explicitly that a meeting about the excessive measures had been held with the law enforcement officers in question, to clarify the matter.

Police did not believe statements made by children

Children felt threatened by man

A worried mother contacted the AOB because the police did not believe statements made by her child and other children and had refused to take evidence from the children. According to the mother's statement, a man had threatened the children with a belt. The children had run home, and the parents had then notified the police.

Two law enforcement offices questioned the four boys and stated that evidence would be taken the following day. After the law enforcement officers had questioned the man, there was in fact no taking of evidence from the children the next day. Moreover, the police stated to the public prosecutors' office that the worried mother's son had merely believed he had seen a belt, and they had therefore proceeded on the assumption that the man's behaviour was not criminal. The police took the view that the children had mistakenly believed that a lanyard hanging from the man's jacket was a belt. The public prosecutors' office then closed the investigation; the AOB was not surprised by this.

Police believed the man; not the children

The AOB found the views of the police unconvincing. The AOB pointed out that it was unsatisfactory to allege that the boy had "merely believed he

had seen a belt" and implausible to assert that the boy had confused a belt with a lanyard, as the boy had claimed to have seen both, according to his mother.

The police were unable to credibly explain why they believed the adult rather than the children. At any rate, the AOB was critical of the fact that no evidence had been taken from the parties involved, and that the police had submitted a report to the public prosecutors' office in such a way that the latter was compelled to close the investigation due to lack of substance.

Racist language when speaking to a member of the cleaning staff

Acting on an anonymous report, which alleged that a police commander at a police station had used racist language when speaking to a member of the cleaning staff, the AOB initiated an ex-officio investigation.

Police commander lacked social competence

The Federal Ministry of the Interior confirmed that the police commander had behaved improperly when interacting with a member of the cleaning staff. Allegedly, he had been quick-tempered and he had shouted at the member of the cleaning staff several times. However, the Ministry had been unable to confirm that racist remarks had been directed at the member of the cleaning staff. The AOB welcomed the fact that the police commander had attended an employee appraisal and had apologised to the member of the cleaning staff.

Erroneous assessment regarding initial suspicion

The AOB was contacted by a father with a minor daughter. In August 2021, she was in her bedroom when an unknown perpetrator used his fingers to part the blinds on the balcony on the first floor. The police were called and recorded the facts at the scene; however, they took the view that there were no grounds for initial suspicion of a criminal act, and therefore no further action was taken to preserve evidence.

Suspect apprehended

The Federal Ministry of the Interior admitted to the AOB that the law enforcement officers, when recording the facts at the scene, did not suspect a criminal offence, and therefore had not preserved evidence at the scene via securing of evidence. The law enforcement officers did, however, comprehensively document the facts, and search operations were initiated in an effort to locate the suspect. Later, the AOB was informed by the father that the suspect had subsequently been apprehended.

AOB welcomed upcoming measures to raise consciousness

The AOB criticised the law enforcement officers' erroneous assessment regarding initial suspicion. It welcomed the fact that in response to this case the Ministry announced various measures, including relevant training activities throughout the Land of Salzburg, and stated that the subject would be discussed at the next leadership meeting. Senior officers were

instructed to bring about improvements in reporting and raise awareness of the issue amongst law enforcement officers.

Improper stop using loudspeaker system

A man complained that law enforcement officers had acted improperly when attempting to stop two people for a traffic violation.

Loudspeaker system used to stop pedestrians

According to the AOB investigation, due to prevailing traffic conditions the driver of a police vehicle had stopped at a red light in front of a pedestrian crossing while a group of pedestrians crossed the street. The last two pedestrians ignored the fact that the pedestrian crossing signal was turning red. The law enforcement officers used hand signals to instruct the pedestrians to stop, but since the pedestrians did not comply, the officers used their loudspeaker system.

Ministry acknowledged improper approach and promised conscious-raising measures

The Ministry of the Interior conceded that the officers had successfully stopped the pedestrians by using the loudspeaker system, but had in fact acted improperly by using it. The proper approach would have been to swiftly stop the pedestrians by following them on foot and speaking to them. That approach was perfectly feasible under the circumstances. The Ministry stated that the officers have duly undergone consciousness-raising measures concerning the matter. The AOB emphasised that the officers' approach was excessive and improper.

Long waiting times for public health officer

A woman submitted a complaint about the conduct of a law enforcement officer during a traffic check and while she was waiting for a public health officer at a police station in Vienna. She also complained about the long waiting time for the public health officer (two hours). The Federal Ministry of the Interior stated that due to the prioritisation system it had been impossible to reduce the waiting time. Because of the inappropriate remarks made, the Ministry ensured that a consciousness-raising meeting with the law enforcement officer was held.

Shortage of (public) health officers in Vienna

As part of preventive human rights monitoring, the AOB has become aware of the problem of long waiting times for (public) health officers (see NPM Report 2016, p. 149 et seq.) Waiting times prolong the time spent in a police station and thus the detention time. The AOB has frequently been critical of the situation, particularly in rural areas where medical personnel are deployed on a contract basis. For a while, the situation regarding police medical officers appeared to be less acute in Vienna, but in 2021 the AOB noticed a deterioration. The Ministry is committed to making this job more attractive and raising pay accordingly.

Driving license check for citizens with certified COVID-19 mask exemption

Repressive measures against mask-exempt individuals?

According to a media report, law enforcement officers in Steyr (Upper Austria) had received an order that individuals who for health reasons were mask-exempt should be reported to the driving licence authority. This affected individuals who chose to participate in demonstrations against COVID-19 measures. The affected individuals took the view that this reporting constituted a repressive measure, which was taken because they executed their right to freedom of expression. The AOB initiated an ex-officio investigation.

Criminal charges against law enforcement officer

The Federal Ministry of the Interior stated that the police order to check whether mask-exempt demonstrators met driving licence eligibility requirements - without any concrete evidence to suggest they did not - was only issued in Upper Austria and nowhere else. Criminal charges were brought against a law enforcement officer who had evidently issued the order, but the Linz public prosecutors' office did not pursue the charges.

Most proceedings halted

Driving licence proceedings for individuals about whom, on the date when checks were performed, there were no concrete indications that they lacked driving licence eligibility, as opposed to merely being mask-exempt, were halted. Proceedings continued (correctly) only for individuals who had been certified as having specific medical conditions detrimental to driving licence eligibility.

According to the Ministry's statement of opinion, after the AOB's intervention an online conference was held with the heads of legal affairs departments at all Land police departments. Notwithstanding the fact that the Ministry does not have direct jurisdiction for driving licence matters, the topic "was addressed in detail alongside other issues, to prevent similar approaches in the future".

No more groundless driving license checks

The AOB welcomed the Ministry's initiative. Particularly in exceptional situations such as the COVID-19 pandemic, it is important to avoid giving the impression that exercising fundamental rights such as freedom of expression could lead to repressive measures on the part of the authorities or the police.

Police officers did not wear masks when conducting COVID-19 checks

A field patrol was carrying out checks at a youth centre to ensure compliance with COVID-19 measures. Since the affected individuals were not wearing face masks, they were reported. One of the youths subsequently contacted the AOB and stated that the law enforcement officers had not been wearing face masks as well, which he considered unequal treatment.

The Federal Ministry of the Interior pointed out that the police are exempt from wearing face masks when implementing the COVID-19 Preventive

Measures Regulation (COVID-19-Schutzmaßnahmenverordnung). However, an internal instruction states that when driving a police vehicle, when interacting with other parties, and if during an official action it is impossible to maintain a distance of 1 metre, public security police officers are obligated to wear a face covering in the form of an FFP2 mask.

Police expected to set an example

Since the law enforcement officers had inadvertently left their FFP2 masks in the police vehicle and were carrying out the official action without wearing face masks, the complaint was justified. The AOB stated that the police ought to be aware that they are expected to set an example. It is certainly true that by law the aforementioned exemption does apply, but the Ministry showed that it is evidently aware of the importance of setting an example and issued the internal instruction.

Officers did not maintain stipulated distance when checking compliance with COVID-19 rules

A man complained that law enforcement officers had not maintained the stipulated distance when checking compliance with COVID-19 rules outside a bar in Linz.

Police expected to set an example

The Federal Ministry of the Interior confirmed that the officers had failed to maintain the necessary distance when checking identity and inspecting identity cards. Since the circumstances of the official action were not expected to result in disorder or escalation, it should have been perfectly possible for the officers to maintain the necessary distance, especially as they are expected to set an example with regard to compliance with COVID-19 measures.

The AOB criticised the fact that the officers had not maintained the necessary distance during the official action, and concurred with the Ministry that by setting an example, officers can help ensure that citizens comply with COVID-19 rules.

Lack of sensitivity when incident was reported

Daughter injured in road accident

A married couple contacted the AOB with the following concern. Their daughter was hurt in an accident when she was using the specialised transportation services for persons with disabilities. The couple had accompanied their daughter to the hospital and subsequently reported the incident to the police. While submitting the report the couple had been treated very rudely by the female police officer who was handling the matter.

The Federal Ministry of the Interior stated that because the incident was somewhat unusual, the law enforcement officers had discussed the incident amongst themselves, including the question of the form in which to report it to the public prosecutors' office. Because of the officers' discussion

amongst themselves about subsequent steps and the perceived rudeness of the female officer, the Ministry expressed sympathy towards the couple, who had not been able to obtain clarity about the officers' next steps in handling the matter. Nonetheless, recording of the details of the incident was carried out promptly, and the officers engaged in further discussion to ensure quick and efficient handling of the files.

Officers regretted bad impression

The Ministry responded by comprehensively addressing and discussing the matter with the officers involved. It was pointed out that the female officer had not intended to treat the couple disrespectfully, and she apologised for the fact that subjective perceptions of poor word choices or tone of voice had given that impression.

Matter comprehensively addressed and discussed

The AOB took the view that the parents had found themselves in an exceptional situation following their daughter's accident. It pointed out that the officers' conduct during the official action was insensitive. It also welcomed the fact that the official action had been comprehensively addressed and discussed.

Improper handling of reports

A man complained that a Vienna police station had improperly handled his reports about property damage. In April 2020, law enforcement officers had been sent to his residential address, as the lock on his garden gate was no longer working and could have been clogged up.

Officers did not bring Immediate Processing Form

The Federal Ministry of the Interior stated that reports about such matters are usually handled by filling out an Immediate Processing Form (Soforterledigungsformular). In cases of this nature, there is no formal taking of evidence from a witness, and therefore the man did not receive a summons to a scheduled hearing. However, the officers had not brought an Immediate Processing Form with them. The man was therefore assured that the form would be completed on his behalf and filed at the police station. He was asked to contact the police station later that day so that he could sign the Immediate Processing Form. He was then handed a report confirmation. The completed Immediate Processing Form was later mislaid at the police station. When he inquired about the matter, he was informed by an officer who was not involved in the official action that there was no report on file. Four months later the filed Immediate Processing Form was found, sent to the man for signing, and after final processing sent to the public prosecutors' office.

Same mistake happened again

Some time later, officers from the police station were summoned again to the man's residential address. The reason for the deployment was once again that an unknown person had caused property damage to the lock. Just as during the previous official action, the officers did not bring an Immediate Processing Form with them, and promised to fill in the form and

file it at the police station. This Immediate Processing Form too was mislaid and not found until several months later. The officers visited the man again, explained the situation and said that they regretted the improper processing.

Commitment to improvement

The Ministry admitted that the administration of the two reports had been improper. It stated that measures have been taken at the Vienna Police, including (further) training and provision of materials. The Ministry apologised for the mistakes and pointed out that the officers had been instructed to be more diligent in their work. The AOB found the multiple mistakes unsatisfactory but welcomed the improvement measures.

Administrative fee for issuing a loss report

A man complained about a law enforcement officer's conduct when charging an administrative fee for issuing a loss report. The man went to a Vienna police station to submit a loss report about his wallet and driving licence. He stated that he was unable to pay the EUR 4.20 administrative fee for the loss report, as he had no money on him due to the loss.

Fee could not be paid as money had been stolen

He was asked by the officer to telephone a friend to ask him to bring the money to the police station. After the friend had handed over the money at the police station, the officer handed over the loss report to the man.

With regard to the option of paying the amount via a method other than cash, the Federal Ministry of the Interior first cited Section 6 of the Federal Fiscal Code (Bundesabgabenordnung), which states that administrative fees can be paid in cash, via money order, using a debit or credit card, or via other cashless electronic payment methods.

Other methods aside from cash

An internal instruction about this states that charges and administrative fees should be paid in cash or using a credit or debit card, in order to avoid money order payments whenever possible. If the charges and administrative fees are not paid immediately, the person owing the fee should first be informally asked to pay the outstanding charges and administrative fees. Administrative fees are to be set forth in a costs notification.

Training measures for security police

The Ministry admitted that the relatively inexperienced officer who was issuing the loss report and the officer who was helping her charge the fee were unaware of these rules. The Ministry regretted that the unpleasant situation had arisen. Following the incident, the officers' departmental head drew their attention to the rules. Moreover, as a result of the case, general training measures were implemented for the Vienna Police. The complaint was justified, and the AOB welcomed the measures taken.

Interrogation records not sent

State Office of Criminal Investigation eventually sent the documents

A man complained that in December 2018 and January 2019, at Josefstadt correctional institution he had been interrogated four times by investigators from the State Office of Criminal Investigation, but had not received a copy of the interrogation records. After the AOB intervened, the State Office of Criminal Investigation ensured that the documents were sent to the man. The Federal Ministry of the Interior admitted that the State Office of Criminal Investigation had been late in sending the documents to the public prosecutors' office and agreed to hold a meeting with the official in question to clarify the matter.

Officer did not disclose her ID number

Officer ID number must be disclosed

A woman complained that the Tyrol Police Department had wrongly given her a penalty for improper use of a seatbelt. She also stated that the police officer had refused to disclose her officer ID number. According to the Federal Ministry of the Interior, the officer who was questioned during the investigative proceedings stated that the woman had not asked her to disclose her officer ID number. The Ministry took the view that there may have been a communication (foreign language) problem. It stated that meeting had been held with the officer to raise awareness, and that in cases of doubt, officers should write their officer ID number on the penalty notice or give the recipient their business card. The AOB criticised the fact that the officer did not disclose her officer ID number while performing the official act, but welcomed the measures that were taken.

Tardy deletion of data in police records system

A woman complained that data about her, which had been entered in the police records system in 1987 had not been deleted, despite the fact that the prerequisites for deletion were met.

The Federal Ministry of the Interior informed the AOB that according to the Carinthia Police Department, in December 1987 the woman had undergone a "police records procedure" at the Federal Police Directorate Klagenfurt, on the grounds that she had committed an offence involving unlawful handling of narcotics. After the AOB intervened, the Carinthia Police Department checked the prerequisites for deletion of data under the Data Protection Act (Datenschutzgesetz) and Section 73 of the Security Police Act (Sicherheitspolizeigesetz), and apologised that the data had not been deleted in a timely manner.

Data eventually deleted

The AOB was critical of the years of delay in deleting the data, but welcomed the fact that the Carinthia Police Department had taken the necessary steps to remedy the situation.

Fees not itemised

Extension of gun permit

A Vienna man submitted an application for extension of a gun permit. At the police station, he was given a blank money order with a proceedings number on it. A short time later, he received a phone call from the Vienna Police Department, informing him of the fee amount. He was not sent a written document with itemised fees. The Federal Ministry of the Interior informed the AOB that this is standard procedure and that usually no further written demand is sent.

Applicants should be offered the option of a printed receipt

The AOB takes the view that this procedure lacks transparency, as it is standard procedure in administrative proceedings to generate a receipt indicating the fees that have been paid. Even if the Vienna Police Department waives sending a receipt in order to reduce administrative costs, it ought to at least offer the applicant the option of requesting a printed receipt.

Costs of emergency medical helicopter deployment

Deployment following „cattle attack"

A man complained that he was charged for an emergency medical helicopter rescue deployment in a hazardous situation arising from a "cattle attack", despite the fact that he could have been rescued via motor vehicle. The AOB first contacted the Federal Ministry of the Interior, who stated that the deployment of the emergency medical helicopter has been carried out by the Tyrol Regional Control Centre and thus was outside the Ministry's sphere of decision-making responsibility.

Helicopter requested by *Land*, not by the Ministry

The AOB then contacted the regional government of Tyrol, which ascertained that the handling of the emergency call and the assignment of the case had departed from standard procedure, because the incident had been reported by the Regional Control Centre of the police. Since the situation was not life-threatening and there was no risk of personal injury, deploying an emergency medical helicopter would not have been unnecessary. If a person had been at risk, the rescue could have been carried out by the mountain rescue services or a helicopter from the Ministry of the Interior. At any rate, a decision was made to choose the fastest method for rescuing the individuals from the danger zone. Overall, coordination of the deployment did not function in an optimal manner. The operator of the Tyrol Regional Control Centre (Leitzentrale Tirol Gemeinnützige GesmbH) therefore offered to bear the costs of the helicopter deployment.

Offer to bear costs

The AOB welcomed the fact that a rapid and satisfactory solution had been found. The office of the Tyrol regional government also apologised for the awkward situation that had arisen for the family.

Tow-away costs after not-at-fault accident

Following a road accident, a Tyrolean man's car was left by the side of the road on a grass verge. The car was a total loss. The other driver was a minor with no driving licence who was driving without the vehicle owner's permission at 70 km/h in a residential area. He had also failed to stop at a stop sign.

Vehicle towed away for no reason following accident

In addition to the not-at-fault damage, there were tow-away costs of EUR 1,000, which were not covered by the insurance company. Because of the location in which the vehicle had been left and the fact that there was no leakage of fluids, towing away the vehicle had not been considered urgent. The Tyrolean man was unable to find out who had ordered the tow-away service.

Ministry apologised for inconvenience

When contacted by the AOB, the Federal Ministry of the Interior stated that the tow-away had been organised by a police officer. The Ministry apologised for the inconvenience caused and advised that a damages claim should be brought under the Liability of Public Bodies Act (Amtshaftungsgesetz) to cover the tow-away costs.

3.7.3 Residence registration

Residence registration certificate accepted without signature

The AOB received a complaint from a woman about an allegation concerning improper registration. Since no specific individual was affected, the AOB initiated an ex-officio investigation to assess a residence registration procedure in the municipality of Niederhollabrunn in 1999.

Ministry admitted error

The Federal Ministry of the Interior admitted that the municipality had at that time accepted the registration certificate without the landlord's signature and had processed the registration. Under Section 3 (3) of the Residence Registration Act (Meldegesetz), a properly filled-out residence registration certificate is required when registering residence with the registration authority. The name of the landlord must be written in upper case letters and the landlord must provide his/her signature.

The AOB found it unacceptable that the residence registration was processed even though the residence registration certificate had not been properly filled out. In 2021, as part of an ex-officio investigation, the municipality found that since no fraudulent registration had occurred, no further action was required.

Refusal to issue confirmation of principal domicile

In May 2021, the AOB received a complaint from a man who alleged that the registration authority in Bludenz had refused to issue him a principal domicile confirmation. Under Section 19a (1) of the Residence Registration Act, upon request the registration authority has to issue a homeless person a certification (in duplicate) that the municipality is his/her centre of social relations. To accomplish this, the person must credibly demonstrate that the municipality has been his/her sole centre of social relations for at least one month, and must indicate a place of contact, which he/she visits regularly.

Confirmation of principal domicile also applies to persons without accommodation

This legislation ensures that homeless persons are able to register. Under other provisions in the Residence Registration Act, the man would not have been able to register. Article 6 (3) of the Federal Constitutional Law provides a definition of the term "principal domicile", but does not require that the person be residing in accommodation, and instead focuses on the "centre of social relations" and "close relationship".

The city of Bludenz, as the registration authority, took the view that when the man met with the authority in 2021 he had not credibly demonstrated that Bludenz had been his centre of social relations for one month. Nevertheless, it did confirm that in July 2021 it had processed a principal domicile registration for the place of contact address provided by the applicant. It admitted that in doing so it had failed to notice that the landlord's signature was missing. The registration authority only relented after the third enquiry from the AOB. It admitted that the man had come to Bludenz city hall several times, and that it had therefore become credible that Bludenz was his centre of social relations. It also stated that it was intending to send the man a principal domicile confirmation.

City of Bludenz promised to send correct principal domicile confirmation

The AOB found it unacceptable that the authority had initially issued a standard principal domicile certification based on an incomplete residence registration certificate, and did not deem the prerequisites for principal domicile certification (for homeless persons) fulfilled until the beginning of October 2021. However, the AOB was pleased to note that the city of Bludenz had given assurance that the principal domicile certification would be sent as requested.

Re-registration with incorrect date

A young father with a family complained that the City of Vienna had re-registered his principal domicile as his secondary residence incorrectly. Because the registration date had been moved forward by two days, he was having problems with disbursement of childcare allowance (see Annual Report 2020, volume "COVID-19", p. 132).

Under residence registration law, the registration authority carries out the registration/de-registration as soon as it receives the properly completed residence registration certificate. Forward- or back-dating of registration procedures has no basis in law.

Data amended for properly submitted application

In its statement of opinion, the Federal Ministry of the Interior admitted that the Municipal District Office of Vienna's 3rd District had initially neglected to contact the man to clarify the matter, which is the usual approach in such cases. Fortunately, the Municipal District Office did correct the properly submitted application and amended the entry about the man's main/secondary residence in the Central Register of Residents, including entering the desired date.

Registration authority did not provide clear instructions

The AOB was contacted by a woman who complained that the municipality of Angern an der March had failed to promptly register her son at their new residential address. As a result, her childcare allowance had been cut.

The Federal Ministry of the Interior conceded that there had been poor communication between the Angern an der March municipal employee and the family. The municipality claimed that the reason the child had been re-registered one month after his parents was that it had not received a completed residence registration certificate.

Duty to explain

Under Section 13a of the General Administrative Procedure Act (Allgemeines Verwaltungsgesetz), the authority is usually supposed to give oral instructions about proceedings to individuals who are not represented by a legal professional, and must explain to them the immediate legal consequences of actions or omissions.

Authority did not provide proper instructions

The AOB took the view that the complaint was justified, as the registration authority had not given proper instructions. It also seemed plausible to the AOB that the woman had not been given a residence registration form when she met with the authority. The fact that the municipality of Angern an der March did not register the child with retroactive effect is compliant with current legislation and did not constitute maladministration.

3.7.4 Civil status matters

Delays in name change proceedings

Communication problems when submitting application

A man complained to the AOB that his name change proceedings had been pending since January 2020 and had not yet been completed. The Vienna-Brigittenau registry office confirmed that the man had met with them in the first quarter of 2020 and stated that at that time it was a purely informational meeting and no application had been submitted. It was not

until a follow-up enquiry was made in March 2021 that the name change proceedings were initiated. The Federal Ministry of the Interior stated with regard to the proceedings that the man had provided information that contradicted the information that had been supplied when he got married in 2007. The Ministry gave its assurance that the complex subject matter would soon be clarified and the proceedings would be completed.

Delay of over a year

The AOB found it unsatisfactory that the delays, which were evidently the result of a misunderstanding, meant that over a year elapsed before the application was processed. It also pointed out that if the applicant had submitted a follow-up enquiry sooner, the matter would have been clarified more quickly.

It is perfectly understandable that changes or amendments to civil registry entries need to be checked carefully if conflicting information is supplied and requires clarification. The registry office completed the proceedings in August 2021.

14-month delay

In another case, the authority handling the name change proceedings, the Wiener Neustadt District Authority, had still not reached a decision after 14 months. The Ministry stated that the long duration of the proceedings was due to the fact that the District Authority was endeavouring to resolve the applicant's concerns in a legally appropriate manner.

Setting a deadline would have prevented delays

The AOB found that after the application was received in May 2020, the District Authority had initially taken the standard procedural steps. In the period to August 2020 it sent the applicant two improvement requests. However, after that the District Authority took no action and did not provide the man with a deadline for submission of further required documents. This resulted in significant delays in proceedings, which the AOB found unsatisfactory.

Birth certificate requested

A man submitted a complaint about the Stadl-Paura registry office, which collected his birth certificate but did not even give him a confirmation about this.

Ministry admitted error and promised to resolve it

The Federal Ministry of the Interior admitted that when the municipality of Stadl-Paura had collected the man's birth certificate, which had been issued in February 2017, this was an error on the part of the authorities. In the register of foreign nationals, the entry indicating the man's citizenship as: "unknown". The Ministry promised that the Stadl-Paura registry office would return the birth certificate immediately.

Birth certificate returned

Under Section 35 (2) (2) of the Civil Status Law (Personenstandsgesetz), a civil status case, which arises in another country must be entered in the civil registry if it relates to a person whose citizenship is unknown and

whose habitual residence is in Austria. A few days after the investigative proceedings were completed, the man reported that he had already received the birth certificate. The AOB welcomed the fact that the registry office quickly corrected the error.

3.7.5 Services law

Long proceedings regarding reassessment of advancement key dates

For a number of years, the AOB has addressed concerns about salary reforms implemented by the Federal Ministry of the Interior and related complaints from law enforcement officers about reassessment of advancement key dates. In 2021, the AOB resolved four investigative proceedings in this area.

Ministry was awaiting European Court of Justice ruling

In the case of a retired police officer from Vorarlberg, the AOB found it unsatisfactory that the administrative authority had taken 17 months to reach a decision on his first application for reassessment of the advancement key date. To ensure that his claims did not become statute-barred, in October 2013 the man submitted a further request to the administrative authority, including references to the preliminary ruling proceedings of the Supreme Court of Justice (which had in the meantime become pending) and proceedings of the Federal Administrative Court before the European Court of Justice. When asked about the steps in proceedings, the Ministry stated that it had been awaiting the 8 May 2019 rulings of the European Court of Justice.

Under Section 38 of the General Administrative Procedure Act, unless the law states otherwise, an authority is entitled to reach a decision itself on initial questions which arise during preliminary proceedings and which would otherwise be decided upon by other administrative authorities or by the courts. If the initial question has already been dealt with in proceedings at an administrative authority or before a court, or if proceedings are pending simultaneously, it can also postpone the proceedings until a legally binding decision has been reached on the initial question.

Applicant did not receive any information

In the AOB's opinion, it would have been good administrative practice at least to have promptly confirmed receipt of the submission. After that, the administrative authority had two options: it should have deferred the proceedings via an administrative notification as defined in Section 38 of the General Administrative Procedure Act, or if de facto it was a question of simply waiting, it should have kept the man regularly updated about the progress of proceedings. In the AOB's view, since the administrative authority did not take any of these steps, it gave the impression that between October 2013 and May 2019 it had not been taking any action.

European Court of Justice ruling

The European Court of Justice rulings of 8 May 2019 (C-24/17 and C-396/17) stated that the Austrian legislation was age-discriminatory with regard to periods of service completed before the age of 18. The European Court of Justice had issued a ruling on Austrian legislation in 2009, and the Austrian legislator had several times unsuccessfully tried to ensure that, without incurring additional cost, there was no age-discrimination.

In 2019, the retired police officer submitted a further application for reassessment of his salary service age. The Ministry pointed out that because of the court ruling, salary reform had become necessary. It stated that the Federal Ministry for Arts, Culture, the Civil Service and Sport was responsible for drawing up procedural guidelines, and the Federal Ministry of the Interior was responsible for the technical and legal adaptations. It pointed out that training measures had taken place between October and December 2019, and between December 2019 and February 2020 a handling system for the numerous pending proceedings had been developed. With those factors in mind, the AOB found it reasonable that after receiving the new application, the Vorarlberg Police Department had completed the proceedings at the beginning of December 2020.

Delay of nearly six years

In a comparable case of a retired law enforcement officer from Salzburg, the AOB found that between September 2010 and June 2016 the Salzburg Police Department had not taken any action in services-law proceedings.

The AOB also dealt with two other cases relating to the length of proceedings regarding reassessment of the advancement key date under 2019 salary reform:

In investigative proceedings regarding a retired police officer from Upper Austria whose data had to be retrieved from the archive, the AOB found it credible that significant effort had been required to determine the comparison key date and generate the necessary documents. It was also reasonable to prioritise applications from law enforcement officers who were on the point of retiring. However, in the AOB's opinion that did not justify the fact that the Upper Austria Police Department had waited 16 months before viewing the file and continuing to process it.

In the case of a retired law enforcement officer from Salzburg, the AOB found it unsatisfactory that the application for reassessment of the advancement key date had initially been left unprocessed for four months until the administrative authority opened and viewed the file. After that, eight months elapsed before the Salzburg Police Department asked the man to provide a statement of opinion. In October 2020, the administrative authority was in possession of all the necessary documents for the decision, but did not complete the proceedings until the beginning of February 2021.

No information sent for months

In the AOB's view, in both cases it would have been appropriate to provide the applicants with general information about the reasons for the length of the proceedings, and to send regular reminders to the Federal Ministry for Arts, Culture, the Civil Service and Sport and to the competent department at the Federal Ministry of the Interior to ensure that the necessary documents for processing were made available.

Refusal to allow a further training

In 2019, a police officer wished to undergo training as an explosives detection dog handler, along with his service dog. Since his request to undergo training was refused, he contacted the AOB.

Reasons for refusal differed

Initially the Federal Ministry of the Interior admitted that the Lower Austria Police Department was suffering from a shortage of detection dogs. However, it stated that the man could not undergo explosives training because he had not completed another training module (tactics). The Ministry subsequently admitted that several other dog handlers had been accepted onto the explosives training course even though they too had not completed the tactics training module. Not having completed the tactics module was not a tenable argument for refusal of admittance onto the explosives course.

A further statement of opinion from the Ministry took a different line of argument: the man's age, which meant that the anticipated number of deployment hours was low, and the fact that in 2020 he had taken numerous sick days. This too was an untenable argument: as it became apparent when the AOB investigated the matter, that dog handlers over the age of 50 or even 55 have been or are being admitted onto supplementary training courses; and furthermore, the number of sick days taken in 2020 was irrelevant to the refusal to allow further training.

Shortage of explosives detection dogs at airport

The Ministry was unable to offer any convincing arguments for the refusal to admit the man onto the explosives dog handler course in 2019. The authority had therefore infringed its duty to manage its personnel in an objectively well-founded manner based on the principle of equal treatment. This infringement of duty was particularly significant, as the Ministry had explicitly admitted the shortage of explosives detection dogs at Vienna International Airport.

Delay in responding to workplace harassment allegations

The AOB was contacted by a man who criticised the fact that he had not received a response to his September 2020 letter. In his capacity as a staff representative, he had reported allegations of workplace harassment and discrimination to the administrative authority.

Ministry admitted slow response

During the investigative proceedings, the Federal Ministry of the Interior admitted that the employee had not received a prompt answer and apologised. The administrative authority had erroneously proceeded on the assumption that it had already dealt with the matter in a previous reply. The administrative authority ensured that the employee duly received a response.

3.8 Justice

Introduction

In the year under review, the AOB received 1,220 complaints concerning the justice system. Most issues raised concerned police departments and facilities for the detention of mentally ill offenders. Numerous complaints related to the excessive length of procedures with the Data Protection Authority.

As in previous years, complaints concerning the justice system mainly regarded the implementation of adult protection law. Some cases related to the duration of court proceedings.

3.8.1 Adult guardianship

Number of complaints down again

During the period under review, the number of complaints received by the AOB concerning adult guardianship fell once again, with a total of 101 complaints being submitted to the AOB.

Continuing criticism of changes of residence and a lack of money

As in previous years, these complaints concerned in particular court rulings – which cannot be investigated by the AOB – on the establishment of judicial adult guardianship measures, the exercise of adult guardianship powers and allegations concerning the inadequate monitoring of their exercise by the competent guardianship court. In a number of cases, it was criticised that persons were admitted to care facilities against their own wishes, or against those of their closest relatives, and their homes were vacated or even sold. In addition, it was claimed that some people received too little money for their personal requirements and were not provided with adequate medication or medical treatment. The persons affected and their relatives also complained that communication with adult guardians from outside the family was not satisfactory. However, there have been no delays on the part of guardianship courts in taking steps to monitor the activities of adult guardianship arrangements, which the AOB was able to control. No complaints were made concerning adult protection associations.

Positive effects of 2nd Adult Protection Law

The AOB considers the decline in the number of complaints concerning adult guardianship to be a result of the positive effects of the Second Adult Protection Law (2. Erwachsenenschutz-Gesetz), which entered into force on 1 July 2018.

3.8.2 Data Protection Authority

Staff shortages at Data Protection Authority

The AOB has dealt with a number of complaints concerning excessively long procedures with the Data Protection Authority. In this regard, the AOB also

noted that, in some cases, an unusually high rate of applications had been made to the authority by certain persons seeking legal recourse.

On a positive note, the AOB observed that the Data Protection Authority has been clearly taking targeted action to reduce its backlog and to end the – indeed excessively long – procedures. For example, between July and September 2021 the authority pursued a campaign with the aim of swiftly concluding procedures that had been pending for a long time.

3.8.3 Police departments and facilities for the detention of mentally ill offenders

Introduction

Consultation days and complaints

In the year under review, the AOB received 778 complaints from inmates at police departments and facilities for the detention of mentally ill offenders. A total of 13 consultation days were held at correctional institutions over the course of the year. These provided an opportunity for sharing expertise with management as well as with executive and non-executive staff. As part of this process, it came to the attention of the AOB – and was also apparent in the complaints received – that tensions in correctional institutions have been increasing as the COVID-19 pandemic has progressed, amongst both inmates as well as staff.

3.8.3.1 Suicide prevention

Numerous incidents

For a number of years, the Federal Ministry of Justice has informed the AOB promptly concerning any suicides or attempted suicides involving persons detained at police departments and facilities for the detention of mentally ill offenders. The number of reports more than tripled compared to 2019. There were 34 incidents in 2021 alone within regional court prisons, and ten in ordinary prisons. Two psychiatric clinics at which forensic patients are held reported one death each.

As a result of this concerning development, a contact discussion was held in the late autumn with the general directorate. The heads of the correctional institutions were then requested in writing to raise awareness amongst their staff.

Suicide of an inmate at the Vienna-Josefstadt correctional institution

Hanged before a life camera

In the middle of June 2021, an inmate hanged himself in a video-monitored inmate cell at the Vienna-Josefstadt correctional institution. The video monitoring unit noticed the suicide. Emergency assistance (including the

usage of a defibrillator) deployed immediately had to be halted after half an hour, when the emergency doctor declared the person dead.

Indication of suicide

The inmate had been moved to a video-monitored inmate cell three days before due to abnormal behaviour and threats that also included an indication of an intention to commit suicide. The psychiatric service had been unable to conduct an interview as the inmate was too aggressive, and the appointment scheduled had been postponed.

It was not clear to the AOB why, in view of the inmate's assertions ("I have a cable. I'm going to kill myself."), which resulted in his transfer to a video-monitored inmate cell, he was classified as VISCI "green" until the time of death.

VISCI (Viennese Instrument for Suicidality in Correctional Institutions) is a system for assessing the suicide risk of detainees. It operates according to a traffic light system: read means high risk, yellow indicates no immediate need for action, and green means that there is no risk. If there is a high risk, the individual concerned must be examined promptly by a specialist doctor, who then decides on the further course of action.

Failure of all specialist services

As reported by the Federal Ministry of Justice, the inmate attracted attention on 13 June 2021. He stated that he was going to kill himself, which, coupled with insults directed at prison guards and the fact that he was kicking against his cell door, resulted in his transfer to a specially secured cell. The doctor consulted did not specify any further action, and also did not require the VISCI "green" classification to be changed.

Danger underestimated

On the following day, the inmate was taken to be heard as a witness. After this, a discussion with the institution's psychiatrist was planned, although this had to be cancelled due to the inmate's refusal to cooperate. No action was taken by the psychological service either, with the result that the VISCI "green" status was maintained. Prison officers were thus under the impression that there was no acute danger of self-harm.

Mistake must not be repeated

The Federal Ministry of Justice concluded from the incident that the information chain for the recording of VISCI status needs to be improved. The management of the Vienna-Josefstadt correctional institution has subjected all procedures and communication structures to a review. New binding guidelines are expected to be adopted soon.

Duty to protect and duty of care violated

The AOB takes note of the actions taken. Finally, it refers to the case law of the European Court of Human Rights according to which the authorities must take all action "that could reasonably have been expected of them" where they knew or ought to have known that the life of a person under their care was subject to a "real and immediate risk" (judgment of 28 March 2017, application no. 78103/14 = NLMR 2017, pp. 103 et seq.). This did not occur in the present case.

Changes in the cell assignment programme – Federal Ministry of Justice

Critical time window

In the middle of November 2020, the Federal Ministry of Justice informed the AOB about the "adjustment of the cell assignment programme for deciding between individual or multiple-inmate cells" (VISCI decree). According to this programme, inmates with an acute suicide risk, who are thus classified as "red", may not at any time be left alone in a cell for multiple inmates.

The AOB welcomes the amendment of the decree. However, it came to the attention of the AOB that – in view of the additional costs of prison guards required in order to monitor inmates with a suicide risk – individual facility managers have been pressuring the psychological service to be rather "restrained" when applying a VISCI-red classification. This would call into question the efficacy of the changes.

Right to life in jeopardy

The Federal Ministry of Justice has not commented on which concomitant measures should be taken in order to prevent the psychological service from being exposed to such pressure, whilst also covering additional staff costs of prison guards associated with the increased need for monitoring. The Ministry has rather (only) indicated that the problem was discussed/addressed within the most recent meeting of prison wardens.

The Federal Ministry of Justice admitted that implementing the decree would be difficult, above all in shared accommodation, as checks as to where inmates are physically located (as they are not confined to cells) cannot be carried out, or are only possible at very high cost. However, since only a small proportion of suicides have occurred within shared accommodation, the fact that an inmate is housed in shared accommodation could in itself be regarded in general as a preventive factor.

In addition, the VISCI decree has been amended once again. Inmates classed as "red" who are held in units in which inmate cell doors are open for most of the time are exempt from the requirement of enhanced monitoring.

Concerns remain

The concerns voiced by the AOB – the specific case regarded the classification of an inmate who was not being held in shared accommodation – are by no means obsolete. It is planned to ask specialist services within personal discussions whether they feel that any pressure has been placed on them by the management of the facility or the chief prison guard to be "restrained" when applying a VISCI-red classification. It is necessary to ensure that specialist assessments are carried out and implemented in the proper manner.

3.8.3.2 Acute psychiatric care

Lack of acute psychiatric care – Sonnberg correctional institution

Whenever the AOB holds a consultation day, its attention is drawn to the lack of acute psychiatric care for inmates. Alongside the inmates affected, members of executive and non-executive staff are increasingly submitting urgent requests to the correctional institution to bring the unsustainable conditions to the attention of responsible decision makers.

Suicidal inmate

This has also occurred at Sonnberg correctional institution. A prisoner was moved to that institution after already attempting suicide twice within a short space of time at Simmering correctional institution.

Further instance of self-harm

Upon arrival at Sonnberg correctional institution, the prisoner asked that he be moved to a video-monitored inmate cell because he could not tolerate being with a cell mate. After injuring himself in the cell, he then had to be taken to a specially secured cell, where he soon continued with his pattern of behaviour, i.e. cutting his upper thigh with a broken drinking cup.

Acute psychosis

The court then ordered a 30-day admission to a specially secured cell. The situation deteriorated two days later, over the weekend. The inmate became psychotic, started to wail and talk nonsense, and also suffered from hallucinations. The prison doctor was called. He recommended immediate admission to a psychiatric unit. The medical superintendent was unavailable. There were no free beds at Göllersdorf correctional institution. The head of the prison hospital at Vienna-Josefstadt correctional institution, the Mauer-Öhling Regional Psychiatric Clinic, the Neuromed Campus Linz and Pavilion 23 at Baumgartner Höhe Hospital were contacted by telephone. All of these psychiatric facilities refused to admit the inmate on the grounds that they were fully occupied.

Life-threatening condition

It was eventually possible to find a specialist doctor, who arrived from Göllersdorf correctional institution situated a few kilometres away. Upon arrival, he found the patient hyperventilating, not in a condition to conduct a discussion and in a state of nervous anxiety. He was clearly not distant from self-harm.

Facility left on its own for hours

Until the doctor arrived, the inmate cried for hours and stated that he wished to speak with his mother. He started to engage in stereotypical repetitive movements, rocking backwards and forwards. In this dissociative condition, it was no longer possible to talk to him. It was only after the doctor had dealt with the acute crisis that the patient's condition stabilised somewhat.

Prison system is overstrained

According to assurances made by leading staff from the specialist service as well as the management of the facility, this case is symptomatic of

situations that repeatedly arise. The facility psychiatrist is only present at the correctional institution for a couple of hours twice a week. The facility does not have any care staff during the night, as well as on Saturdays, Sundays and public holidays. If an inmate is not in a condition to be transported and no facility is available to which he could be admitted as an in-patient, the only alternative is to keep him in a specially secured cell. A safety helmet is fitted in order to protect against head injuries. It is not possible to ensure even semi-adequate medical care or assistance.

Consequences of a lack of acute psychiatric care – St. Pölten correctional institution

Cut down hanging from the noose

At the start of December 2020, the NPM received a report concerning an inmate who had made repeated suicide attempts at St. Pölten correctional institution. The prisoner had tried to hang himself from the bars of a specially secured cell using tear-resistant clothing. The attempt was unsuccessful due to the provision of immediate emergency assistance by two prison guards.

Restraint inevitable

Due to his stated intention that he would be "100% dead today" and in view of the fact that the inmate had injured himself by cutting both lower arms and his stomach on sharp masonry in the specially secured cell, he was transferred to a basement detention room. As he caused further self-harm there by banging his head against the wall, his freedom of movement subsequently had to be restricted and, as stated in the report, "all safety measures were intensified for this purpose".

Correctional institution overstrained

The AOB was informed on various occasions, both by the management of St. Pölten correctional institution as well as by prison guards and non-executive staff that mentally ill persons cannot be handled and cared for appropriately in a correctional institution.

It is unclear why – according to the report – the prison doctor only arrived 1 ¾ hours after the provision of emergency assistance, why a medical examination was not carried out at an earlier stage and also why it was not decided to transfer the inmate to a public psychiatric hospital.

The Federal Ministry of Justice initially disputed the assertion that the doctor only saw the inmate at 1.15 p.m. It was asserted that the incorrect time had been indicated. In actual fact, the Ministry claimed that the doctor had examined the inmate at 12.00 p.m., and then left the facility at 1.15 p.m.

Medical examination too late

It is not possible to conclude whether the medical examination relating to the acts of self-harm caused by the inmate to himself was carried out at the appropriate time, as it is not apparent from the documents submitted

how severe the injuries were. However, in view of the fact not only that there were injuries requiring attention, but also that the inmate was found hanging from the bars at 11.35 a.m. and had to be cut down from this position by staff, it would appear that the doctor arrived too late.

Psychological support inadequate

The Federal Ministry of Justice stated that the transfer of an inmate to a specially secured cell is always reported to the psychological service. Depending upon the assessment of the inmate's safety, an on-site interview is offered as quickly as possible. It is conceded that the video interpreting system could not be used in this case, as the specially secured cells at St. Pölten correctional institution are located in the basement. However, the statement fails to consider the causes and how a suicide attempt could have been prevented.

When asked after the incident what could have helped him not to attempt suicide, the inmate stated: "If I could have spoken to somebody and explained what I was thinking, if someone had listened to me. As I don't speak German that wasn't possible".

No overtime pay for guard duty in hospital – Ried im Innkreis correctional institution

Problem throughout Austria

The AOB was informed concerning shortcomings in acute psychiatric care for inmates also during consultation days in Upper Austria. Whilst staff at Suben correctional institution stated that there was no assistance at all and they were left to their own devices, staff at Ried im Innkreis correctional institution complained that they had to manage the need for additional staff in relation to guard duty in hospital themselves.

Acute suicidal tendencies

Reference was made for example to the situation of an inmate who was admitted to Ried im Innkreis correctional institution in August 2021. Emergency intervention was already required two days after his admission. A psychological interview was held in the inmate's cell in the presence of two prison officers and the qualified nurse. The prisoner lay rigid in bed, shaking his head. After being spoken to, he started to hyperventilate and could not be calmed down.

First transfer

Due to the acute risk of suicide, the generally unstable mental condition and the refusal of any medical treatment, the inmate was admitted to the psychiatric unit in Braunau for one week. After this, he spent time at Baumgartner Höhe Hospital. He was returned to Ried im Innkreis correctional institution in the middle of September 2021.

During an interview, the inmate indicated that he had not been eating for three days and refused to take his medication. As self-harming behaviour

continued even in a specially secured inmate cell, the medical superintendent was contacted once again with a view to his transfer to Braunau Hospital.

Guard duty

Since the end of May 2021, Braunau Hospital has been providing urgent psychiatric support to prisoners at acute risk of harming themselves or others. Two prison guards must be present at all times whenever a patient is admitted. Admission occurs on the directions of a doctor.

Staff constantly disgruntled

In this case when the patients were admitted, they were guarded by two prison guards, as agreed. As explained to the Federal Ministry of Justice, the overtime for August 2021 arising in this regard was due to a total of three deployments of guards to hospitals. Although the general directorate expressed its thanks to the guards, it also stated that "nonetheless, every effort will have to be made to comply with the overtime quota by the end of the year". It is self-evident that, in view of their duties in everyday prison life, this approach was not particularly appreciated by the guards involved.

Fitness to undergo detention and admission of persons with mental illnesses – Vienna-Josefstadt correctional institution

At the end of February 2021, the AOB was informed concerning a 20-year-old individual in pre-trial custody. According to psychiatric reports, the young woman suffered from a combination of paranoid schizophrenia and low intelligence. She was receiving appropriate medication.

Indescribable conditions

The inmate suffered from a significant developmental delay. On account of her antisocial behaviour, it was not feasible, or indeed reasonable for other inmates, to keep her in a communal cell. She refused to follow any rules. Alongside bodily hygiene, living in a closed space represented a major challenge for her. Her inmate cell was often smeared with faeces and remnants of food. She was dependent on assistance in order to carry out all acts. Due to her illness, the woman was unable to focus her attention on anything for longer than ten minutes. It proved to be difficult to provide therapy or socio-pedagogical support to her. She hardly spoke.

Living on the floor

Since the inmate could not be admitted to regular detention, she was held for seven months in an isolation cell in the women's wing, which was monitored in real time. This inmate cell is not fitted in the same way as a normal inmate cell. It only has a mattress placed on the floor as well as a cushion and a blanket. There is no table or chair.

Locked away for seven months

The inmate took her meals sitting on the floor for months. She did not have any contact with other inmates and spent 24 hours a day in isolation without any distraction. The only contact she had was with the staff who supported her in relation to personal hygiene, as well as the department's officers.

After visiting the inmate cell, the AOB stressed to the prison warden, and subsequently to the Federal Ministry of Justice, that this type of accommodation (including video monitoring lasting for more than seven months) was unacceptable from a human rights standpoint. It was also questionable whether the inmate was fit to undergo detention at all.

Structural problem

This case may be an exceptional one. However, the AOB is being contacted with increasing frequency concerning the fitness to undergo detention of persons who are not suitable for the normal penal system due to mental disorders or illnesses, or low intelligence. In most cases, it is prison guards or carers who contact the AOB out of compassion for the people under their responsibility, who are unable to speak for themselves.

Accommodating and supporting these people whilst upholding their rights and dignity is challenging. When doing so the correctional institutions reach their limits. They lack structural facilities as well as trained staff. In most cases, these people are locked away in individual cells. It is then largely left to the department staff how to deal with them. It is clear that carers often feel left alone in this difficult situation.

Enormous efforts

The young woman was later transferred to Schwarzau correctional institution after the enforcement court had rejected a deferral of detention. The inmate is expected to be held in an inmate cell in the infirmary of Schwarzau correctional institution until her release in the autumn of 2022. The Federal Ministry of Justice assures that everyday life in detention is going well, that the woman is receiving basic care and that she receives individual socio-pedagogical support in the infirmary. The main aim of support is to enable the inmate to internalise the necessary morning hygiene, which is always the same, and at some point to attend to it herself without any assistance.

Another goal is to get the prisoner to be enthusiastic about anything and to arouse her interest. Due to her severely low intelligence, the daily routine has to be completely structured, and the inmate requires support. Moreover, constant attention has to be paid to the cleanliness of the inmate cell; she receives support in this regard. Regrettably, cognitive support is not really possible as the inmate does not know how to read or write, and refuses to engage in any meaningful activity or occupation.

Need for care also after detention

In socio-pedagogical terms, the woman is in any case reliant on constant, basic care in line with her disability, which does not overwhelm her. Simple and structured conversations are possible, although her comprehension is limited, her ability to concentrate is reduced, and she does not always have spatial and temporal awareness. The inmate requires intensive social, psychological and psychiatric care and support in relation to everyday life in detention, and will continue to need care and support also after her release.

Accordingly, the timely organisation of appropriate residential options for the post-detention period is considered to be particularly important.

3.8.3.3 Infrastructural fixtures and fittings

Potential danger represented by a specially secured inmate cell – Schwarzau correctional institution

Numerous concerns

As a routine matter, the only specially secured inmate cell was visited during the consultation day held at the end of May 2021. It is situated on the first floor of the normal wing. Although the cell is only used occasionally for a couple of hours at a time, a range of improvements were suggested: first of all, the iron frame on which the mattress is placed should be removed and replaced by a sofa-bed. The chair and table, also made of steel, bolted to the floor and wall, which could also be used in order to self-harm, should also be removed.

High potential danger

In addition, the massive, uncovered iron struts were noted, which serve to separate the anteroom from the actual inmate cell, cover the heater and also act as a specially-made fitting for the wash basin taps. A person could use any of these struts to strangle themselves using tear-resistant clothing.

Risk of injury in security cells – Vienna-Josefstadt correctional institution

After a complaint by an inmate concerning a period spent in a cell, in February 2021 the AOB visited the specially secured cells in the secure wing. Various deficiencies were noted in terms of how they were fitted out.

Multiple shortcomings

For instance, the subsequent instalment of a grille intended to prevent inmates from reaching the window represented a source of danger. A person could use these iron struts to strangle themselves using tear-resistant clothing. The inmate cell tiling also represents a source of danger as it has been repeatedly damaged and inmates could cause serious harm to themselves using broken, sharp-edged parts of ceramic tiles. It was also suggested that the mattress, around 10 cm high, placed on the floor be exchanged for a sofa-bed, as is now standard in many correctional institutions.

Acute source of danger in a video-monitored inmate cell – Krems correctional institution

Flawless rooms

After a consultation day held in March 2021 the AOB visited high-security cells at Krems correctional institution. The specially secured cells were in an impeccable condition. The rooms are generously sized and equipped with

a bright, friendly floor covering. Each room also contains a sofa-bed. The walls are painted with washable paint. Inmates have independent access to fresh water in the inmate cell.

The iron struts incorporated into the grille separating the inmate cell from an anteroom have been placed behind Plexiglas screens. The WC has been partially obscured so that inmates are only visible in their general outline on the monitoring camera. A vandal-resistant radio has been incorporated into the wall alongside the emergency call button, which allows inmates the option of choosing between three pre-set stations and also to adjust the volume.

Acute source of danger

Although no shortcomings were found in the specially secured inmate cells, an acute source of danger was identified in the video-monitored inmate cell from the guard's room when inspecting the monitor. A suspended ceiling has been installed in this cell around the WC area. The suspended ceiling is supported by the room ceiling via a metal bar around 30 cm long, which is uncovered and could be used in order to secure a noose. The AOB recommended that this source of danger be neutralised as soon as possible.

Seriously inadequate condition of an inmate cell – Suben correctional institution

Iron reinforcement in the floor

For the purpose of examining a complaint the AOB visited a cell for multiple inmates at Suben correctional institution. When entering the inmate cell, one literally stumbles over four iron struts, which jut out from the floor by around 3–4 cm in the middle of the cell. A double bed had originally been attached to them, which had subsequently been removed. It had been forgotten to cut these struts, which had been concreted in, down to a level flush with the floor.

Significant risk of injury

Two of these struts had previously been covered on a makeshift basis with adhesive tape, which had worn away in the meantime. The other two struts were protruding from the floor entirely unsecured. Since most of the inmates in the inmate cell wear sandals, these trip hazards represent a direct risk of injury.

The WC area contained a switch, which was not connected to an electrical socket and there was a crack in the ceramic toilet. The inmate cell also contained a broken chair including a broken iron part, which had already been reported by the inmates. Suben correctional institution assured that the shortcomings would be rectified quickly.

Size and condition of an inmate cell – Vienna-Simmering correctional institution

Sleeping with an open window

At the consultation day held in February 2021, two inmates objected to the size and condition of the inmate cell in which they were being held. The cell was so small that they did not receive sufficient air during the night and had to keep the window open. Given the winter temperatures prevailing at the time, it then became extremely cold.

Tiny inmate cell

As was apparent from the subsequent visit, the inmate cell had been designed for one person only. However, due to the high pressure on occupancy rates, it had been necessary to accommodate two people in it. The two inmates only had one chair and a tiny table. On a positive note, the cell contained lockable cabinets. Most of the inmate cell was occupied by a bunkbed, although the ladder and guardrail were turned towards the wall, and were thus unusable. The bed's head/foot section was located directly in front of the window, which is closable. At the time of the visit (around 5.00 p.m.), the radiator was lukewarm.

It is clearly apparent that, due to the size of the room, the air is not sufficient for two inmates. If the window has to be opened, they must lie with either their head or their feet directly in front of the open window.

Bunkbed turned around

The wing staff indicated that the size of the inmate cell in question was no different from that of the other inmate cells in the building, which are also occupied by two people. The provision of lockable cupboards is not (yet) standard. It was stated that the bunkbed would be turned around the following day in order to enable safe usage of the top bunk.

Condition of an inmate cell – Sonnberg correctional institution

Broken window

At the consultation day held in the middle of March 2021, an inmate objected that it was not possible to close the only window in a cell for multiple inmates. This meant that it was cold during the night. As was established during a subsequent visit, the window overlooking the internal yard was a wooden window and the two sashes had become warped; as such, they needed to be replaced. The person responsible for the wing noted the deficit.

Consequences of over-occupancy

In addition, the inmate cell appeared to be in a shabby condition. It was over-occupied with four inmates sleeping in two bunkbeds, as was clear from the fact that not every occupant had their own chair, with the result that some had to eat meals sitting on their beds. Officers in the building also objected to the cramped inmate cells, which did guarantee only some privacy to inmates and led to tensions amongst the prisoners. In addition,

transition units by their nature have a high turnover, which results in greater wear and tear of the inventory.

Fitting out of the mother and child wing – Schwarzau correctional institution

Shabby condition of the common room

At the end of May 2021, the AOB visited the recreation room on the mother and child wing, following complaints by inmates about its condition. The AOB noted that the floor was warped and torn in places. This represented a trip hazard especially for small children. The veneer on sideboards installed in the recreation room was flaking off and leaving behind sharp edges. The AOB asked the management of the facility to rectify the position quickly by changing the floor and furniture.

Defective intercom system

It was also noted that the intercom system was broken. One inmate stated that she had reported this in writing several times to the official responsible for the wing, but that no repair had been carried out to date.

3.8.3.4 Living conditions

Poor sanitary condition of the exercise yard – Stein correctional institution

Overpowering stench

For more than a year, a very elderly inmate suffering from dementia emptied his urine from a plastic container out of the window of his ground-floor inmate cell into the internal yard of Stein correctional institution. This resulted in a significant stench. All inmates were exposed to the stench during their daily exercise. For more than a year, internal complaints made by inmates came to nothing until one prisoner contacted the AOB.

Clearly visible marks

After the AOB intervened, the contaminated areas were cleaned in the spring of 2021 with a high-pressure cleaner. The situation had been going on for so long that the stone surface had been thoroughly discoloured by the uric acid. During an unannounced follow-up visit at the start of June, the area of the yard affected was not smelling and was in a proper hygienic condition.

Incomprehensible neglect

Since the names of each of the inmates who had – repeatedly – objected had not been recorded and it was not possible to confirm that the complaints had been followed up within the facility, the Federal Ministry of Justice instructed the warden of Stein correctional institution to ensure a more careful management of complaints. It is unclear how not one single officer noticed the powerful stench when monitoring exercise.

Working during exercise time – Suben correctional institution

Evident discrimination

One prisoner complained that he had not been able to participate in exercise every day. He also worked at weekends in the bakery from 6.00 a.m. to 11.00

a.m. All other inmates from his section were entitled to time outdoors on Saturdays between 8.00 a.m. and 9.00 a.m. After this, inmates' cell doors were kept open for one hour. During this period it was possible to move freely throughout the wing before being locked up again.

The inmate considered himself to have been cheated of this "free time", which could be used in order to telephone friends and relatives. In addition, he was forced to share an inmate cell with nine prisoners. It was often stuffy in the cell. The inmate returned from work exhausted. The average temperature when working was 35°C. He missed the time in the fresh air.

Right must be exercisable

After considering the complaint, the management of Suben correctional institution stated that it would quickly take action to ensure that the inmate could participate in outdoor exercise as well as his right to spend time outdoors, granting him one hour each day to do so – weather permitting.

Water temperature of showers not adjustable – Hirtenberg correctional institution

One inmate objected that it was only possible to adjust the water pressure when showering at Hirtenberg correctional institution. It was not possible to adjust the water temperature.

Thermostats blocked

The Federal Ministry of Justice confirmed the freely accessible thermostat had been covered up in the shower rooms. Covers had been applied by the facility's own locksmith. They did not want inmates to be able to adjust the temperature. It had been set at between 35°C and 40°C, and thus pre-defined.

Fixed water temperature

In the view of the AOB, there is quite a significant fluctuation range already between 35°C and 40°C. Not everybody will want to wash with water of this temperature (e.g. during the summer). In the view of the AOB, the ability to adjust water temperature individually when showering is a standard that can also be expected in custody.

The Federal Ministry of Justice decided to allocate EUR 85,000 for installation work. Retrofitting of the total of eight bathrooms would be associated with a total investment cost of around EUR 160,000, taking into account incidental work (painting, tiles etc.). Since no complaints had previously been received concerning water temperature, the costs were considered to be disproportionate.

Control units must be reinstalled

The AOB maintained its criticism, especially as the freely accessible central temperature settings had been subsequently covered up, thus leaving inmates no opportunity at all to make adjustments appropriate to their circumstances.

In addition, the guarantee of an expected performance level must not be dependent upon the frequency of complaints. The AOB recommended retrofitting using the services of qualified inmates. This would not only mean cost-efficient building work, but would also help to achieve a higher level of occupation.

Sparse employment opportunities and criticism regarding food – Ried im Innkreis correctional institution

Recurring complaints

As previously in July 2018, a large number of inmates once again complained that the food was of poor quality and the portions given out were often too small at the consultation day in Ried im Innkreis correctional institution held at the start of October 2021. The problem was previously raised in the Annual Report 2018, although there had not been any improvement since then.

Food is delivered from Suben correctional institution, situated at a distance of around 30 km, where it is also prepared. Although it is possible to heat up food in the old kitchen of Ried correctional institution, meals are sometimes given out lukewarm.

Hungry inmates

Those heard during the consultation day also included a porter who is responsible for giving out food portions. He stated that a few days before dumplings with cabbage had been served, and that he had been supposed to feed forty people with a half-full saucepan of cabbage. They often help one another out in the building by asking on the other floors whether there is any extra food. However, on a number of occasions the amount of food available was not sufficient, which understandably caused resentment amongst inmates.

Lack of reciprocal understanding

The management of the facility confirmed that the food had occasionally been of poor quality and that portions had not been adequate. In order to provide appropriate records on this to Suben correctional institution, documentation is now being kept and photographs were provided wherever the quantity was insufficient, in particular for meals given out from a saucepan.

As previously in 2018, the AOB addressed the problem on the following day with the head of the kitchen at Suben correctional institution. He pointed out that he was required to comply with the directive concerning food when preparing meals, as well as other prescribed procedures. The current situation is unsatisfactory for both correctional institutions.

Too little work

A number of prisoners have also expressed a desire to perform work. Owing to the sparse employment opportunities, the proportion of inmates to whom a job can be assigned at Ried correctional institution is lower than

50%, which means that newly arrived inmates have to spend months on waiting lists. An increase in the employment rate is only feasible for day release prisoners; possible transfer to relaxed detention is a prerequisite for this.

As a result of spatial conditions, Ried correctional institution is unable to offer any employment aside from cleaning services, kitchen work and a facility business. The construction of a new workshop would end up occupying the only green areas on the site.

Unusual lunchtimes – Hirtenberg correctional institution

An inmate at Hirtenberg correctional institution objected that lunch starts to be given out on two days each week as early as 10.30 a.m. The Federal Ministry of Justice responded in the first instance that lunch is given out at the times indicated in the approved house rules, i.e. from Mondays to Thursdays at 1.15 p.m., on Fridays at 11.45 a.m., and at weekends and on public holidays at 10.30 a.m. It is stated that these times have been "adjusted in line with the timing requirements of facility management".

The AOB referred to its criticism previously voiced in 2014 and noted that facility management must be arranged in such a manner as to comply with legal requirements. According to the case law (Vienna Regional Criminal Court, 192 p. 79/16 = JSt–Slg. 2017/12), even 10.40 a.m. is not a usual time to eat lunch.

Following this, the house rules of Hirtenberg correctional institution were amended. The time when lunch is given out at weekends and on public holidays has been moved to 11.00 a.m.

Offer of goods and display of prices in the prison kiosk – Schwarzau correctional institution

Expensive branded products

In May 2021, numerous inmates complained of the product range and prices in the prison kiosk. On the same day, the AOB took a closer look at the goods on sale in the kiosk and compared the prices. This established that only highly-priced branded products of certain consumer goods and toiletries were being offered.

Low level of choice

It is important in particular for a target public with limited financial means also to be offered a cheaper alternative (e.g. own brand) in order to have a choice. If this is not possible on account of the limited space available, the offer of a low-cost product should be preferred. The Federal Ministry of Justice promised to pass this recommendation on to operators.

Offers under the table

Some inmates also stated that there were "hidden" goods on offer in the prison kiosk, which were only made available by sales staff to selected

prospective buyers. One example was a detergent that was offered exclusively to these customers.

Lack of transparency

The AOB asked that the operator of the shop be required to display all goods on offer in the kiosk openly so that no individual customers could be preferred over others.

The Federal Ministry of Justice responded that the business operating all prison kiosks was obliged under contract to advertise around 15–20 items each week as "cheaper options". These offers are labelled and thus visible to all detainees.

Breeding ground for discrimination

Since the operator purchases through wholesalers, it is possible that special offers may also be available for some additional items, even if this is not specifically mentioned in a correctional institution. However, these reduced prices would also apply in all instances in the facility, as prices are fed into the checkout system centrally for the whole of Austria. Kiosk employees might often know that certain detainees may be interested in a special product and specifically tell them about it. However, this should not result in anybody being excluded from a special offer.

In order to determine the daily price for a product, the item must be scanned at the checkout. Upon request, a no-commitment price enquiry can be made. According to the Federal Ministry of Justice, it is not possible to mark the item accordingly. This is because the goods on offer, and thus the product ranges, are different. A single uniform list containing all special offers cannot be sent out to all correctional institutions.

Duty to display prices breached

The AOB maintained its criticism: according to the Federal Act on Price Marking (Preisauszeichnungsgesetz), providers of goods are obliged to indicate the sale price where goods are visibly displayed or otherwise made available for sale on a shop's premises. Pricing information must be clearly legible and attributable to the respective goods. The sale price is the gross price, and must therefore already include value added tax and any other taxes. Shops and supply chains must also indicate the unit price (price per kilogramme, litre, metre etc.) alongside the sale price. The current arrangements are unlawful.

Inability to purchase mail-order goods – Vienna-Simmering correctional institution

Purchase not possible

It is becoming increasingly difficult for detainees to purchase consumer goods that cannot be located on the prison kiosk product list. Inmates complained of this also during a consultation day at Vienna-Simmering correctional institution. This often concerns clothing, shoes or small electronic devices such as radios.

Detainees have an individual right to wear underwear as well as simple and appropriate outer garments. Any purchase must be concluded through the correctional institution; they must "broker" the purchase. Items that cannot be obtained in the prison kiosk may only be procured by private mail order in exceptional cases and with prior approval.

A multifaceted problem

The Federal Ministry of Justice has stated in this regard that it is conducting discussions with the company that operates prison kiosk throughout Austria. However, it is apparently unwilling to extend its product range to include "non-food" items. There is also stated to be a lack of storage and parking capacity (in correctional institutions).

No printed catalogues

Mail order is particularly difficult due to the fact that the major mail order companies have stopped issuing printed catalogues and now offer their products online. As they do not have access to the internet, prisoners can thus no longer obtain information concerning the goods on offer.

In principle, it is possible to download PDF files that can be provided to detainees as printed versions. The usage of tablets, e-readers or similar devices through which detainees could access mail order catalogues in PDF format has been discussed.

Increasing requirement of registration

However, even if prospective buyers were to know about goods and prices, in many cases placing an order would be impossible as mail order companies require advance registration and payments can now only be processed via credit card. A solution first needs to be developed for all correctional institutions.

Withdrawal of technical devices regulated – Federal Ministry of Justice

Permanent exclusion

The AOB has received increasing number of complaints from detainees concerning the failure to return technical devices to them. Most cases concern computers allowed as a privilege, where the right to use them has subsequently been withdrawn.

The warden of Graz-Karlau correctional institution stated that the recommendation made by the AOB that inmates be offered a timeframe for regaining the privilege to have their own PCs or notebooks would be examined with reference to the individual circumstances of each request. However, the Federal Ministry of Justice concluded in March 2020 that there were "no conceivable circumstances" under which a computer that had been withdrawn due to abuse would be returned.

Recommendation

The AOB then recommended to the Federal Ministry of Justice that it issue a decree regulating the conditions under which detainees at police departments and forensic institutions could be allowed computers as a privilege, as well as the conditions under which withdrawn devices could be returned again.

Statement of opinion of the Human Rights Advisory Council

As the reason for this the AOB stated that the principle of objectivity would be violated if detainees were deprived of the privilege to use their own technical devices and were not allowed any opportunity to regain that privilege, irrespective of the type and severity of the violation. This view is also supported by the Human Rights Advisory Council. It has set up a working group to consider this matter, the concluding statement of opinion of which has been incorporated into the recommendation of the AOB.

Ministry of Justice accepts the need for change

At the start of January 2021, the Federal Ministry of Justice announced that changes would be made to the Enforcement Handbook (Vollzugshandbuch) concerning privileges and amenities. There will hence be three possible scenarios in future:

Under the first category, a privilege is withdrawn as an administrative penalty in the event of a one-off, non-serious violation. The instructions on the right to appeal contained in the notice concerning the administrative penalty will incorporate an indication that the person who has received the penalty may demonstrate his or her reliability for the duration of a period of withdrawal, which will justify the return of the device.

The second category covers abuses of the privilege. In such cases, a provisional observation period will be set, concerning which the detainee may also be notified in writing, thus enabling him or her to change how he or she acts during this period of time.

Finally, there is also a third category that will cover all other cases, such as those for which the detainee is not individually responsible, e.g. in the event that a training plan is subsequently given up, where the right to use a technical device was granted as a privilege for this purpose.

In adopting the changes to the Enforcement Handbook, the Federal Ministry of Justice thus endorsed the recommendation made by the AOB.

Access to foreign language television channels – Suben correctional institution

More than 10% of detainees affected

Various detainees at Suben correctional institution complained that they were unable to receive radio and television programmes in their own national language. There are currently 30 Turkish-speaking prisoners, who do not receive any entertainment or information in their native language. Some of these detainees were previously held in Graz-Karlau correctional institution, at which five Turkish channels (sport, music, entertainment and information) can be received.

According to the Penitentiary System Act (Strafvollzugsgesetz), prisoners must be encouraged to make meaningful usage of their free time and, where necessary, guided in doing so. For this purpose, they must be given

the opportunity in particular to read, to receive (radio and television) broadcasts, to participate in sport or to play board games.

De facto discrimination

Although the Act does not provide for any specific right to receive broadcasts in one's own national language, in view of the fact that 86 channels can be watched at Suben correctional institution, including broadcasts in English, Russian and Arabic, it appears disproportionate to exclude a sizeable group from the ability to consume broadcasts in their national language.

Adjustment recommended

The AOB recommended that the precise number of Turkish-speaking detainees be established, and that consideration be given to the needs of this population group within regular reviews of the programmes fed in to the correctional institution. Especially as the overwhelming majority of those heard during the consultation days have received legally binding repatriation orders, and one aspect of their resocialisation is that they must not be excluded from the programmes offered by their country of origin.

3.8.3.5 Contact to the outside

Too few visiting opportunities for those held in pre-trial detention – Federal Ministry of Justice

Timing not compliant with statutory requirements

Visits must be scheduled on at least four weekdays including at least once in the evening or at the weekend. The AOB examined visiting times at court prisons and found that the statutory requirement was not being complied with. The decision as to which visits detainees awaiting trial may receive in any specific individual case and whether visits should be monitored is taken by the public prosecutors' office during investigation proceedings and by the court within the main trial.

Rigid working hours

The Federal Ministry of Justice stated that visits are monitored in most cases by trainee lawyers, who are not available during evenings or on Saturdays. It argued that a regularly (weekly) commitment outside of normal working hours was not compatible with the prerequisite of "exceptional need" laid down in the Traineeship at Court Act (Rechtspraktikantengesetz).

However, some correctional institutions, such as those in Graz-Jakomini and in Korneuburg, do not offer any visiting hours during the evenings or at weekends unless the monitoring of conversations has been arranged. This shortcoming cannot be explained by the need for the presence of court staff, but is rather due to the unwillingness of court prison guards to adjust their duty roster accordingly.

Rights must be exercisable

The AOB underlined on a number of occasions that organisational considerations may not result in a situation, in which detainees' rights are not guaranteed in full. If visiting hours are only scheduled in the morning and around lunchtime, detainees run the risk of losing all social contact. Visiting hours must be offered as an alternative at least once during the evening or at weekends so that relationships can be maintained. The opportunity to visit should be arranged such that working persons or school-age children can visit detainees too.

Times should be visitor-friendly

The AOB recommended – as a first step – that detainees awaiting trial whose conversations do not need to be monitored be allowed the opportunity to receive evening or weekend visits at least once each week. It should then be considered how the ability to receive visits at the appointed times can be arranged also for those detainees awaiting trial whose conversations must be monitored.

No changed planned

The Federal Ministry of Justice stressed that an expansion of visiting hours would be in the interest of the prison administration, but there was no prospect of it at the present time – in particular due to the emergency situation (COVID-19 pandemic) and the related staff and organisational difficulties. Should the situation become less critical and court prison guards have sufficient executive staff, evening or weekend visits could be arranged from the start of 2022 at least for those detainees awaiting trial whose conversations do not need to be monitored.

Hugging a child forbidden – Suben correctional institution

At a consultation day in Suben correctional institution, one inmate complained that he had been prohibited from hugging his child during a table visit, even though the child had taken a PCR test. He himself had been double vaccinated and had also recovered from an infection.

Unequal treatment

The AOB found that at the time the complaint was made, although extended visits were permitted, to which children under the age of twelve could be taken subject to a negative PCR test (within the previous 24 hours), it was not however permitted to hug a child (who had likewise taken a test) during a table visit.

Reasons not apparent

There was no objective justification for this less favourable treatment. The AOB called on the Federal Ministry of Justice to ensure that contact restrictions during table visits not be treated more strictly than during extended visits.

Charging of costs for monitoring of telephone calls – Federal Ministry of Justice

Detainees pay for the monitoring of their own cells

In response to a number of complaints concerning the costs of telephone calls, the AOB referred the Federal Ministry of Justice once again to its comments made in the Annual Report 2020 (volume "Monitoring Public Administration", p. 120 et seq.) concerning the costs of telephone calls. The federal authorities should bear any additional costs arising as a result of increased expenditure, such as for instance for monitoring conversations and the management of cleared telephone numbers, which accordingly pertain to the performance of executive tasks.

The Federal Ministry of Justice stated that the operator had to provide the telephone system and to program the software for a customer group of only a couple of thousand users (with special functions), and also to provide ongoing maintenance, whilst enabling the central input of telephone numbers and a special control system. The costs arising for detainees as a result were not classified by the Federal Ministry of Justice as "direct costs of detention", but rather as "consequential costs arising under contract".

Extra costs should not be passed on

The AOB takes the view that the fact that these are "consequential costs" does not alter the fact that these costs are not associated with the provision of "telephone services" but rather with the special circumstances of detention (possibility for clearance, monitoring of conversations etc.). However, as the Federal Ministry of Justice indicated in its statement of opinion, these costs are incorporated into the call rate. If the costs for monitoring telephone calls cannot be calculated, the AOB takes the view that this cost element should at least be estimated and credited to detainees, and it is recommended that the Federal Ministry of Justice arrange for this to happen.

Misdirected post – Vienna-Mittersteig correctional institution, Floridsdorf satellite facility

Late forwarding

One inmate complained that, at the Floridsdorf satellite facility, post sent to inmates, including from their lawyers, was being distributed after delays of up to ten days. This was not due to any shortcoming on the part of the correctional institution but rather to the fact that, as the building numbers were the same, letters were often sent to the neighbouring district court and remained there for some time before the correctional institution was informed that another "basket of post" had to be picked up.

Better coordination

The Federal Ministry of Justice arranged for Vienna-Mittersteig correctional institution to establish contact with the district court filing office so that it could be informed quickly concerning any items of post

addressed to Floridsdorf satellite facility. In addition, two staff members will ask the district court filing office once or twice each week whether it has received any items of post in the future. This should ensure that any post incorrectly delivered to the district court is forwarded to Floridsdorf satellite facility promptly.

3.8.3.6 Right to privacy

Opening of Aidshilfe letters – Federal Ministry of Justice

Sensitive content

In response to a request by a detainee in a forensic institution, the AOB became aware that letters sent to detainees by the HIV-aids charity Aidshilfe are not being treated in accordance with the special rules applicable to correspondence with public bodies, external legal advisors and support facilities. This is due to the fact that Aidshilfe does not qualify as a "support facility" within the meaning of Section 90b (6) of the Penitentiary System Act (Strafvollzugsgesetz).

Case-by-case decision making

Although it was possible to determine in this case that the letter was treated as confidential, and was not opened, there is no legal requirement for this.

Position of the Ministry of Justice

The Federal Ministry of Justice informed the AOB that it did not have any principled objections to an extension of the scope of privileged bodies according to Section 90b of the Penitentiary System Act. However, if Aidshilfe were to be classified as a privileged support facility, this could result in unequal treatment compared to other facilities and associations. As they are constantly changing, it is not possible to provide a definitive list of such organisations or facilities.

Change desirable

In the view of the AOB, the inclusion of Aidshilfe within the class of privileged support facilities would contribute to achieving uniform application. Moreover, this would mean that, in future, the fact that a detainee's letter is not opened, would no longer be dependent on the goodwill of individual staff members. The AOB agrees with the view taken by the Federal Ministry of Justice that the mere inclusion of Aidshilfe within the scope of Section 90b Penitentiary System Act would fall too short.

3.8.3.7 Torture, abuse and degrading treatment

Naked in video-monitored inmate cell – Schwarzau correctional institution

Naked in front of a live camera

In June 2021, two female inmates complained independently of each other that they had been subject to a body search involving complete undressing in November 2019. Before the search was carried out, they had pointed to the fact that the room contained two cameras and that other rooms were

available. The female guards stated: "Nobody's going to watch anyway". In fact, the camera was connected to the guards' room, which was occupied at the time of undressing.

Full disrobement

It was clarified on the consultation day that a body search with disrobement had been carried out on the two female inmates as well as a third female prisoner who was also present in the inmate cell. More detailed inquiries established the following: after a mobile telephone had been found in the inmate cell, the three prison inmates were taken to the recreation room on the evening in question. There they were forced to undress fully alongside one another. As is stated in the report provided, during this process "the fact that the room was video monitored was overlooked due to a lapse of professional and human judgment on the part of the prison guards".

Mistakes conceded

The male prison guard on duty at the reception desk did not follow the undressing. In order to do so, he would have had to specifically alter the video system's program to be able to observe the body search in the recreation room. This did not happen. The correctional institution did not dispute that the course of action was not compliant with legal requirements. It also conceded that the fact as to whether any third parties had seen the images was not relevant. All staff were reminded of the need to comply with legal requirements. A clarifying talk was also held with the two inmates, who indicated afterwards that they were satisfied.

No further action by the AOB was therefore required. It was unable to establish whether, as had been alleged by the two inmates, the guards had intentionally disregarded the fact that the room was being video monitored.

Insensitive conduct by prison officers – Stein correctional institution

Noise lasting several minutes

As in the previous year, at the consultation day held at the start of June 2021 detainees complained of unnecessary acoustic nuisance when locking the doors of inmate cells. Some guards are alleged to have addressed inmates with the phrase "Lock-up time – what's up?" and to have caused unnecessary noise after locking cell doors at around 8.40 p.m. by banging on the locks of inmate cell doors. Given that open sections contain around 60 doors on each floor, this was stated to cause considerable acoustic nuisance.

Brusque actions

In addition, an inappropriate conversational tone was used by a number of guards when testing inmates before starting work. They addressed inmates with the phase: "Testing time, come here!", and took nasal swabs in some cases in such a manner as to cause unnecessary pain. Although he had been initially threatened with not being allowed to work if he did not allow himself to be tested, one inmate had insisted that a throat swab be taken from him.

Nuisance avoidable

It is not disputed that the prison officers must ensure that cells are locked properly. This means that, after the inmate cell doors have been locked, it is necessary to check whether the bolt has been properly closed. However, it makes a difference whether the bolt is pushed or struck with a fist in order to check whether it has engaged. The chief prison guard reminded the guards of the need to act with greater sensitivity. The opportunity was also taken to refer to the proper manners.

Impression of unequal treatment – Schwarzau correctional institution

Identical complaints

On a number of occasions, inmates objected during the consultation day at Schwarzau correctional institution that there was "no line" and that they felt that they were being neglected, that others were being preferred over them and that they had no idea why they were not receiving an easing of restrictions.

Systemic causes

The facility management conceded that the impression of unequal treatment could arise because inmates at different stages of their sentence were being held on the same wing. This could establish a conviction that one particular inmate was being preferred and was being granted eased restrictions or privileges that were not available to other inmates.

The AOB could only pass on these complaints voiced by a number of persons on the consultation day to the facility management and refer to the mood amongst the inmates. It was promised to make internal decision-making processes more transparent.

Lack of knowledge leads to dissatisfaction

It would be helpful if the stage of the sentence could be apparent from the colour of the name tags on inmate cell doors, as first-time offenders, inmates subject to relaxed detention and persons nearing the end of their sentence qualify for privileges that are not available for those in regular detention. However, it is for the management of the facility to devise and implement any improvements. It is correct that data protection requirements must be complied with in each specific case where privileges are granted due to medical reasons.

3.8.3.8 Health care

Lack of legal protection regarding coercive treatment – Federal Ministry of Justice

Profound interference

For a number of years, in cases involving coercive treatment, the AOB has demanded that those affected, whether they are being held in pre-trial detention or detained in forensic institutions, be granted a subjective right to the resolution of their complaints, or given the opportunity to have the

legitimacy of their treatment examined by (enforcement) courts (see Annual Report 2017, volume "Monitoring Public Administration", p. 84).

No legal protection

The Federal Ministry of Justice has pointed out that the question as to whether and how medical treatment (lege artis) needs to be carried out must be decided exclusively in accordance with the rules of medical science and under the respective doctor's responsibility. As such, on account of its nature, it cannot be decided on within the ambit of ordinary legal proceedings. No changes in the law in this area are envisaged.

Unequal treatment not justifiable

The AOB is not convinced by this stance. Specifically, the Federal Ministry of Justice itself has discussed the adoption of new rules on consent to coercive treatment or an authorisation regime under judicial control based on the model of the Hospitalisation of Mentally Ill Persons Act, which it has incorporated into a draft version of a Reform Act on the Detention of Mentally Ill Offenders (Maßnahmenreformgesetz) 2020. Generally speaking, a right of appeal should ensure that the overall detention of mentally ill offenders is under judicial control. It is regrettable that, as previously, no similar discussions concerning the reform of Section 69 Penitentiary System Act in relation to prison inmates are being conducted.

Actions by a dentist call for criticism – Feldkirch correctional institution

No x-rays

The representative of a prisoner complained that the facility dentist in Feldkirch carried out teeth extractions without previously taking an x-ray. The AOB found that the dentist had extracted part of a tooth in the winter of 2020 and a whole tooth in the summer of 2021 without having taken an x-ray.

Inadequate care

The Federal Ministry of Justice stated that the correctional institution had been incorrectly proceeding on the assumption that, according to the fee regulations, x-ray images could not be charged for in relation to tooth extractions, and thus should not be taken. At the meeting held in the winter of 2020, the dentistry superintendent informed the general management of Feldkirch correctional institution once again that x-rays have to be taken prior to extractions and after root canal treatments – for both medical and forensic reasons.

Dentist resistant to instructions

According to the Federal Ministry of Justice, the facility dentist had also been made aware of this requirement several times. However, there had been difficulties in enforcing the requirements, especially as he was working in the facility as a self-employed dentist. The Federal Ministry of Justice assured that new instructions concerning the need to take x-rays would be provided to Feldkirch correctional institution.

Thorough examination recommended

The AOB considers this to be insufficient in view of the fact that the facility dentist has repeatedly failed to take x-rays before extracting teeth, despite

being instructed to do so by the dentistry superintendent. Therefore, a review of treatment provided by the facility dentist during the previous year was requested. It needs to be clarified whether the facility dentist has failed to take x-rays in any other cases involving tooth extractions or root canal treatment.

It is also recommended that all facility dentists throughout the country be informed regarding those cases in which an x-ray must be taken.

No blood test – Vienna-Josefstadt correctional institution, Schwarzau correctional institution

At a consultation day held in May 2021, one inmate expressed her concerns about her medical care. Previous efforts to attend to her health at Vienna-Josefstadt correctional institution, where she was being held in pre-trial detention, had been inadequate. She suffered from a chronic illness, which – had greater care been taken – should have been diagnosed earlier.

Chronic illness

The Federal Ministry of Justice stated that the inmate had worked in the regional court prison performing different household tasks in the hospital wing, and had thus been seen practically every day during visits by doctors. She had been largely in good health at that time and did not suffer from any serious illnesses. Her chronic illness was diagnosed very quickly at Schwarzau correctional institution.

Blood test too late

However, the medical superintendent conceded to the general management that a blood test was only carried out after her transfer to Schwarzau correctional institution. The applicable decree stipulates that such tests should as a general rule be carried out according to medical need, and where applicable prior to transfer into criminal custody.

The inmate was taken into criminal custody more than two months before she was transferred to Schwarzau correctional institution. A blood test should have been carried out at this stage at the latest – if appropriate also at Vienna-Josefstadt correctional institution.

Procurement of a medical device – Stein correctional institution

Patient feels neglected

An inmate at Stein correctional institution complained that he had asked the management of the facility when the "oxygen concentrator" ordered for him would arrive. He was not informed concerning the anticipated date of arrival, but simply told that the device "will get here eventually".

Request not acted upon

The AOB found that the cost estimate was not drawn up or submitted in good time. It is not acceptable that, despite requests by the patient, Stein correctional institution did not do anything for four weeks and in particular

did not enquire as to when the device would arrive; as such, the complaint was justified in this regard.

Order of glasses – Vienna-Simmering correctional institution

Extremely poor eyesight

A prisoner at Vienna-Simmering correctional institution complained that he had had to wait ten months for a new pair of glasses. He had submitted a request for eyewear in February 2020, as his glasses had developed a small crack and he was extremely short-sighted. His glasses broke entirely in September, following which he had to submit a new request in October 2020. However, it was only after repeated insistence that he was examined by an optician at the end of December 2020. He received his new glasses in January 2021.

Months without glasses

The Federal Ministry of Justice stated that a request had only been submitted in October 2020, which had been promptly approved. However, due to the pandemic and the lockdown at the end of 2020 it had not been possible to arrange an examination by an optician.

Although it is not certain that the request was submitted in February 2020, it must be concluded that the delay in acting on the request for a new pair of glasses made (at the latest) in October 2020 represents a failing within the administration of justice.

Earlier action would have been possible

The fact that an appointment with an optician could not be arranged until the end of December 2020 cannot be justified with reference to the lockdown. Opticians and ophthalmologists were working throughout this period. Moreover, the inmate had stressed the urgency of his request on various occasions and asked to discuss the matter with the financial manager and the prison warden. His glasses had become unusable in September 2020. A visual impairment of –8.5 dioptres was established when testing for the new glasses.

Form for doctor's visit – Vienna-Josefstadt correctional institution

Bureaucratic impediment

An inmate at Vienna-Josefstadt correctional institution complained that his request for an appointment with a doctor or a psychiatrist had been returned with a note indicating that more detailed reasons were required.

It transpired that it is common practice at Vienna-Josefstadt correctional institution for detainees to have to provide precise reasons for any appointment with a doctor or psychiatrist.

Access to a doctor must be subject to a low threshold

The Federal Ministry of Justice responded to the complaint by stating that the form used should be adapted: the form should be largely pre-compiled in future, so that the detainee only needs to cross the respective boxes or provide any necessary supplementary information. The aim is to distinguish

between acute and less acute problems, and thus to ensure prioritised medical care.

Particularly sensitive data

It is expected that information relating to health will be provided on the inside of the folded page of the form, and thus protected against being seen by other people. This should ensure the confidential treatment of medical data. The redesigned form should be available for use by February 2022.

Lack of confidentiality doctor's consultations – Vienna-Mittersteig correctional institution, Floridsdorf satellite facility, Schwarzau correctional institution

The AOB repeatedly receives complaints relating to the fact that detainees are unable to consult a doctor in a confidential manner. This is often due to the fact that a second person is present in the room, such as a nursing assistant or a prison guard. Discussions with a doctor are particularly sensitive and difficult if they involve problems relating to the urogenital area.

Insensitive statement

The AOB received a complaint from an inmate at the Floridsdorf satellite facility of Mittersteig correctional institution in relation to a case in which – by his own assertion – he expressed a desire to discuss an "intimate problem" with a doctor. The discussion was held in the presence of a nurse and within earshot of a prison guard. After the inmate had taken off his underwear, the doctor said aloud, at a volume audible to the other persons: "Ah, you've been circumcised".

Violation of confidentiality

This was extremely uncomfortable for the person concerned. It amounted to a violation of doctor-patient confidentiality. As the doctor was not present in the facility on the day of the visit, the complaint could only be lodged with the management of the facility along with a request that it be passed on to the medical service along with a reminder to pay (greater) attention to confidentiality.

Open conversation not possible

During the consultation day at Schwarzau correctional institution a number of inmates also complained about the fact that consultations with the psychiatrist and the general practitioner were not conducted in private. A prison guard was always present in the room. Not only did the guard's presence disrupt the atmosphere, but the guard also intervened in the doctor-patient-dialogue and issued instructions that the doctor was required to comply with. In the follow-up talks the prison warden indicated that a desire for a third person to be present had been voiced by the psychiatrist. The general practitioner in turn required assistance in dealing with electronic medical history documentation.

Recommendation

The AOB referred to its recommendation issued on 27 January 2017 that prison officers should only be called on in exceptional situations due to a dangerousness assessment or when requested by the doctor.

Improvement assured

The management of the facility assured that the matter would be discussed with the psychiatrist. Since any references to the patient's behaviour in prison could be helpful before changing medication, the guard should inform the psychiatrist in future before the start of the medical consultation. This would enable the confidential nature of the talks between the doctor and the patient to be guaranteed. In addition, the inmate would not have the impression that a third party was overriding his or her own interests.

Demonstrative lack of interest on the part of the psychological service – Stein correctional institution

Desire for a discussion

During the consultation day held by the AOB at the start of June 2021 one inmate in the high-security wing complained that he had been waiting for two to three weeks for an appointment with the psychological service. He had been adversely affected by an incident that had resulted in the death of a fellow inmate. He wanted to have a talk to get things off his chest.

Before the consultation day was continued on the following day, the AOB was informed that the concern had been addressed in the meantime. Around one hour later, the inmate appeared again in order to translate for a fellow inmate at the latter's request. When asked about the discussion that had taken place in the meantime with the psychological service, he described it as follows:

No open conversation

The inmate cell door was opened. The psychologist came in, sat down on a chair in front of him, looked at him and asked: "And?" Two prison guards had been standing on each side of him. Under these circumstances, a discussion did not make any sense. In addition, the inmate had not had the impression that the psychologist had been seriously interested in how he was doing, and it had not been possible to talk about burdensome events in the presence of prison guards.

In the subsequent discussion, the AOB asked the psychologist to describe the situation from his own perspective. He conceded that the discussion had been held in the presence of two prison guards. When queried, he was unable to explain why a room with a mesh partition had not been chosen instead.

Concern can be accommodated without any risk

If there are actually any serious safety concerns that indicate that it is not appropriate to have a discussion with an inmate without a physical barrier, the psychological service may be expected to consider on its own initiative how a confidential discussion can be facilitated. If there is no suitable room

anywhere throughout the entire correctional institution, communication with the inmate could be conducted through the hatch on the inmate cell door. In such an eventuality, the prison guards would have to be out of earshot. This would take account first of all of the staff's interest in protection, and also at the same time the inmate's concerns.

Failure to deploy a video interpreting system – Wels correctional institution

A detainee at Wels correctional institution complained that, despite his extremely poor knowledge of German, it was not possible to obtain an interpreter. An examination confirmed that no interpreter had been provided during his admission interviews or when providing medical care, and that a fellow inmate had interpreted when discussing his care arrangements.

System implemented in 2018

The AOB has been calling for years for detainees not be used to provide translation or interpreting services and for the provision of care and medical attention to detainees not to be impaired by language barriers. It is not clear why special services do not use the video interpreting system where language barriers exist, even though it was comprehensively rolled out in 2018.

Fellow inmates must not be used as interpreters

The Federal Ministry of Justice accepted this view and assured that it could remind all correctional institutions at the forthcoming conferences of prison wardens once again that fellow inmates must not be used as interpreters – even with the consent of the inmate for whom they are interpreting. In addition, the issue should also be comprehensively addressed by the medical superintendent within the ambit of the next training session.

3.8.3.9 Detention of mentally ill offenders

Violation of the separation rule – Federal Ministry of Justice

Difficult inmate

Following a fire at Vienna-Mittersteig correctional institution, one detainee was transferred to Vienna-Josefstadt correctional institution, even though it was not permitted to detain the mentally ill offender at this facility (prior to the entry into force of the amendment to the District Jurisdiction Ordinance for Criminal Enforcement, Federal Law Gazette II 2020/607). The Ministry justified this decision on the grounds that the detention of this inmate in a "permitted" correctional institution would have been associated with a high cost or would have disrupted the mood in the facility.

Alternative accommodation

There would be no case of maladministration only because accommodation at a "permitted" facility had not been possible. However, this was not argued by the Federal Ministry of Justice. The complaint was thus well-founded.

Excessively long waiting time for therapy – Stein correctional institution

Months on a waiting list

During the consultation day at Stein correctional institution held at the start of June 2021 one inmate complained that he had been waiting for therapy since October. The detainee had only been staying in the Mittersteig special medical facility for ten days when a fire was started by an inmate in an inmate cell. He was subsequently moved to Stein correctional institution. This facility, which was already under significant strain, not only had to take in a considerable number of unplanned detainees, but also had to deal with pandemic-related restrictions, including prohibitions on contact. Resources have been increased in the meantime and the facility has been restructured. However, new staff will first need to be trained. Some of the new staff will need to have experience in dealing with the most complex disorders.

Entitlement to prompt care

The AOB took note of the efforts being made by the department for the detention of mentally ill offenders. However, it also pointed out that the intensification requirement means that therapy must be started as quickly as possible within facilities for the detention of mentally ill offenders. Furthermore, according to the requirement of individualisation, detainees must be offered therapy specific to their disorders (Federal Constitutional Court 4.5.2011, 2 BvR 2365/09 = EuGRZ 2011 – European Basic Rights Magazine, pp. 297 et seq.).

Statutory requirement unequivocal

According to the Penitentiary System Act (Strafvollzugsgesetz), detainees must receive medical care, in particular psychiatric, psychotherapeutic, psycho-hygienic and educational support that is commensurate to their condition in order to achieve the goals of criminal enforcement. It follows from the statutory duty to administer the prison system "that detainees are at the same time also entitled to such care" (Supreme Administrative Court of Austria, judgment of 25 November 2008, 2005/06/0029). As the Supreme Administrative Court held in this ruling, a delay lasting for several months is not consistent with this statutory requirement.

In this case, the detainee had been waiting for therapy for more than eight months.

3.8.3.10 Personnel

Unequal treatment in relation to remuneration for hazardous work – Federal Ministry of Justice

Employees from the special services at Sonnberg correctional institution took advantage of the opportunity for a discussion. They considered that they were being treated unequally on the grounds that the head of the legal office received a monthly supplement for hazardous work, irrespective of

whether he actually had any contact with detainees when working, whilst they by contrast did not.

Difference based on the law

The Federal Ministry of Justice pointed out that the unequal treatment results from the provisions of the Salary Act (Gehaltsgesetz). High-ranking officials who regularly perform enforcement work are entitled to a monthly allowance for the special risks associated with their ordinary duties (according to Section 40a of the Salary Act). On the other hand, high-ranking officials and contract staff performing service on prison wings as well as officials from the special services receive a hazardous work allowance for work that entails a particular risk for their life or bodily integrity (according to Section 19b of the Salary Act). This hazardous work allowance is a so-called "active allowance", which is only paid in respect of work actually carried out in contact with inmates that has been duly documented in each individual instance.

Equal treatment would be fair

The AOB understands that officials consider themselves to be treated unfairly in particular situations in which they receive less favourable treatment, such as in the event of illness or leave. It therefore recommends that reforms be considered as to how this difference in treatment can be removed.

Staff shortages in the social work service – Vienna-Simmering correctional institution

During a consultation day in February 2021 a number of inmates complained that it was very difficult to get an appointment with the social work service. It was only possible to discuss concerns with a staff member from this special service in exceptional cases.

It was explained to the AOB that 3.5 full-time equivalent positions were currently vacant, but that job interviews had already been held in order to resolve this shortage. It is hoped that it will soon be possible to provide full support again.

Right to social care

The correctional institution is tasked with offering social support to detainees. This task, which is provided for by law, is the corollary of the subjective right of prisoners under public law to social care in relation to specific matters. The staff shortage in the social work service has negative effects not only on detainees but also on the working conditions of the existing staff.

3.9 Climate action, environment, energy, mobility, innovation and technology

Introduction

843 cases

In the year under review, the AOB received 843 complaints falling within the purview of the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology. The 302 complaints relating to traffic concerned in particular driving licences, the implementation of the Motor Vehicles Act (Kraftfahrgesetz) and the Federal Road Tolls Act (Bundesstraßenmautgesetz) as well as the law on aviation and railways.

The AOB received 512 complaints concerning energy-related issues, almost all of which were verbatim-identical statements of opinion concerning the amendment of the Regulation on the Rollout of Smart Meters (Intelligente Messgeräte-Einführungsverordnung), which were actually addressed to the Ministry, but were also transmitted to a number of other bodies. The backdrop to these complaints was the evident persisting scepticism regarding smart meters, which the AOB has considered in a number of Annual Reports.

A total of 29 complaints concerned environmental law, in particular procedures under the Waste Management Act (Abfallwirtschaftsgesetz), the Federal Act on Environmental Impact Assessment (Umweltverträglichkeitsprüfungsgesetz) and funding such as "replacing fossil fuels".

3.9.1 Driving licences

Costs of driving licence examinations

High financial burden

Once again, criticisms were raised in 2021 about the high costs of the specialist medical assessments that must be presented, in particular by persons with a chronic illness, when applying to renew driving licences that are valid for a fixed period of time. A significant defrayal of the cost would be appropriate here.

Requirement of hair analysis tests

The AOB received a number of complaints objecting that, in cases of suspected alcoholism, driving licence authorities on a regular basis require holders of driving licences to submit the results of hair analysis tests in order to maintain their driving licence. This practice is being followed in particular in Upper Austria.

Interference in everyday life

The requirement is surprising – for instance compared to the requirement for blood tests – and results in a disproportionate restriction on everyday life. The hair must be at least 3 cm long at the time of extraction (from the back of the head) and cannot be died or bleached. In addition, this method can apparently identify any consumption of alcohol within the previous three months. This means that those affected are practically not allowed to consume any alcohol at all over the period specified by the authorities, which may extend to a number of years, even if they are not driving a motor vehicle at the time. This is in addition to costs of at least EUR 150.00 per test.

The AOB found that, according to the case law on Section 14 of the Driving Licence Act Health Regulation (Führerscheingesetz-Gesundheitsverordnung), the issue or grant of a driving licence for a fixed term and subject to conditions is only permitted if alcohol addiction or repeated alcohol abuse in the past has been unequivocally established, thus resulting in a need for an extended period of abstinence. In such cases, abstinence may also be monitored by requiring hair analyses.

Complete abstinence not always required

If no conclusive findings have been made concerning alcohol addiction or repeated abuse, such a requirement is unlawful. Where these prerequisites are not met, complete abstinence from alcohol is not required by law for a positive assessment of the ability to adapt to traffic conditions. In addition, the evaluation of this aspect by the public medical officer must be based on an assessment by a specialist doctor (specialist in internal medicine and/or psychiatrist).

In relation to this issue, the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology stated that the relevant department does not keep any records or statistics on the extent to which hair analysis is required. However, restraint should be exercised regarding the requirements. It does not appear to be justified to impose an "advance requirement" of hair analysis without having examined whether it is necessary in the specific individual case.

Information for driving licence authorities recommended

The AOB recommended that the driving licence authorities be suitably informed or reminded (such as by way of a decree) concerning the legal position and the current case law on the legal prerequisites for the imposition of a requirement of hair analysis tests. At the time this Annual Report was finalised, the Ministry had not informed the AOB whether it had acted on this recommendation.

Examination by a public medical officer in the event of suspected consumption of addictive substances

Following a road traffic control, law enforcement offers required two drivers to undergo an examination by a public medical officer on the grounds of suspected impairment due to addictive substances. Public medical officers carried out a clinical examination, which they documented using the official form "Examination of fitness to drive". They concluded that the individuals were not fit to drive on the grounds of impairment due to addictive substances. The Upper Austria Police Department and the District Authority of Linz-Land then withdrew the drivers' licences for a period of one month.

Blood test negative

However, the assessment of the blood samples taken during the examination established a couple of weeks later that there had been no such impairment. The authorities then revoked the administrative notifications previously issued. It was clearly incomprehensible to those affected how demonstrably incorrect examinations could have been carried out, which ultimately also resulted in costs, amongst other things in order to file appeals against the withdrawal decisions.

Within an exchange of correspondence with the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology and the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, the AOB established that the question of impairment by addictive substances should be answered with reference to medical examinations carried out in the specific case. It is evident that there can be "mis-diagnoses" in individual cases.

Requirements must be scrutinised

However, efforts should be made to ensure that appropriate requirements have been put in place to regulate the conduct and documentation of clinical examinations by public medical officers in cases involving suspected impairment due to addictive substances or medication. These must be capable of preventing incorrect assessments in individual cases as far as possible and ensure uniform enforcement in this area by the driving licence authorities.

Authorship of the form unclear

A relevant question was in particular whether the official form used by public medical officers reflected the current state of medical science as regards the examinations and tests specified in it. It transpired that neither the Road Traffic Department nor the Health Department was aware who the author of this official form was. During the course of enquiries carried out by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, it was possible to clarify that it had been drawn up by the Federal Ministry of the Interior.

The Federal Ministry of the Interior stated that it was not specifically provided for by law how examinations should be carried out in cases involving suspected impairment due to addictive substances. The official form was a "drug check form", which is intended to provide support in setting out the necessary scope of examinations relating to the enforcement of Section 5 of Austrian Road Traffic Act (Straßenverkehrsordnung). Police departments had been instructed to use this form. Uniform application – including by district administrative authorities – would be desirable.

Uniform usage appropriate

Finally, the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology as well as the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and the Federal Ministry of the Interior pointed out that the official form reflects the current state of medical science as regards the examinations that need to be carried out. The AOB thus recommended that the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology incorporate the official form into the Annex to the Driving Licence Act Health Regulation or publicise it in another appropriate manner with a view to promoting uniform usage. At the time this Annual Report was finalised, the AOB had not been informed whether this recommendation had been acted upon.

Recording of "distinguishing features" in a driving licence examination

Is a tattoo relevant for a driving licence?

When applying for a driving licence, a man was required to undergo an examination by a public medical officer at the Traffic Department of the Vienna Police Department due to asthmatic illness. Although the public medical officer certified that he was fit to drive without any restrictions, he also inexplicably included a reference to "Tattoo + ear tunnel on both sides" in the form "Medication examination according to Section 8 of the Driving Licence Act".

No justification provided by the public medical officer

The authority justified this with reference to the public medical officer's obligation to document "distinguishing features" on patients undergoing examination in the section "overall clinical impression". However, it was not clear to the AOB why a tattoo and/or an ear tunnel should constitute "distinguishing features" of relevance for the driving licence authorities. Should these be relevant from a medical perspective in any specific case, the matter should be (or should have been) addressed in greater detail and justified in the report of the examination by a public medical officer.

The AOB could therefore fully appreciate the annoyance of the individual affected at the documentation of these "distinguishing features" in the report of the examination by the public medical officer, even though they were clearly irrelevant for the law applicable to driving licences.

Extension of the probationary period for multi-phase driving licences – COVID-19

Probationary driving licence

A woman complained to the AOB after the Traffic Department of the Vienna Police Department had extended the probationary period for her driving licence in December 2020 by a further year. By an administrative notification issued in August 2019, the Police Department had issued a driving licence to her for category B vehicles subject to the three-year probationary period prescribed by law. In August 2020, Bundesrechenzentrum GmbH (the IT-provider for Federal Departments in Austria) informed the woman that the twelve-month period for completing the second on-road skill refinement session had elapsed and set her a new deadline of four months. The woman was required to complete this session by 16 December 2020.

Failure to comply with deadline due to COVID-19

Since driving schools were closed due to COVID-19 restrictions between 17 November and 12 December 2020, the woman informed the Police Department before the four-month period expired that she would be unable to take the skill refinement session scheduled for 3 December 2020. The woman also asked for an extension as the next appointment for a skill refinement session was only available on 21 January 2021. The Police Department failed to examine the request and, by an administrative notification of 17 December 2020, extended the probationary period on the driving licence by a further year.

Multi-phase training for driving licences provides for the completion of a second training phase after the issue of a driving licence for category A and B vehicles. If not all multi-phase training modules are completed (skill refinement sessions and road safety training) within twelve months (for category B) of the issue of a driving licence, the new driver is granted a four-month grace period according to Section 4c of the Driving Licence Act. If the training is not completed within this four-month period, the probationary period is extended by one year and a further grace period of four months is set.

„Tolerance decrees" issued by the Ministry concerning deadlines

The tolerance decrees issued by the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology having regard to the reduced operations of authorities and driving schools due to COVID-19 allow broad scope for the authorities to extend deadlines. Accordingly, the tolerance decrees expressly provide for the extension of deadlines also in cases in which multi-phase training could not be completed on time on account of the restrictions. An assessment as to whether the prerequisites are met must be made in each individual case and an individual decision must be reached by the driving licence authority.

The Ministry stated that the Traffic Department – despite having been ordered to extend probationary periods – had proceeded according to

Section 68 of the General Administrative Procedure Act (Allgemeines Verwaltungsgesetz) where "justified by the circumstances" and that such administrative notifications had been retrospectively cancelled. The Ministry was unable to state how many and which cases had been affected, despite having been asked to do so. The AOB recommended that the case be reviewed. The Traffic Department stated that it had applied the tolerance decree "generously", although it once again was unable to provide any figures. Responsibility was claimed to lie with the individual concerned. Neither the Ministry nor the Traffic Department was willing to cancel the administrative notification. As previously, the AOB took the view that the woman had taken all steps in good time and should therefore have benefited from the "tolerance decrees".

Delays at the Vienna Traffic Department

One public medical officer for the whole of Vienna

The AOB received some justified complaints in 2021 concerning the length of driving licence procedures at the Traffic Department of the Vienna Police Department. These were caused by contact restrictions or restricted administrative procedures imposed as a result of COVID-19. However, some delays were also due to staff shortages in the administrative sector, including in particular shortages of public medical officers. Specifically, from July 2021 the Vienna Traffic Department only had one single public medical officer for some time.

Staff increases promised

In response to the AOB's request to accelerate the procedures, the Police Department stated in November 2021 that the fourth job advertisement for the recruitment of public medical officers had been published by the HR department in 2021 and that six people had already been appointed. In addition, administrative staffing levels have been increased. Further recruitment procedures are underway.

Distance learning for driving licence examination – COVID-19

The AOB stated in the Annual Report 2020, volume "COVID-19", p. 137 et seq., that, as a result of COVID-19 restrictions, classroom teaching had not been possible at driving schools for extended periods of time. Driving schools therefore offered interactive live online courses ("e-learning" or "distance learning") in order to prepare for the theoretic part of the driving exam. However, these courses were not recognised by driving licence authorities. This meant that learner were required to repeat the theory courses at driving schools.

E-learning allowed for a limited period of time

The Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology clarified in a decree issued in February 2021 and based on the 4th COVID-19 Emergency Measures Regulation (4. COVID-19-Notmaßnahmenverordnung) of the Federal Ministry of Social Affairs,

Health, Care and Consumer Protection that, in order to process the backlog caused by the lockdown, for a limited period of time theory training could be provided in an e-learning format without any requirement of physical presence at a driving school.

The Lower Austria Regional Administrative Court held in a ruling of 24 March 2021 (GZ LVwG-AV-1064/001-2020) that "there is no specific prohibition on distance learning within the ambit of theory training". However, at the present time a legal entitlement to this "cannot be inferred from road traffic law".

The Regulation on the Implementation of the Motor Vehicle Act was amended with effect from 10 April 2021. Section 64b of the Regulation expressly provides that theory training for all categories of driving licence must be provided through classroom teaching.

E-learning should be an exception

At the same time, an exception to the requirement of classroom teaching was created. If on account of the restrictions imposed in order to combat the spread of COVID-19 it is not possible to provide classroom teaching on driving school premises, or if this is only possible to a limited extent, theory training may exceptionally be permitted also in the form of "e-learning" without any requirement for candidates to attend driving schools in person. Specific provision was also made as to how this "e-learning" should be structured. The competent Federal Ministry or the competent Federal Minister must make an announcement in the Federal Law Gazette stating that the prerequisites have been fulfilled and indicating the precise period of time during which it will be permitted. Announcements of this type were made several times in 2021.

Expert discussions ongoing

In relation to the permanent facilitation of "e-learning", the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology took the view that (aside from the pandemic) classroom teaching was a better means for achieving the intended goal – i.e. comprehensive training concerning road traffic and the recognition of risks – under normal conditions. However, expert discussions about the benefits of digitalisation within driving licence training will naturally continue.

In Germany the Federal Ministry for Digital and Transport has granted the German federal states the right to allow distance learning or e-learning instead of classroom teaching under certain circumstances. The German Ministry instructed the German Federal Highway Research Institute (Bundesanstalt für Straßenwesen) to design a study with the aim of establishing whether, or under what framework conditions, any parts of theory training could be carried out in this manner. This study will certainly also provide information that is relevant for expert discussions in Austria.

Statutory basis would make sense

It will thus ultimately be up to legislators whether to grant applicants for driving licences an enforceable right to complete driving licence theory training (also) in the form of "e-learning" or "distance learning", and thus to take advantage of the benefits of digitalisation for this group of persons after the pandemic has ended.

3.9.2 Motor vehicles

Offensive personalised number plates

According to Section 48a (2) (d) of the Motor Vehicle Act (Kraftfahrzeuggesetz), an application for a personalised number plate may be granted or renewed upon condition that "it does not contain any ridiculous or offensive combination of letters or combination of letters and numbers, and does not contain any ridiculous or offensive combination or letters or combination of letters and numbers when combined with the reference to the licensing authority".

Vienna Police Department fails to renew a personalised number plate

The owner of a personalised number plate containing the combination of letters "W-AP···." complained to the AOB as the Traffic Department of the Vienna Police Department had informed her in an informal letter that it would not be possible to renew the personalised number plate. The authority referred to a decree of the Federal Ministry for Transport, Innovation and Technology of 23 July 2015 (GZ BMVIT-179.493/0011-IV/ST4/2015).

Decree regulates offensiveness

This decree lists examples of combinations of letters and numbers that may be offensive within the meaning of Section 48a (2) (d) of the Motor Vehicle Act, and which should not therefore be granted or renewed. These also include the combination of letters "WAP", which in extreme-right circles are used as code for "White Aryan Power".

The woman pointed out that she and her husband jointly owned the motor vehicle registered in Vienna. She had previously given the personalised number plate to her husband as a birthday present. His initials were "AP" and the remaining four numbers represented his date of birth. She stated that there was no connection with extreme-right circles and that this moreover could not be implied by the combination of letters "W-AP". It was also objected that the Traffic Department had delayed in issuing an appealable administrative notification.

The AOB asked the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology to comment on the duration of the proceedings. It was also pointed out that the AOB had been informed of similar cases in the past. In those cases, the road traffic authorities had refused to renew personalised number plates with reference to the decree

in question on the grounds that they contained the combination of numbers "14", "84" or "444".

Average observer decisive

According to the case law of the Regional Administrative Court, the test used within the official assessment of offensiveness for the purposes of the Motor Vehicle Act must be whether the personalised number plate could be perceived of as being offensive not with reference to "specialist knowledge" concerning the relevant (right wing) extremist circles, but rather to the "average observer".

On this basis, the Supreme Administrative Court held that the combination of letters "HH" was offensive. On the other hand, it was held that the combinations of letters and numbers "FG", "BH", "14", "18", "28", "74", "84" and "88" were not recognisable as extreme-right codes for an average observer, and were thus concluded not to be offensive within the meaning of the Motor Vehicle Act, even though these combinations appeared in the relevant decree.

Regarding the specific case to which the complaint referred, the AOB criticised the fact that it took more than seven months for the Vienna Police Department to reject the application.

Administrative Court overturns administrative notification

The Vienna Regional Administrative Court allowed the appeal against the administrative notification. As justification the Regional Administrative Court held, with reference to previous case law, that it had been unable "to establish in any way" why the personalised number plate applied for could be regarded as offensive by an "average observer". In the light of the case law on the perception of the offensiveness of a personalised number plate by an average observer, the AOB recommended that the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology review the decree issued in 2015.

The Ministry pointed out in this regard that it is inherent to the very nature of a code that it is not recognised by an average observer. Extreme-right codes have been used precisely because their significance is not readily apparent to the public at large, and thus serve the purpose of circumventing or trivialising prohibitions. Accordingly, one of the purposes of a code is to prevent it from being established, irrespective of whether usage of a code is intentional, a chance occurrence or a reference to something different. The Ministry does not intend to amend the decree.

Decree must be amended

The AOB assumes that, in order to ensure that the law is implemented properly, the authorities must allow applications for the issue of personalised number plates if they contain combinations of letters or combinations or letters and numbers that the Regional Administrative Court has already found not to be offensive within the meaning of the Motor Vehicle Act. It is not clear to the AOB why these combinations should nonetheless continue to be included in the decree.

In addition, the decree should be thoroughly reviewed in order to establish whether any other combinations of letters or combinations of letters and numbers listed in it could be perceived of as being offensive in the light of the case law not only by the relevant (right wing) extremist circles but also by an average observer.

Irrespective of the above, legislators are at liberty to establish a legal framework according to which the ability for the relevant (right wing) extremist circles to identify an (extreme right) code is in itself sufficient in order to establish a personalised number plate as being offensive.

Equipping of trucks and buses with turning assistance systems

In the Annual Report 2020, volume "Monitoring Public Administration", p. 137 et seq., the AOB set out developments relating to a potential EU-wide obligation to equip or retrofit trucks and buses with turning assistance systems. According to EU Regulation 2019/2144 of 27 November 2019, new vehicle types will have to incorporate such systems from 6 July 2022, as a prerequisite for approval throughout the EU. The installation of these systems will only become mandatory for new vehicles from 7 July 2024. EU law does not provide for any requirement to retrofit vehicles that are already in usage at the relevant point in time.

No prospect of a retrofitting requirement

In response to a joint request by the German Transport Minister and the Austrian Transport Minister, EU Commissioner for Transport Adina Vălean decided that the date after which turning assistance systems would become mandatory for all newly licensed vehicles could only be changed in accordance with the co-decision procedure. In order to achieve this, it would be necessary to renegotiate the recently achieved political consensus. However, such a renegotiation would not be appropriate. A binding requirement to retrofit trucks and buses would only be supported by a very limited number of Member States.

The Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology stated in this regard that it is involved on an ongoing basis with the work of the High Level Group on Road Safety and that the issue of turning assistance systems will be addressed "at every appropriate opportunity". It also referred to subsidies for the voluntary installation and retrofitting of cornering assist systems.

Refusal of a taxi driver's licence due to insufficiently good character

Insufficiently good character?

A man contacted the AOB stating that, after taking the taxi driver's examination with the Traffic Department of the Vienna Police Department,

he had submitted an application for the issue of a taxi driver's licence. The Traffic Department had rejected the application in July 2021. The Traffic Department had done so solely with reference to ten administrative fines imposed between December 2018 and January 2021, which constituted grounds for a finding concerning insufficient good character in accordance with Section 6 (1) (3) of the Operating Regulations for the Non-Linear Carriage of Passengers.

According to this provision, a taxi driver's licence must be issued upon condition that the applicant is of "good character". The prerequisite of good character must have been met at least over the five-year period prior to the issue of the licence. The prerequisite of good character is not met by any person who "owing to repeated legally binding punishments for breaches of the provisions governing road traffic order and safety, appears to display a strikingly careless attitude towards these provisions".

Minor breaches - considerable distances travelled

The man stated that he had been working as a professional driver for around 30 years. Between 2018 and 2020 alone, he had demonstrably completed thousands of journeys in Vienna as a driver for hire and driven for more than 100,000 kilometres without being involved in any accidents. However, the authority had declined to take this into account within the procedure along with the fact that the administrative fines – most of which had been issued as penalty orders – had only been imposed for what were, in most cases, minor breaches of road traffic rules.

Five penalties had only involved minor breaches of the maximum permitted speed limit by between 11 and 18 km/h. Two penalties had been issued as the man had failed to stop behind the stop line when a traffic light was showing yellow. One penalty had been issued due to a broken number plate light. Another one had been issued for the abuse of hazard warning lights.

Overall conduct decisive

According to the case law of the Supreme Administrative Court, the issue as to whether a person is of good character must be established within an investigation. This must take account of the person's overall behaviour. As a general rule, minor breaches of the law may call the requirement of good character into question also in the event of repeated administrative offences. However, the existence of even a large number of administrative penalty orders does not release the authorities from their obligation to establish within the proceedings the specific conduct to which the relevant penalty orders relate. This must not be limited solely to a consideration of records of administrative fines. The authority must also consider whether any criminal proceedings reveal any characteristics of the individual's personality that are incompatible with the provisions of road traffic law.

The Traffic Department stated that the assessment was not limited to a mere mention of the administrative fines. These were referred to within the assessment of good character specifically along with the relevant time

of each offence and the applicant had been informed concerning it when he was heard. The administrative notification rejecting the application expressly referred to the statement provided by him and concluded that this information "could not be assessed to his benefit".

Decision not sufficiently grounded

However, the AOB noted in response that Section 60 of the General Administrative Procedure Act (Allgemeines Verwaltungsgesetz) provides that the "results of the review, the considerations with reference to which the evidence was assessed as well as the assessment of the law made on the basis of this" must be summarised "in a clear and transparent manner". The Traffic Department had failed to comply with these requirements in the reasons given for the administrative notification as it had simply listed the administrative fines without explaining why the applicant's statement could not be assessed to his benefit.

The administrative notification did not contain any substantive engagement at all with the arguments submitted by the applicant. This was the case in particular as regards the minor seriousness of most of the offences as well as their weighing against the distance travelled during the observation period.

New application

As around 15 months have passed since the last administrative offence, the man has announced that he will submit a new application for the issue of a taxi driver's licence. The AOB assumes that the principles mentioned above as well as the man's "good conduct" in the intervening period will be incorporated into the decision-making process.

Inflexible digital road toll sticker

Insufficient flexibility

As criticised in previous years under review, the holders of digital annual road toll stickers have limited opportunities to transfer the road toll sticker to a new number plate, as provided for under the Federal Road Tolls Act (Bundesstraßen-Mautgesetz) and the ASFINAG Tolling Regulation.

Improvements advisable

In particular, the fact that the possibility of transferring the road toll sticker is limited to the same registered owner does not make sense. Thus, in the event of a change of number plate, the road toll sticker cannot continue to be used following the sale of the vehicle after the start of the year, even though the purchase price has been paid for a full calendar year. The AOB considers that more customer-friendly rules would be appropriate here.

3.9.3 Aviation law

Payment of registration fee for the operators of model aircraft

Limited payment options

The AOB received complaints from several model aircraft enthusiasts who have been exercising their hobby for years. Since 2021, the operators of unmanned aircraft have been subject to a requirement of registration. The fee introduced for this purpose can only be paid by credit or debit card.

The AOB contacted Austro Control and was able to expand the payment options to include EPS payments/online transfers.

Sluggish activity by the Federal Safety Investigation Office

Case file suggests bias

A man complained to the AOB concerning the Federal Safety Investigation Office in relation to an air accident on 5 April 2014. The AOB found that there were reasons to doubt the independence of one of the staff members. He was involved in the investigation into the air accident despite being an employee of the company that had been operating the aircraft involved in the accident. The Safety Investigation Office had not drawn any conclusions whatsoever from this fact, of which it was aware.

Reopening of investigation

Due to the results of the investigation, the reopening of the investigation was ordered and a new head of the investigation was appointed.

Investigation report years late

The man subsequently submitted a new complaint to the AOB following the failure to issue an investigation report two years after the investigation was reopened. It was only after multiple interventions by the AOB that a draft report was released in March 2021 – almost seven years after the air accident and nearly three years after the reopening of the investigation had been ordered. At the time this Annual Report was finalised, the final report concerning the air accident on 5 April 2014 had still not been released.

Excessive length of proceedings unjustified

In view of this unquestionably long proceedings, the AOB identified this as case of maladministration. This is because the goal pursued by legislators in carrying out a safety investigation that would enhance the safety of civil aviation by preventing accidents and disruption will be seriously impaired by such a long duration of proceedings. Owing to technical progress, the presentation of the results of an investigation after such a long period of time could hardly be capable of enhancing safety.

3.9.4 Railway law

AOB calls for barrier freedom on suburban trains and at railway stations

Non-barrier-free suburban trains not consistent with standards

The AOB previously stated in its Annual Report 2019 that the usage of non-barrier-free series 4020 suburban trains is no longer consistent with contemporary standards and represents an unreasonable imposition on people reliant on barrier freedom. There have been repeated complaints concerning this issue.

4020 units in service by 2025

In 2019 Austrian Federal Railways announced that it would completely phase out the old non-barrier-free series 4020 suburban trains (120 units were built between 1978 and 1987) following the purchase in 2022 of recently ordered trains. However, only a couple of new City Jet trains are actually in service. For various reasons – including the failure to approve the Talent-3 multiple-unit trains – total replacement was not completed on time. The obsolete suburban train units will remain in service until 2025. For persons with restricted mobility, it is de facto impossible to use them due to the extremely high entry steps.

More welcome news has by contrast been received regarding barrier freedom at railway stations of the Vienna suburban train network. The Vienna Grillgasse stop is now barrier-free following renovation work carried out in 2021. The Vienna Strebersdorf stop was also comprehensively modernised in 2021.

Construction of noise protection barriers

Noise protection barriers widely desired

People have repeatedly complained to the AOB about the failure to build noise protection barriers near their homes in order to reduce the noise associated with railway operations. The AOB took these complaints as an opportunity to contact Austrian Federal Railways and clarify whether the statutory prerequisites for a noise protection barrier were met, and whether Austrian Federal Railways was willing to contribute to the costs.

Fortunately, thanks to the cooperative approach taken by Austrian Federal Railways, it has been possible to get a number of these projects up and running. This includes one in Leonding, where it is planned to build noise protection barriers in 2022 in the vicinity of the four-track extension of the western line between Linz and Wels in the Gaumberg area. In Lower Austria it is planned to build a noise protection barrier in 2024 near the St. Andrä-Wördern railway station.

3.9.5 Environment

Acoustic nuisance from a waste treatment facility

The AOB previously reported in the Annual Report 2020 (volume "Monitoring Public Administration", p. 144) regarding a matter in which various people from the surrounding area contacted the AOB with a complaint about acoustic nuisance from a waste treatment facility. The facility was approved in 2006 and has been adapted several times.

Noise level represents health risk

According to statements made by the public specialist in human medicine, all noise level peaks measured were significantly higher than the maximum threshold of 42 dB. This was resulting in medically unjustifiable nuisance also for healthy adults and children, which was increasingly developing into a health hazard. Following the criticism by the AOB, the Governor of Styria arranged for new noise measurements to be taken after January 2020 and commended the action that the company had taken, in some cases on its own initiative, to the AOB. A noise protection barrier should also be built as required by the authorities.

Noise protection barrier built

The construction project was initially delayed. Eventually, the facility operator announced that the noise protection barrier would be completed in the autumn of 2021. The persons affected by the noise confirmed to the AOB that the noise protection barrier had been built, but that it has not brought the improvement they had been hoping for. They now suspect that a nearby meat processing plant, which is regulated by the Trade and Commerce Authority, may also be causing noise. They fear that the Trade and Commerce Authority and the Waste Management Authority could each attempt to pass responsibility onto the other, with the result that no action is taken. The AOB pursued its examination with both authorities.

Odour nuisance caused by a composting facility

A woman complained to the AOB concerning noise, dust and smells that were being emitted by a composting facility situated at a distance of 200 metres. The AOB previously reported on this in the Annual Report 2020 (volume "Monitoring Public Administration", p. 144 et seq.).

Competence finally established

Since the composting facility is operated jointly along with a farm, it had been disputed for a number of years, which would be the competent authority for this matter. In case the facility were to be classified as a business ancillary to agriculture, the Governor of Styria would be competent under the Waste Management Act (Abfallwirtschaftsgesetz). If, however, the facility were not to be classified as a business ancillary to agriculture, the District Authority of Leoben would have competence under the Austrian Industrial Code (Gewerbeordnung). Thus, the case file was sent

back and forth between the Governor of Styria and the District Authority of Leoben several times. After an investigation was initiated by the AOB, the District Authority issued an assessment in November 2020, finding that the composting activity was not subject to the Austrian Industrial Code and accordingly that the Governor of Styria was competent under the Waste Management Act. Whilst this dispute concerning competence was ongoing, the authorities took hardly any action to improve the situation for local residents.

Facility closed - no deliveries of new material

Developments occurred regarding this issue in 2021: following the imposition of several administrative penalties, the Governor of Styria issued an order prohibiting the delivery of any further waste to the composting facility. Legally binding decisions were issued by the Regional Administrative Court of Styria in the autumn of 2021 upholding the withdrawal of the licence as well as the decision to close the facility. In the meantime, the facility has been closed by the authorities. According to the authorities, now it is only allowed to process the material it has already received. The operator subsequently sought to reverse the decision to close the facility and to recover its licence. According to most recently available information, the proceedings are still pending.

False registration of a potentially contaminated site

In March 2021, a man received a letter from the office of the Regional Government of Lower Austria stating that his property had been recorded as a "contaminated site" by Umweltbundesamt GmbH (the Austrian expert organisation for environmental matters). The reason given for this was the fact that a print works and a petrol station had been operated on the property for several decades.

Incorrect registration was avoidable

However, both businesses had been operated on other properties. After the AOB became involved, the office of the Regional Government of Lower Austria carried out an investigation and arranged for the inaccurate entry to be cancelled. The AOB criticised the way this had been handled, because the property had been registered as a "contaminated site" without prior notification of the property owner and because the office of the Regional Government of Lower Austria had not indicated the reason for the incorrect registration. Had the property owner been informed prior to registration, the incorrect entry could have been avoided.

3.10 The arts, culture, the civil service and sport

Introduction

The Federal Ministry for Arts, Culture, the Civil Service and Sport includes the State Secretariat for Arts and Culture, the authority of which also includes the preservation of cultural heritage sites. The small number of complaints received during the year under review that fell within the purview of the Ministry concerned in most cases the preservation of cultural heritage sites.

For a number of years the AOB has been committed to achieving barrier-free access for public buildings. Establishing this type of access is particularly difficult where the building is subject to a preservation order. The case involving the Kufstein parish church shows that solutions can nonetheless be found.

At this point, the AOB takes the opportunity to refer to its efforts to set up a contact centre for victims of abuse from the arts, culture and sport sectors, as well as its discussions concerning this matter with the Ministry.

3.10.1 Contact centre for victims of abuse from the arts, culture and sport sectors

The arts, culture and sport offer an enormous potential for promoting the development of children and young persons without any consideration of their age, gender, sexual orientation or social or ethnic origin. These areas should offer all children the opportunity to acquire skills in an environment characterised by respect and trust. Although there is no doubt that good work is being carried out by clubs and associations, in recent years, cases involving abuse at arts, culture and sporting bodies have resulted in a number of negative news stories.

Institutional risks

In view of its experience as a National Preventive Mechanism and as a Pension Commission under the Pensions for Victims of Children's Homes Act (Heimopferrentengesetz), the AOB considers it important to stress that there are institutional risk factors that may facilitate emotional, psychological and physical violence and abuse in all areas of life in which children are placed in the trust of adults. These include spatial and organisational isolation (e.g. within seminars, education and training centres as well as camps), the removal of boundaries legitimized by heightened competition, games and high performance, along with the related culture of silence in order to avoid a loss of recognition or damage to one's own reputation. In many cases, there are no adequate mechanisms for reporting violence and abuse, no low-threshold warning systems and

only insufficient organisational support. This was made clear by Ombudsman Bernhard Achitz in discussions with responsible officials from the Ministry.

Preliminary work underway

In March 2021, Vice-Chancellor and Minister for Culture and Sport Werner Kogler and State Secretary for Arts and Culture Andrea Mayer announced that preparatory work had already started on a contact centre for victims of abuse from the arts, culture and sport sectors, as had been called for by the Culture Committee (resolution proposal for 52/AEA). The AOB hopes that it will soon be up and running.

3.10.2 Preservation of cultural heritage sites

Access to Kufstein parish church

Access problems for persons with disabilities and the elderly

A local builder in Kufstein has been working on a voluntary basis for some time in order to establish barrier-free access to the Kufstein parish church. In his complaint, he stated that the Federal Office for the Care of Monuments (Bundesdenkmalamt) had objected to the establishment of barrier-free access in numerous letters. An acceptable solution has still not been found. Such access, or at least a barrier-free climbing aid, is absolutely necessary: the church's catchment area also includes institutions for persons with disabilities, and in particular the elderly and persons with restricted mobility have problems in accessing the church.

In its initial statement of opinion made to the AOB the Federal Office for the Care of Monuments asserted that it had already approved the winning project in an architectural competition. It provides in particular for a lift inside the church hill. An alternative could be to organise a motor transport service, especially if the church could be reached by motor vehicle. It stated that other options preferred by the builder and the pastor would not be feasible under the law on the preservation of cultural heritage sites, as they would interfere too much with the substance of the site.

Solution preferred by the Federal Office for the Care of Monuments too expensive

However, according to the builder, the "winning project" preferred by the Federal Office was abandoned as it was not financially feasible. Excavation carried out by hand to a depth of around 2 metres found the remains of an old town wall. Nobody had been able to state definitively that it could be removed. The Municipality of Kufstein therefore decided to terminate the project, especially as construction costs had been estimated at EUR 400,000.

The "winning project" was also objectionable having regard to its consequences: it would have replaced part of the vehicular access route to the church, which is also used as an emergency route for the fire and ambulance services, with steps and thus prevented the usage of machinery to clear snow. The solution proposed by the Federal Office of establishing a

motor transport service as a substitute for barrier-free access did not take account of the right to self-determination of persons with disabilities.

Involvement of AOB helps to reach consensus

The complaint was also considered in the ORF television programme Bürgeranwalt ("Advocate for the People"). As a result of preparations for the television programme and of the involvement of the AOB, the various stakeholders (Federal Office for the Care of Monuments, the builder, the Municipality of Kufstein, the Kufstein parish church and the Salzburg Archdiocese) conducted further discussions.

It was subsequently possible to resolve the most evident points of contention. The builder expressed his thanks for the intervention and announced the positive result as follows: "As a result of the change in circumstances, it was possible to identify a new option for the climbing aid, which was approved by all parties during this very constructive discussion. Thanks to your support and the resulting public pressure, [those responsible for taking a decision] adopted a very practical approach".

3.11 Defence

Introduction

In 2021, the AOB dealt with 33 complaints and enquiries relating to the Federal Ministry of Defence. The complaints concerned employment law issues such as promotions or retirements, housing costs allowances under the Army Fees Act (Heeresgebührengesetz), conscription procedures, call-up for military service as well as negative experiences whilst performing national service.

Clarification of right of appeal

The AOB received various complaints from conscripts stating that it had not been made clear to them that they could appeal to the Federal Administrative Court against the decision made by the Conscription Committee concerning their fitness for service. To summarise, the AOB considers that young conscripts should be provided with clearer information concerning their right to appeal against conscription decisions.

Conscripts' experiences provide basis for improvements

In addition, the AOB also received reports concerning negative experiences during national service. It is naturally not possible to review all descriptions of individual experiences retrospectively. However, the AOB endeavours to proceed with the utmost sensitivity in this area and to have a sympathetic ear for young persons performing national service. The AOB is only able to make specific enquiries with the Federal Ministry of Defence, and where applicable to point out structures and perspectives that are no longer in line with current standards, if young recruits provide accurate reports concerning their experiences.

Social challenges

A complaint made by a transgender person who was declared to be unfit for service due to the failure to undergo gender reassignment surgery showed that also the Austrian Federal Army has to deal with contemporary social developments. Strategies need to be developed and implemented in this regard in order to avoid unlawful discrimination against transgender persons in future.

3.11.1 Position of transgender persons in Austrian Federal Army

Change of name and civil status

A young transgender conscript informed the AOB that he had been automatically found to be unfit for service by the Conscription Committee due to a lack of external genitalia. He had been born female, but had always felt like a male. He changed his name and civil status in December 2018 and started hormone therapy in March 2019, having planned to do so for a long time. His breasts were removed in September 2019.

Desire for career in the Austrian Federal Army

The young conscript informed the AOB that he had been wanting to pursue a career in the Austrian Federal Army for some time. He had originally wanted to enlist in the Austrian Federal Army voluntarily (as a woman) immediately after completing school leaving exams. However, in the end he had decided to wait until he had changed his civil status and had his breasts removed and join the army as "himself", i.e. as a man. After reading in a magazine published by the Austrian Federal Army that transgender persons are currently prohibited from performing national service in Austria, he initially contacted the Citizens' Service Office of the Austrian Federal Army and asked whether this information was accurate. Following numerous telephone calls with a variety of offices, he was ultimately assured on various occasions that his transsexuality would not in principle prevent him from performing national service. He subsequently received a conscription date in February 2021.

He first completed some examinations and tests. On the following day, a psychological interview was scheduled. Until this time, he had still thought that he had a real chance of joining the Austrian Federal Army.

Psychological interview

However, the psychologist told him at the start of the interview that the chances of being accepted into the Austrian Federal Army were extremely slim for transgender persons. Later on in the interview, he was informed that he had achieved above-average scores in almost all areas of the psychological tests, and had scored within the upper average range in only a few areas and just under the average in only one area. He had scored so well that they would "normally" jump at the chance to get him into the Austrian Federal Army. However, it was likely that they would not take him.

Automatic unfitness for service

He was asked right at the start of the medical examination whether he was aware that he would "automatically" qualify as unfit for service on account of his circumstances. In the concluding interview, he was informed that he had been found unfit for service. His poor eyesight and allergies were initially indicated as reasons. His transsexuality was not openly discussed at the concluding interview. The major in charge had simply said "well, and the rest you know, right". The conscript received the notification, but did not sign the document waiving his right of appeal.

No written response explaining unfitness for service

As the young conscript wished to file an appeal against the decision finding him unfit for service, he wrote to the Conscription Committee and asked for the precise reasons for the decision. Since, in spite of repeated reminders, the conscript was not provided with written reasons for his unfitness for service, the AOB asked the Federal Ministry of Defence, notwithstanding the ongoing procedure, to state in writing the reasons for the Conscription Committee's decision.

Automatic unfitness for service due to a lack of external genitalia

In its statement of opinion, the Ministry started by asserting that the young conscript had undergone the conscription procedure "at his own request". A decision taken by the Conscription Committee had found him to be unfit for service. He had been informed orally concerning the result of the medical and psychological examination. "Transsexualism" does "not automatically result in unfitness for service". As is the case for any conscript, it is necessary to examine in each individual case whether the person is fit to perform military service. "According to the medical evaluation tool created by the Military Health Department within the Federal Ministry of Defence" a conscript must be declared "unfit" for military service "where he lacks external genitalia". In this regard, it is immaterial whether the penis or testicles have been absence since birth, following an operation or due to some other reason.

Re-conscription after full gender reassignement surgery

Although he had been found unfit for service, the young conscript has however the option of submitting a new request for an examination of fitness for military service following full gender reassignment surgery.

Official reasons in writing given retrospectively

At the same time as the statement of opinion was sent to the AOB, the conscript finally received a letter from the Lower Austria Conscription Committee regarding his appeal against the decision finding him unfit for service, which was entitled "Preliminary decision on the appeal, party hearing". The letter presented an account of the two-day conscription procedure. It then noted the diagnoses reached during the conscription procedure: transsexualism, myopia (short-sightedness), side-effect of Parkemed, allergic rhinopathy and an "other food allergy" (cows' milk). As mentioned in the letter to the AOB, a reference was made to the "medical evaluation tool" and the possibility of re-conscription following full gender reassignment surgery.

Surgery is not a condition to change gender

The AOB was initially unable to understand the Federal Ministry of Defence's assertion that the young conscript had undergone the conscription procedure "at his own request". In its view, as a male adult citizen, the young conscript was obliged by law (National Defence Act) to undergo conscription. The AOB stressed that the fact that gender reassignment surgery had not yet been carried out was incapable of affecting the requirement of conscription. In legal terms, the young conscript had been a male Austrian citizen since he changed his civil status in accordance with Section 41 (1) of the Civil Status Law (Personenstandsgesetz). Referring to the case law of the highest courts, the AOB pointed out that gender reassignment surgery is not a requirement (any longer) in order to change gender in Austria.

„Medical evaluation tool" out of date

Moreover, it was not clear for the AOB what legal status the "medical evaluation tool" had and when it had been adopted. At any rate, it now appears to be out of date. It therefore does not make sense why the lack

of external genitalia should automatically entail physical unfitness for service. The AOB naturally welcomes the fact that each case is considered individually during a conscription examination. However, if the "medical evaluation tool" asserts that a person should automatically be deemed to be unfit for service if external genitalia are absent, any examination of the individual circumstances will always be superfluous in such cases.

Surgery is a highly personal decision

In response to the reference by the Federal Ministry of Defence to the possibility for transgender persons to undergo full gender reassignment surgery and thereafter "to contact them again", the AOB noted that the imposition of the "condition" of gender reassignment surgery for an examination of fitness to serve in its view amounts to unethical pressure. The decision to undergo surgery of this type is highly personal and involves a serious operation with considerable risks.

The AOB gained the overall impression from its research that transgender persons have until now been prevented from performing national service and that they are not welcome in the Austrian Federal Army.

Prohibition on discrimination also covers transgender persons

With regard to the prohibition on discrimination, the AOB referred not only to Article 7 of the Federal Constitutional Law along with the Federal Equal Treatment Act (Bundes-Gleichbehandlungsgesetz) and the Federal Ministry of Defence's own Equality Guidelines, but also the case law of the European Court of Justice. According to this case law, the prohibition on discrimination due to gender also covers transgender persons (see Case C-13/94, Cornwall County Council).

Cancellation of decision concerning unfitness for service

The decision finding him unfit for service was ultimately reversed and the young conscript was invited to complete the conscription procedure again. The AOB recommends that the criteria for fitness for military service be updated and subsequently published. In addition, it also considers that new strategies should be developed and implemented in order to avoid any future unlawful discrimination against transgender persons.

3.11.2 Legal protection against conscription decision

No reasons or instructions on the right to appeal

By a decision of the Upper Austria Conscription Committee, a young man from Upper Austria was initially found to be "temporarily unfit for service" as he had been planning to undergo jaw surgery for some time, which was scheduled during his period of national service. The conscript's father complained to the AOB that the Conscription Committee's decision finding him "temporarily unfit for service" did not include reasons or instructions concerning the right to appeals. This represented a fundamental problem, especially since, without the instructions concerning appeals or a statement of reasons, 19-year-olds generally do not know what type of appeal they should bring as well as the (precise) reason relied on by the Conscription

Committee. An oral reason is no replacement for written reasons, which could be consulted again at a later stage.

Waiver of right of appeal has to be signed on the spot

When conscripts are provided with conscription decisions, which do not contain instructions concerning appeals, they are provided at the same time with a form for waiving their right of appeal, which they are supposed to sign immediately. As a result, young conscripts are pressured into waiving their right of appeal immediately, and thanks to this course of action, no appeals are generally raised.

The AOB confronted the Federal Ministry of Defence with the objection concerning the lack of reasons for the Conscription Committee's decisions as well as the handing out at the same time of forms for waiving the right of appeal, which are supposed to be signed immediately on the spot. The AOB stated that it had received numerous complaints from conscripts stating that it had not been made sufficiently clear to them that they could have appealed against the decision taken by the Conscription Committee.

Written record only upon request

The Federal Ministry of Defence referred to the oral provision of reasons for decisions and the instruction concerning appeals. Conscripts can be provided with a copy of the specific records relating to them upon request. In addition, it stated that conscripts are informed orally at the time the decision is announced concerning their right to request a written copy of the decision issued orally. The issue of written conscription decisions would be impractical given the large number of conscription decisions.

The AOB concluded in this regard that it was not objecting to the oral issue of conscription decisions according to Section 62 (1) of the General Administrative Procedure Act (Allgemeines Verwaltungsgesetz) in itself. Moreover, the AOB did not doubt that, at the time the decision was announced orally, conscripts were informed (also orally) pursuant to Section 62 (3) of the General Administrative Procedure Act concerning their right to request a written copy of the decision within three days.

Lack of knowledge regarding appeals

The AOB attributed the fact that some conscripts did not appear to know about their right of appeal to their lack of knowledge regarding the legal position coupled with their limited receptiveness after the conscription procedure. Some conscripts also stated that they had felt pressured into waiving their right of appeal. However, the AOB takes the view that young persons who are not closely acquainted with administrative law need special protection, especially where they have been found to be "temporarily unfit for service".

AOB recommendation

The AOB recommended that the written confirmation of the decision concerning fitness for military service incorporate a reference to Section 62 (3) of the General Administrative Procedure Act, including also within this context a reference to the possibility of waiving the right of appeal.

Were the Federal Ministry of Defence to act on this recommendation, it would be the conscript himself who would actively take the initiative of waiving the right of appeal in the future. Complaints would no longer be made by conscripts who felt that they had been pressured into waiving the right of appeal. Aside from the minor adjustment to the written confirmation of the decision concerning fitness for military service, the implementation of this recommendation would entail hardly any additional cost for the authorities.

The Federal Ministry of Defence referred to the low number of appeals against conscription decisions before the Federal Administrative Court and stressed that conscripts were "evidently well informed". The AOB stated that, in its view, the low number of appeals was attributable to the lack of information and the issue of forms for waiving the right of appeal.

3.11.3 Preservation of cultural heritage sites

A young conscript complained concerning a conscription confirmation by the Vienna Military Command. The Conscription Committee issued the following confirmation:

Alleged medical and psychological exam

"Mr [···] underwent medical and psychological examinations concerning fitness for military service over the period [···]. The decision by the Vienna Conscription Committee is UNFIT FOR SERVICE".

In his view, this confirmation would suggest to subsequent employers that he had undergone a psychological examination and had been declared unfit based on the results. However, in his case no psychological or medical examination had taken place, as he had been automatically found to be unfit for service on account of a chronic illness.

Confirmation concerning the conscription decision

There was also a lack of clarity in this case concerning the right to file an appeal. The Vienna Military Command initially stated in a letter to the young conscript that the contested form was not a conscription "decision" but rather only a "confirmation" that a conscription procedure had been carried out and that the decision had been unfit for service.

The conscription decision itself is a decision announced orally, which is then formalised in a specific document. A conscript may challenge the decision by appeal, unless he has expressly waived the right to do so. The contested confirmation served "only as documentation of the fact that the conscription procedure had been carried out at a particular time". The standard formulation "medical and psychological examinations" was stated to reflect the text of the legislation laid down in Section 17 (2) of the National Defence Act 2001 (Wehrgesetz) and was "not based on the specific procedure". A "revision of the confirmation template" was underway, although the "timescale was dependent on available staff resources".

Revision should be possible within short time

The AOB asked the Federal Ministry of Defence for a statement of opinion. The AOB stressed that, in view of the concise wording in the existing "confirmation template" concerning the conscription procedure, it could be presumed that the general "revision" prospected could be completed within a short space of time, even in the event of staff shortages.

Reference to written copy of decision

Since here too it had not been clear to the young conscript that he could have appealed against the conscription decision, the AOB once again referred expressly to its recommendation that the information concerning the right to appeal and the significance of a waiver of the right to appeal be improved (see chapter 3.11.2). The written confirmation of the decision concerning fitness for military service should incorporate a reference to Section 62 (3) of the National Defence Act, including also within this context a reference to the possibility of waiving the right of appeal. The AOB also asked that the confirmation previously issued to the young conscript be rectified and that the Federal Ministry of Defence provide a further statement of opinion concerning its recommendation.

Reference to non-existing psychological examination removed

The Federal Ministry of Defence subsequently reported that the confirmation concerning the conscription decision had been revised. The reference to the psychological examination, which had never been carried out, was removed. The Ministry also stated in response to the recommendation by the AOB that fewer than 30 conscription decisions are challenged before the Federal Administrative Court each year out of an average of around 45,000 conscription procedures. This indicates that conscripts are receiving sufficient information, and therefore the recommendation by the AOB would not be acted upon.

Low number of appeals due to lack of knowledge

The AOB welcomed the swift rectification of the confirmation of the decision concerning fitness for military service in the specific individual case. However, it stressed once again that the low number of annual complaints against conscription decisions made to the Federal Administrative Court does not in itself suggest that young conscripts are receiving sufficient information. It is rather attributable to the form for waiving the right of appeal, which is handed out at the same time as the confirmation concerning the conscription decision. The AOB regrets the Federal Ministry of Defence's unwillingness to act on its recommendation.

3.11.4 Compulsory military service – early discharge due to incapacity for service

Negative experiences

Following his early discharge due to incapacity for service at the start of 2021, a serviceman in compulsory military service described his negative experiences during his period of national service to the AOB. He reported concerning, amongst other things, bulling by trainers, the intentional exposure of weaker servicemen and homophobic statements.

Early discharge due to incapacity for service

A few weeks after his early discharge, the serviceman received a decision giving notice of a new period of conscription starting from January 2022. He doubted that this course of action was lawful.

Disciplinary action

The Federal Ministry of Defence addressed the serviceman's allegations, although it was only possible to assess his assertions in relation to jokes about "gay-looking" recruits along with other homophobic assertions made by a trainer. The concerned group commander remorsefully conceded that the allegations were true and confirmed in its entirety the account provided by the serviceman. The Federal Ministry of Defence stated that disciplinary action had already been taken.

Preventive training

The AOB welcomed the swift taking of disciplinary action against the group commander concerned in the specific individual case. However, it also called for preventive action on inappropriate remarks about sexual orientation and that trainers receive appropriate training.

As regards the new conscription procedure notified along with the decision, the AOB informed the serviceman that the issue of a notice concerning a new period of conscription following a previous discharge was consistent with the case law of the Supreme Administrative Court of Austria and the Federal Administrative Court. According to the case law of the Supreme Administrative Court, a consequence of an assessment by a military doctor that resulted in the early discharge of a conscript is solely the issue of a notice concerning a new period of conscription. The definitive decision concerning any change to "fit for service" compared to the last examination of fitness for service is a matter for the Conscription Committee during the new conscription procedure (see the ruling of 20 February 1990, ZI. 89/11/0235). The former assessment is therefore only provisional in nature, and its result is not binding at all on the Conscription Committee, although it is of fundamental relevance (see also the ruling of 19 April 1994, ZI. 93/11/0272).

The Supreme Administrative Court also held in its ruling of 28 April 2005 (ZI. 2005/11/0068) that an early discharge due to incapacity for service in accordance with Section 30 of the National Defence Act 2001 does not amount to a declaration of "definitive" unfitness for service. It follows from Section 30 (2) of the National Defence Act 2001, which provides that a person is also unfit for service if he/she is only expected to become unfit for service after 24 days, that Section 30 (1) of the National Defence Act 2001 does not apply merely in the event of "definitive" incapacity for service but rather – also – in the event of temporary incapacity for service, which might accordingly cease as provided for under Section 28 (5) of the National Defence Act 2001.

Whereas Section 28 (5) of the National Defence Act (discharge from service) expressly clarifies that early discharge in accordance with Section 28 (3) of

the National Defence Act does not preclude a subsequent call-up for service once the reason for discharge no longer applies, Section 30 of the National Defence Act (early discharge due to incapacity for service), on the basis of which the serviceman was discharged, does not contain a similar reference.

AOB makes legislative recommendation

Notwithstanding the case law of the Supreme Administrative Court referred to above, the AOB thus recommended that the Federal Ministry of Defence propose a legislative clarification to Section 30 of the National Defence Act to be incorporated into the next ministerial draft legislation.

3.11.5 Call-up of key workers for militia exercises

Difficult situation due to COVID-19

A company complained to the AOB because one of its workers had been called up in the autumn of 2021 for a four-day militia exercise. The situation in the company was difficult due to the COVID-19 pandemic and the militia soldier called up was essential for its operations. The worker's request, supported by reasons, that he be exempt from the militia exercise was rejected without any further justification.

Call-up of key workers

The AOB asked the Federal Ministry of Defence to provide a general statement concerning the calling up of key workers during economically difficult periods. It was also asked to state why an exemption had not been granted in this case.

The Ministry stated that each application must be examined individually. During the course of investigative proceedings carried out by the AOB, the Ministry caught up on the individual examination in this case and by an ex-officio decision granted an exemption due to "general economic interests".

Detailed examination of each individual case

The AOB welcomed the positive response in this specific case and stated, however, that the failure to take account of the special economic interests of key workers should not result in a situation over the long term in which companies do not hire militia soldiers at all. This could specifically result in a fall in the number of militia soldiers in the Austrian Federal Army. The AOB therefore recommended that exemption requests be carefully examined in each individual case and that any refusals be justified in detail, even though they do not have the status of decisions according to the case law of the Supreme Administrative Court.

3.11.6 Housing costs allowance under the National Defence Act

Orphan's pension finances costs of living in parent's home

A young conscript complained to the AOB because his application for a housing costs allowance had been rejected. In a telephone call with the Army Personnel Department, the conscript had stated that he had only

officially been paying rent to live in his father's home since September 2020. The Army Personnel Department concluded that he had not been liable to pay for accommodation within the meaning of Section 31 of the Army Fees Act (Heeresgebührengesetz) at the time he he received his conscription order in July 2020. The conscript told the AOB that he had not paid any "rent" until September 2020 only because he had previously still been receiving an orphan's pension and a family allowance until this time as he was completing an apprenticeship. In particular, the orphan's pension had previously been used in order to defray accommodation costs. In this regard, he had been paying "compensation" to live in his father's house. The conscript's apprenticeship was completed around the end of August/ start of September 2020, which resulted in the loss of his entitlement to an orphan's pension. The conscript started to work immediately after this and officially paid "rent" to his father out of his income.

Housing costs allowance should enable conscription to keep their own home

According to Section 31 (1) of the Army Fees Act, the housing costs allowance is intended to defray costs that are demonstrably incurred during the period of military service in order for the serviceman to retain the right to live in the home in which he is officially resident. However, according to this provision, this right only applies to the home in which the beneficiary was living in return for the payment of consideration at the time the conscription order took effect. Based on the reasons given for the refusal by the Army Personnel Department, the AOB therefore asked whether he could be considered to have been living in the home "for consideration" within the meaning of Section 31 (1) (1) of the Army Fees Act at the time the conscription order was issued in July 2020.

In its statement of opinion, the Federal Ministry of Defence simply asserted that, according to the case law of the Federal Administrative Court, the contribution of the orphans' pension in order to cover housing costs amounted to a form of "offsetting the payments" and not "compensation".

Family allowance is a welfare benefit for parents

However, in the view of the AOB, the facts underlying the case considered in the ruling of the Federal Administrative Court, which was mentioned by the Federal Ministry of Defence, of 10 February 2020 (W136 2222640) on "offsetting" were not, or were only partially, comparable with the facts at issue here. For instance, in contrast to an orphans' pension, the family allowance is a welfare benefit received by parents for children living within their household, whereas an orphans' pension is a benefit that is intended to guarantee social support for the surviving children following the death of an insured parent.

Ministry fails to follow AOB's recommendations

On account of his difficult circumstances, throughout the period of his training the young conscript paid (a part of) his orphans' pension to his father in order to live the latter's home. The conscript started to work immediately after his apprenticeship ended and paid rent to his father from

this point onwards in order to live in the father's home. In the view of the AOB, the prerequisite of the payment of compensation towards housing costs may be deemed to have been met at the time the conscription order was issued. The AOB therefore suggested that the rejection be amended ex officio. Should this recommendation not be acted upon, the AOB proposed that a hardship payment be made pursuant to Section 56 of the Army Fees Act. The Federal Ministry of Defence failed to address the arguments raised by the AOB and did not act on the AOB's recommendations.

3.11.7 Preservation of cultural heritage sites

Delayed promotion to first lieutenant

A militia soldier was promoted to the rank of lieutenant in 2012. Although he had fulfilled the prerequisites laid down in the promotion guidelines for his next promotion to first lieutenant since 2015, he was only promoted in 2018.

Delay in appointment as a captain

The militia soldier complained to the AOB objecting that, as a result of his delayed promotion to first lieutenant, this would also delay his subsequent promotion to captain. He needs to complete 75 days of weapons exercises as a first lieutenant in order to be promoted to the next rank of captain. He would already have completed the 75 days had he previously been promoted to first lieutenant at the right time. Initially, the "excess days served" as a lieutenant that had not been taken into account for his promotion to first lieutenant were "imputed" or "credited" to his promotion to captain. However, this crediting was then abruptly cancelled, which is why he once again needed to complete the full 75 days as a first lieutenant in order to be eligible for promotion to captain.

During the investigative proceedings carried out by the AOB it was established that it had actually been forgotten to promote the militia soldier to first lieutenant in 2015. As a result, although he fulfilled the prerequisites laid down in the promotion guidelines, the competent military commander did not submit a promotion request. In order to "make up" for this oversight, the "excess" days of military service performed as a lieutenant were initially attributed to promotion to captain. However, this decision was subsequently reversed.

Promotion guidelines

The AOB conceded that the fact that the "excess" days of military service performed as a lieutenant before his promotion to first lieutenant could not ultimately be imputed to his next promotion to captain was lawful. Specifically, the completion of 75 days of military service as a first lieutenant is expressly stipulated in the promotion guidelines as a prerequisite for promotion to captain.

No arbitrariness in relation to promotions

However, the AOB objected to maladministration on the grounds that the promotion request had been forgotten, even though the prerequisites had been met. Although nobody has a legal entitlement to promotion, promotions should be granted consistently and there should be no scope for arbitrariness. The promotion guidelines are intended to ensure consistent application. If a promotion request is not submitted immediately after the prerequisites have been met, there can be unjustified differences in treatment as a matter of fact. The late promotion to first lieutenant not only resulted in an initial failure to achieve the rank of first lieutenant, but also affected the subsequent opportunity for promotion to captain.

Incorrect crediting of days

The AOB objected to a further aspect of maladministration consisting in the fact that the "excess" days of military service completed by the soldier as a lieutenant were initially "credited" as "replacement days" for the subsequent promotion to captain and at a later stage – correctly – disregarded. On account of the initial (unlawful) decision to credit those days, the first lieutenant had a legitimate expectation in achieving earlier promotion to captain, and was then frustrated at a later stage.

The AOB recommended an examination as to whether the prerequisites were met for the grant of a bonus in appreciation of service pursuant to Section 4a of the Army Fees Act or another form of compensation.

Very low bonus in appreciation of service

The Federal Ministry of Defence acted upon this recommendation by the AOB. However, according to the calculation method used by the Ministry, the amount of the bonus in appreciation of service amounted to EUR 44.10, which was very low and could not be regarded as compensation for late promotion.

3.11.8 Promotion to officer - officer suitability examination

A militia soldier – who had already been serving since 2013 as an expert – was waiting to be promoted to officer rank. He complained to the AOB concerning the long duration of the procedure for establishing a training programme for expert service officers, concerning structural unequal treatment in relation to the appointment of officers and concerning the officer suitability examination, which was required before he could be appointed as an officer.

Overlap with complaint to the Parliamentary Commission for the Armed Forces

Since the Parliamentary Commission for the Armed Forces (Parlamentarische Bundesheerkommission) had already upheld the complaint about the lack of a training programme as justified, the only question remaining for the AOB as regards the training programme for military experts was whether the missing training programme could be caught up within a short space of time. Since this was the case, there was no indication that there would be any

(further) delay. The AOB also did not identify any substantive shortcomings within the training programme.

Two-day officer suitability examination

The remaining points raised in the complaint to the AOB concerned in the first instance the two-day officer suitability examination, which was required before the soldier could be promoted to officer rank and transferred to the group O1/specialist focus "expert service". In this respect, the militia solder suspected that he had been treated differently from other persons awaiting promotion to officer rank. The militia soldier was informed by email about the exact procedure for the two-day officer suitability examination for experts. This was supposed to include in particular comprehensive psychological tests.

The militia solder subsequently decided not to submit an application for an officer suitability examination as he considered such an examination to be unjustified on account of his experience, the fact that he had been working as an expert since 2013 as well as his commendations. In parallel with his complaint regarding this issue submitted to the AOB, the militia solder also complained to the Parliamentary Commission for the Armed Forces concerning the requirement of an officer suitability examination or the failure to admit him to the training programme for transfer to the group O1/specialist focus "expert service".

At the time the complaint was resolved by the Commission, the militia solder was informed through the Federal Ministry of Defence that his complaint about the alleged unjustified failure to admit him to the training programme for transfer to the group O1/specialist focus "expert service" had been rejected as unfounded. It was not possible to identify any unlawful action as it is only possible to apply for specification of the training programme for transfer to the group O1/specialist focus "expert service" after officer suitability has been established.

Moreover, since the Commission had already decided on the substance of the complaint concerning the need for an officer suitability examination, the only matter remaining for the AOB in its investigative proceedings was to examine the points raised in the complaint regarding the alleged unequal treatment in the appointment of officers and in relation to the specific arrangements applicable to the officer suitability examination.

No structural unequal treatment

The AOB was unable to identify any structural unequal treatment in relation to the officer suitability examination required in relation to transfer to the group O1/specialist focus "expert service". It is clear from an overall consideration of the provisions referred that officer suitability is a prerequisite for embarking upon the officer career track or promotion to officer rank. Specifically, all persons seeking promotion to officer rank must undergo an officer suitability examination. Any person seeking appointment as an officer must undergo a "suitability examination" – over and above the

conscription examination. Officer suitability must be established before embarking upon the officer career track (career track for appointment as an officer or non-commissioned officer). The result of "fit for military service" obtained during the conscription procedure as a militia soldier was only sufficient for his previous activity as a serviceman. Since the militia soldier's officer suitability has never been established or is not clearly evident, he must – as is the case for any person seeking appointment as an officer – undergo an officer suitability examination (physical and mental fitness) before being appointed and transferring to the group O1/specialist focus "expert service".

Finding of unequal treatment in the individual case

However, the complaint concerning the exemption from the officer suitability requirement, as asserted by the militia soldier, which was confirmed by the Federal Ministry of Defence in 2017, was justified. The AOB found that unequal treatment had occurred in this specific case. However, the AOB did not conclude that there had been any general, objectively unjustified unequal treatment in relation to the officer suitability examination, which is in principle required of all persons awaiting promotion to officer rank, on account of the exception from the officer suitability examination granted since this occurred at the time the period of compulsory service came to an end.

More specific determination of officer suitablity criteria

The AOB found that the complaint was well-founded also as regards the lack of any transparent decision or parameters establishing or specifying officer suitability criteria. Accordingly, the AOB was also unable to discern any clear and transparent parameters from the provisions presented establishing the criteria that must be met for a finding of a person's (subsequent) suitability to serve as an officer. Thus, more detailed information concerning the "personal suitability" required or the "suitability to serve as an officer" or any differences from the prerequisites for appointment as an officer – depending upon future duties as an officer – are not apparent either from the training programme for "military experts" or from the rules applicable to promotions.

AOB recommendation

The AOB recommended first of all that the Federal Ministry of Defence examine more closely the prerequisites for obtaining "suitability to serve as an officer" or "personal suitability" as referred to in the relevant provisions and announce the result accordingly. In addition, the AOB recommended that scope for differentiation be considered, in particular in the event that an officer suitability examination has to be taken at a later stage – depending upon previous, actual and intended future duties.

Reaction by the Ministry of Defence

The Federal Ministry of Defence informed the AOB that it would act on the recommendation. More detailed prerequisites for obtaining officer suitability or personal suitability would be established and announced

within the ambit of an instruction providing clarification and detailed rules in relation to military experts, and were already being drawn up.

3.11.9 Selection criteria for study at the National Defence Acadmey

An academic working in a number of fields contacted the AOB and complained that his application for a PhD place at the National Defence Academy had not been considered.

Prerequisite and priorities for study

The call for applications listed both the prerequisites as well as priorities for acceptance. In his application, which had been submitted within the applicable deadline, the academic had explained why he was suitable for the study programme and that he complied with the application guidelines. However, in spite of, or specifically on account of, his qualifications, the academic was not selected as a PhD candidate. Having already completed his post-doctoral qualification, the academic felt that he had been discriminated against. According to international academic practice, a PhD programme is intended to enhance the competence established by, and the scope of, an existing academic qualification. It should not under any circumstances involve the mere acquisition of an academic title without following an academic career path. According to his own research, out of the ten individuals nominated, only six of the candidates selected had actually been working at universities and schools. As far as he was aware, previous participants in the PhD programme had been primarily general staff officers, and few of these had actually completed the study programme.

Newspaper article criticising study programme

The academic went on to cite a media report from the "Kurier" newspaper which alleged that "despite concerns on the part of control authorities, generals are buying PhDs", with costs starting from around EUR 500,000. The article also alleged that a control body within the Austrian Federal Army had objected that a qualification from this programme could not be "beneficially incorporated into an average career path".

The AOB asked the Federal Ministry of Defence to provide a statement of opinion and to present corresponding documentation. In order to be able to exclude any objectively unjustified difference in treatment in relation to the selection of candidates for the PhD programme, it was asked in particular to explain in greater detail the guidelines applicable to the award of places on the programme, as well as the actual selection criteria used.

Military study as additional selection criteria

The Ministry justified the failure to select the academic on the grounds that the most important consideration when choosing participants was that of increasing the proportion of staff officers holding a PhD. This meant that "as a general principle, only applicants qualified as EQR 7 are appointed". A balanced mix of general staff officers, persons completing the university

master's course in "Military Leadership" as well as military personnel and civilians working within the Federal Ministry of Defence's/Austrian Federal Army's education system, or persons intended for such roles, is selected for the PhD programme. Persons completing military studies are "considered on a priority basis" because, in contrast to those completing civilian studies, they do not have any other opportunity to complete doctoral studies. Since the academic had already reached level EQR 8 at the time of his application, he did not fall under the class of "personnel particularly eligible for support who should be directed into officially supported studies on the basis of a specific examination of needs and staff planning". It was asserted that this furthered the "implementation of the unit's internal staff development strategy" and did not constitute unjustified discrimination or maladministration. The cited newspaper article was claimed not to be up to date.

Precise criteria prevent unequal treatment

After reviewing the appointment criteria, the AOB did not find it acceptable that the relevant previous education and professional experience, which was evidently required in the end, was not mentioned in the call for applications. In order to be able to exclude any objectively unjustified unequal treatment or arbitrariness when selecting candidates for this PhD programme, which was free of charge and much in demand, the AOB took the view that in future it would be necessary to establish the selection criteria more clearly in advance of the call for applications, and subsequently to comply with these criteria.

3.12 Agriculture, regions and tourism

Introduction

261 cases

During the year under review 2021, a total of 261 complaints were received in relation to the Federal Ministry of Agriculture, Regions and Tourism. Most of these (77) related to the water law, 28 complaints concerned the implementation of the law applicable to forestry, whilst 10 related to agricultural subsidies.

In addition, since the 2020 amendment to the Federal Ministries Act (Bundesministeriengesetz) came into force, the Federal Ministry of Agriculture, Regions and Tourism has also been competent for "broadband rollout, telecommunications and postal services", which previously fell within the purview of the Federal Ministry for Transport, Innovation and Technology. In 2021 digital infrastructure and postal services were subjected to a new stress test and were in rising demand as a result of the COVID-19 pandemic. As was the case during previous years under review, the 128 complaints submitted to the AOB related to television and radio licence fees and the procedures followed by GIS Fee Info Service (GIS Gebühren Info Service GmbH), the company responsible for administering the fees for the public broadcaster ORF in order to implement the TV and Radio Licence Law (Rundfunkgebührengesetz).

3.12.1 Water law

Duration of proceedings an issue once again

2021 saw a slight increase in complaints concerning the duration of proceedings under water law, following significant falls in previous years. Other submissions concerned in particular status as a party within water law approval procedures, questions relating to flood protection and sewage disposal, as well as disputes with water cooperatives.

Delayed processing of enquiries concerning a flood prevention project

Regional government of Upper Austria fails to respond to enquiries

One man complained that he had submitted enquiries to the office of the regional government of Upper Austria on various occasions, most recently in January 2021, as the water law authority containing questions relating to a flood prevention project. However, due to reasons that are not apparent, the enquiries were not answered.

During the course of an investigation by the AOB, the office of the regional government of Upper Austria attended to the outstanding enquiries in June 2021 and stated that it had been unable to do so earlier on the grounds that the responsible official had been on sick leave for a number of months.

Since this circumstance was attributable to the authority, the complaint was to be well-founded.

Request to ensure the position required by law – delay

Leibnitz District Authority fails to deal with enquiry

A woman complained that the Leibnitz District Authority had been late in dealing with an enquiry made in June 2020. In this enquiry she had asked for the issue of an order by the water authority requiring the removal of an unauthorised water pipe running over her property.

Removal was only ordered by a decision taken in April 2021, following investigative proceedings carried out by the AOB. The District Authority justified the lengthy duration of its proceedings with reference to the fact that the woman had failed to act on a request to specify her assertions. However, the AOB was unable to establish that this fact necessarily prevented the matter from being resolved more swiftly. The long duration of proceedings was therefore objectionable.

Delayed response to enquiries

Vöcklabruck District Authority fails to answer enquiries

A man complained that his emails sent in October and November 2020 to the Vöcklabruck District Authority as the water law authority had not been answered for reasons that were not apparent.

The Vöcklabruck District Authority confirmed that the enquiries had been received. However, it was unable to establish why they had not been answered. The authority provided answers in July 2021. The AOB criticised that it had taken around eight months to respond to the enquiries.

Deposits in the Traunsee

Legal basis insufficient

In the Annual Report 2020 (volume "Monitoring Public Administration", p. 155 et seq.), the AOB reported on deposits of driftwood and flotsam in the Traunsee lake as well as on the disputed issue as to who was responsible for cleaning it up. During the course of its investigative proceedings the AOB found that the Water Rights Act (Wasserrechtsgesetz), the Forest Act (Forstgesetz) or the Waste Management Act (Abfallwirtschaftsgesetz) did not offer a sufficient statutory basis for the imposition of an administrative obligation to remove these deposits.

The AOB recently asked the office of the regional government of Upper Austria whether it would be possible to (co-)finance clean-up work. Although the Land Upper Austria did not consider that it would be able to do so, by a resolution adopted in the meantime in the Diet of Upper Austria, it announced that it would take action with the Federal Government to establish a legal framework for a clear allocation of competence over the issue of "flotsam/driftwood". This resolution was presented to the Council

of Ministers at its meeting held on 26 May 2021 and was subsequently referred to the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology and the Federal Ministry of Agriculture, Regions and Tourism.

Financing must be clarified

In relation to this matter, the Federal Ministry of Agriculture, Regions and Tourism referred to the fact that the Disaster Fund Act (Katastrophenfondsgesetz) provided for the responsibility of the Federal Ministry of Finance. The Federal Ministry of Agriculture, Regions and Tourism also recommended that, were support to be granted, the costs of removing flotsam and driftwood be secured with funds from the disaster fund, to which the Laender and the municipalities should contribute at least in equal shares with the Federal Government.

In September 2021 a petition calling for a basis to be created in federal law for cleaning up pollution caused by flotsam and driftwood was transmitted to the President of the National Council, concerning which the AOB issued a statement of opinion to the Petitions Committee.

Petition is being considered

Amongst other things, statements of opinion were requested from the Laender within the ambit of follow-up work in relation to this petition (No. 69/PET). At the time this Annual Report was finalised, statements of opinion from several Laender had already been submitted to the liaison office of the Laender established at the office of the regional government of Lower Austria. They were forwarded to the parliamentary authorities along with a request that they be taken into account.

The AOB welcomes that action is being taken to create a legal basis for the removal of flotsam and driftwood, as well as its financing, and will continue to monitor related developments.

3.12.2 Agriculture and forestry

Tree damage from bark beetles

Establishment of a woodland fund

In its Annual Reports 2019 and Annual Report 2020 (volume "Monitoring Public Administration", p. 157 et seq.), the AOB described the effects of wide-scale woodland damage caused by bark beetles, in particular in 2018 and 2019. In order to prevent the resulting losses to woodland owners, on 7 July 2002 the National Council enacted the Woodland Fund Act (Waldfondsgesetz), as a basis for establishing a woodland fund.

The Federal Ministry of Agriculture, Regions and Tourism issued the Woodland Fund Special Guideline to regulate the award of subsidies. According to this guideline, compensation is payable in respect of woodland damaged by bark beetles upon condition, amongst other things, that the

affected area is situated within a cadastral municipality in which at least 3% of total woodland was damaged in 2018 and 2019.

Criticism of conditions for compensation

Some woodland owners objected that the method used in order to calculate the area damaged or the minimum proportion damaged did not reflect standard practice and that it disadvantaged owners of smaller woodland areas. Specifically, woodland areas were identified using satellite images based on treetop discolouring. However, this disregarded the possibility that the tree may have been long dead at the time the treetop was discoloured. At this stage, bark beetles will already have left the dead tree and infested neighbouring trees.

In contrast to the larger forestry businesses, the owners of smaller woodland areas inspected their woods almost daily in order to identify tree infestation with bark beetles at as early a stage as possible and to remove the tree. This prevents bark beetles from multiplying and damaging neighbouring trees. For this reason, no dead trees with discoloured treetops can be identified from aerial images for these (mostly small) woodland areas.

Procedure reliable according to the Ministry

In response to this, the Federal Ministry of Agriculture, Regions and Tourism stated that the identification of damaged areas using satellite images had been the "only and most reliable" procedure for establishing bark beetle damage from previous years. The discolouring of already dead trees was not the crucial factor – as was asserted by the woodland owners concerned – but rather "special areas/time patterns of trees used" that were typical for bark beetle infestation.

This meant that it was possible to identify felling – including any felling due to the appearance of bark beetles over a very small area – beginning from the minimum area of 0.1 ha specified in the Special Guideline. Once this minimum area has been reached, it is immaterial for the procedure applied whether the individual trees had already died at the time they were felled, which means that trees cut down due to bark beetles that were still healthy at the time can also be compensated.

The AOB has informed those affected concerning the above and will monitor whether any further complaints are received concerning this issue.

Taking dogs into woodland

Right to access woodland for „anyone"

The AOB was confronted with the issue of encounters between different woodland users, in particular involving hunters, which repeatedly result in disputes over the extent to which dogs may be taken into woodland. According to Section 33 (1) of the Forest Act (Forstgesetz), as a general rule "anyone" may enter into and remain in woodland for recreational purposes.

Different opinions have been voiced in media reports as to whether this right to access woodland also includes the right to take along a dog. Since the Supreme Administrative Court does not appear to have adopted any case law on this issue, which is however of interest for a large number of people, the AOB asked the Federal Ministry of Agriculture, Regions and Tourism as the authority with ultimate responsibility for woodland to set out the government's legal position.

Ministry states that dogs may be taken inot woods

The Ministry stated that, according to the prevailing interpretation, the right to access woodland provided for in the Forest Act includes the right to take a dog both on and off woodland paths. In such cases, the dog may be regarded as a "companion of the person".

Hunting law must be complied with

However, the Ministry also indicated that the issue regarding the proper control of a dog within woodland is not provided for in the Forest Act, but rather in the first instance under the hunting law of the individual Laender. In numerous cases, these subject people who keep dogs to special duties of custody and supervision, and also impose criminal provisions in order to prevent dogs roaming around or killing game in hunting areas.

Legislative clarification recommended

However, the legal position set out by the Ministry is not binding on the competent district administrative authorities within any administrative penalty proceedings. The AOB thus recommends that the legislator clarify Section 33 of the Forest Act in order to ensure legal certainty and uniform application.

Applications for subsidies by private guest houses – COVID-19

In the Annual Report 2020 (volume "COVID-19", p. 100 et seq.) the AOB described complaints concerning the limited access to subsidies from the Hardship Fund (Härtefallfonds) for certain private guest houses.

On 24 February 2021, the National Council decided to expand the class of entitled persons under the Hardship Fund Act (Härtefallfondsgesetz). As a result, not only landlords offering up to a maximum of ten beds in their own home could receive payments under the Hardship Fund, but also all tourist landlords that earn income under the Income Tax Act (Einkommensteuergesetz) and pay the visitor tax in relation to it.

Not even possible to submit an application

However, a problem was caused by the fact that it was not technically possible to submit a subsidy request to AMA as the processing office if any prerequisite was (correctly) answered in the negative when the electronic form was completed. Accordingly, in such cases a rejection letter containing reasons for rejection was not generated by the subsidy management authority, even though this was required in the subsidy guidelines. According to the Federal Ministry of Agriculture, Regions and Tourism, this

procedure was "justified as a means of saving resources whilst processing subsidies on a large scale".

AOB refers to need for possibility of review

The AOB stated that a written rejection of a subsidy request containing reasons for rejection is necessary in order to ensure legal protection, since compliance with the requirement of equal treatment, which (also) applies in the area of subsidy management by the Federal Government, must be open to review by the courts. In addition, it is unreasonable to expect those applying for a subsidy to provide false information in any electronic application – which may thus even be punishable under criminal law – simply in order to ensure the submission and substantive examination of an application.

The Federal Ministry of Agriculture, Regions and Tourism subsequently referred this problem to the Finanzprokuratur (the statutory lawyer and legal advisor of the Republic of Austria), in particular as it was also of interest for the future handling of project subsidies in relation to the common agricultural policy, which will be managed exclusively electronically from 2023.

Finanzprokuratur shares AOB opinion

The Finanzprokuratur stated that documentation needed to be issued also in relation to subsidy decisions that resulted in the rejection of an application in order to ensure that they could be reviewed by the courts. These requirements are complied with for subsidy applications made electronically by a "letter generated automatically by the system containing appropriate reasons" if it can be "printed out and saved locally by the subsidy applicant".

However, in the view of the AOB, the mandatory notice concerning the reasons for the rejection of a subsidy application can only be issued if it is possible to submit an application. The AOB recommended that this requirement be taken into account when structuring and processing subsidies, and assumes that the Federal Ministry of Agriculture, Regions and Tourism will manage subsidy applications in future in accordance with legal requirements.

Partial closure of the Vienna Augarten

In March 2021 the AOB received a complaint stating that the "Ambrosi Garden" in the Vienna Augarten (a public park) had not been open to the public since the autumn of 2020. More than 800 people had called in a petition for it to be reopened permanently.

Closure due to security concerns

The Federal Ministry of Agriculture, Regions and Tourism, which is responsible for the management of the area, explained that the area had been temporarily closed as it had not been profitably used for a number of years. Visitor security could not be guaranteed, in particular during the

winter. The winter closure of the Ambrosi Garden from 1 November to 1 April was ordered by the Austrian authority responsible for the efficient management and conservation of historic buildings (Burghauptmannschaft Österreich).

The AOB therefore also contacted the Federal Ministry for Digital and Economic Affairs. It reported that negotiations had been ongoing with a number of stakeholders since the user Österreichische Galerie Belvedere had moved out in 2018. During this period, the building and the site had been temporarily closed to the public in order to ensure their protection. There was a risk of acts of vandalism or unauthorised entry to the site and its buildings in particular during the winter months.

Opening has taken place

Finally, the AOB was informed that, under the terms of an agreement reached between the Advanced Federal Teaching and Research Institute for Horticulture and Austrian Federal Parks (Höhere Bundeslehr- und Forschungsanstalt für Gartenbau und Österreichische Bundesgärten) and Burghauptmannschaft Österreich, the site would remain open to the public during the 2021/22 winter season. The AOB assumes that this opening will be permanent, otherwise it will have to expect further complaints.

Job advertisement for the head of the Advanced Federal Teaching and Research Institute for Horticulture and Austrian Federal Parks

Job advert tailored to a particular person

An unsuccessful candidate for the position of head of the Advanced Federal Teaching and Research Institute for Horticulture (Höhere Bundeslehr- und Forschungsanstalt für Gartenbau) and Austrian Federal Parks (Österreichische Bundesgärten), advertised by the Federal Ministry of Agriculture, Regions and Tourism, which is a subordinate department of the Ministry, complained to the AOB. He complained amongst other things that the job application procedure had been specifically tailored to a particular candidate. The job advert had been written in such a manner as not to require any pedagogical qualifications or any experience in or knowledge of scientific horticulture or landscape management. The preferred candidate, who was a former colleague of the Minister, did not have any of these qualifications. For the same reason, the job advert did not require any business management skills or any experience in the areas of employment law, business management, etc.

It was also objected that no job interviews had been held. The review commission set up by the Federal Ministry of Agriculture, Regions and Tourism had not therefore established a comprehensive picture of the suitability and personality of each candidate. In addition, the Ministry had not complied with the statutory time limits applicable in relation to the replacement of the head of the institute, who had retired.

Job advertised too late

The AOB found that, according to Section 5 (3) of the Civil Service Job Tender Act (Ausschreibungsgesetz), a job advert for the position of head of institute should have been published at the latest within one month of the time the position became free, in this case at the end of April 2019. However, the job advert was only published on 21 January 2020.

According to Section 5 (2) of the Civil Service Tender Act, the job advert should "indicate any special knowledge and skills, alongside those generally required, that are expected of candidates in order to fulfil the requirements associated with the function or job advertised". Any such special knowledge and skills should be established "in accordance with the tasks of the relevant organisational unit as provided for in the organisational chart". Moreover, the job description for the specific position is also significant, amongst other things.

Job advert does not reflect organisational chart

The AOB criticised that neither the duties mentioned in the job advert nor the special knowledge and skills expected of candidates in accordance with Section 5 (2) of the Civil Service Tender Act covered the full range of duties of the management of the Advanced Federal Teaching and Research Institute for Horticulture and Austrian Federal Parks specified in the organisational chart.

Moreover, the prerequisites required in the job advert in relation to the performance of tasks did not cover the full range of tasks associated with the position described in the text of the job advert. Thus, according to the job advert the tasks of the head of the institute should also include the "conduct of management of the institute in accordance with the tasks provided for under employment law (duties of line managers and heads of departments, Section 45 of the Austrian Civil Servants Act 1979) as well as the development of pedagogical schooling and teaching, management and structuring of the everyday business of the institute". In spite of this, the job advert did not require any knowledge of employment and labour law, nor any pedagogical qualifications or experience.

Job advert not consistent with job description

Moreover, the tasks to be performed by the head of the institute as indicated in the job description were in some respects not consistent with the job advert. The Federal Ministry of Agriculture, Regions and Tourism justified this on the grounds that the focus of the head of the institute had shifted from pedagogical tasks to management as a result of the merger of the Advanced Federal Teaching and Research Institute for Horticulture with Austrian Federal Parks in 2016.

However, it was not clear to the AOB why, since the duties of the head of the institute included in particular "strategic planning and overall management of the organisational unit" according to the job description, the job advert did not require candidates to have experience in corporate management or knowledge of business management, controlling, etc. It was

also incomprehensible why the job description had not been adapted before the job advert was placed, if indeed the duties of the head of the institute were to have a new focus.

Job interviews are not required by law. However, in the view of the AOB interviews would have been appropriate in order to enable a more detailed assessment of candidates by the review commission, thus offering a better basis for decision making regarding the choice of head of the institute.

The review commission ultimately classified four applicants as fully suitable for the position having regard to the job avert. The Minister followed the commission's opinion when deciding who to appoint.

3.12.3 Broadband rollout, telecommunications and postal services

Delivery problem for the postal service

The complaints submitted against Post AG, a company responsible for postal services in Austria, or other delivery services concerned almost entirely delivery problems. In many cases it was objected that letters and in particular packages were not handed to recipients, but that an unsuccessful delivery notification slip was left, even though the item could have been received at any time throughout the entire day in question (persons in quarantine, working at home, etc.). Vulnerable persons indicated that they had the greatest interest in contactless delivery. However, this was not offered by Post AG. For this group it was not only difficult to go to post offices or collection points in person, but also unacceptable, as they took contact restrictions seriously due to increased risk of severe illness following an infection. The Austrian Court of Audit recently recommended that greater attention be dedicated to the unjustified leaving of unsuccessful delivery notification slips, as well as posting the parcel to alternative recipients (Austrian Court of Audit, Federal Government Series 2022/1).

3.12.4 GIS Fee Information Service

Need to reform the law applicable to television and radio licence fee

A large number of citizens complained to the AOB concerning the legal rules on the collection of television and radio licence fees, which were no longer in line with current standards. The current position is that "households using only the Internet", which can watch a certain amount of ORF broadcasts, are not required to pay any television and radio licence fee (and also no ORF programme charge). By contrast, households with a television set that is used exclusively as a monitor (without access to ORF programmes) are obliged to pay the licence fee. The AOB takes the view that this is extremely questionable as a policy measure and is not objectively justifiable.

Expansion of exemption from television and radio licence fee appropriate

An exemption from the television and radio licence fee is only possible for persons who fall under the closed list set out in the Regulation on the Registration of Television and Radio Licence Fees (Fernmeldegebührenordnung). This frequently causes social hardship.

Legal position is regarded as socially unfair

The AOB has pointed out on several occasions, most recently in its Annual Report 2019, that the rule set out in Section 47 (1) of the Regulation on the Registration of Television and Radio Licence Fees, according to which the exemption from the television and radio licence fee is conditional upon the receipt of certain benefits, is regarded by many citizens as socially unfair. This affects above all those socially disadvantaged people who cannot be exempt from the television and radio licence fee exclusively on account of the fact that, despite their difficult financial circumstances, they do not receive any of the benefits mentioned. This is a concern in particular for persons performing military service, low-income self-employed persons, students and persons whose income consists exclusively in maintenance support. They cannot be exempt from the television and radio licence fee even though they are required to live on a fixed monthly amount that is significantly lower than the rate set for an exemption from the television and radio licence fee.

Entitlement to be expanded

In 2021 the AOB once again dealt with a number of complaints in which an exemption from the television and radio licence fee was not possible for these reasons. The AOB thus reiterates its standpoint that it is high time for this statutory provision to be reviewed and for the scope of entitled persons to be expanded.

3.13 Social affairs, health, care and consumer protection

Introduction

Record number of complaints

In 2021 the number of complaints received by the AOB in relation to both public health insurance (2021: 392, 2020: 268) as well as health care (2021: 1,749, 2020: 545) reached new record highs. The latter resulted in particular from the wide-ranging concerns submitted to the AOB regarding COVID-19 protective measures and how they were perceived, the offer of vaccines, as well as pandemic management.

Long waiting times for reimbursement of costs

Once again, the AOB also received a large number of complaints concerning the long processing times, in some cases lasting for several months, for reimbursements by the Austrian Public Health Insurance Office (Österreichische Gesundheitskasse) following consultations by doctors without a contract with public health insurance offices. The problem has been exacerbated by the fact that demand for doctors without such a contract has increased as permanent positions in the public health insurance system cannot be filled. This is coupled with the long waiting lists for treatment by doctors working under contract with the health service. Accordingly, the AOB calls once again for the processing of reimbursements to be expedited as a general matter by the deployment of additional staff. In addition, the AOB criticises the fact that often only a small proportion of the actual costs is covered.

Inadequate provision for incontinence

A large number of people complained to the AOB concerning public health insurance as they had been disadvantaged by the new rules on incontinence care adopted by the Austrian Public Health Insurance Office. In 2021 the Austrian Public Health Insurance Office overhauled the rules applicable to the issue of products and agreed with its contractual partners (bandage makers) to adopt new rules on establishing objective criteria for individual needs. Both children and adults with disabilities have no longer been receiving approval for products or quantities that had previously been approved, despite ongoing bowel and bladder incontinence. It was possible to remove most restrictions following an investigation by the AOB.

Increase in complaints concerning pension insurance and care and nursing allowances

A total of 413 investigative proceedings were initiated in 2021 concerning pension insurance. Also the number of complaints regarding assessments of entitlement to care and nursing allowances was stubbornly high. As previously, a significant proportion concerned the classification of persons with severe cognitive and/or mental impairments, including in particular those suffering from dementia and persons with multiple serious disabilities. In many cases, their assessments of entitlement to care and nursing allowances fell far short of the amount of time and psychological effort required for their care and support. This fact is attributable on the

one hand to frequent lack of knowledge amongst medical specialists about the implications of cognitive or mental impairments for care needs and on the other hand to the Classification Ordinance under the Federal Care Allowance Act (Einstufungsverordnung zum Bundespflegegeldgesetz).

Good cooperation

Once again, in 2021 the owners and operators that pay out pensions and care and nursing allowances were extremely cooperative with the AOB and were consistently willing to cut through red tape to quickly identify solutions permitted within the statutory framework.

Ex-officio investigation concerning specialist assessment

Due to the large number of complaints concerning specialist assessments under the Austrian Federal Disability Act (Bundesbehindertengesetz), the AOB decided to initiate an ex-officio investigative proceeding. It focused on the process for obtaining a disability pass or the additional annotation concerning "unfitness to use public transport due to a long-term mobility impairment as a result of disability", which is required in order to obtain a disabled badge for a car.

3.13.1 COVID-19

COVID-19 vaccination

Registration and prioritisation

Recommendation on prioritisation

After the first vaccine doses were approved and delivered to EU Member States, Austria also started administering COVID-19 vaccinations in December 2020. Due to a shortage of vaccine doses, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection issued the "Recommendations of the National Vaccination Committee for prioritising COVID-19 vaccinations" (Version 1.0, valid from 14 December 2020) in the middle of December 2020. Prioritisation was recommended from a specialist medical perspective in order to provide protection against COVID-19 as soon as possible to persons at particularly high risk of serious illness or death (above all the elderly and persons with underlying conditions), as well as those at particularly high risk of infection on account of their job, for jobs of systemic importance (e.g. health and care staff).

The aim was to avoid serious illness and death, to relieve the burden on the health care system and to deploy vaccines in a manner that was medically appropriate, justified and ethically defensible. However, due to the complex storage conditions required for the vaccine as well as short expiry dates, minor exceptions were sometimes made to prioritisation in order to avoid vaccine wastage.

Responsibility for roll-out passed to *Laender*

The Federal Government transferred responsibility for implementing the COVID-19 vaccination strategy to the Laender on the grounds that – according to the reasons provided by the Federal Ministry of Social Affairs,

Health, Care and Consumer Protection – they were familiar with "regional circumstances and needs" and "requirements differed throughout the country". It was assumed that public health services and office-based doctors already had the "necessary expertise, experience and infrastructure", with the result that it would also be "much more cost-effective to build on existing structures and experience". The COVID-19 vaccination plan of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection was to serve as a binding framework issued by the Federal Government for the roll-out of COVID-19 vaccinations in the individual Laender.

Registrations and appointments were managed according to the systems used in the Laender. However, at the start of the vaccination programme most Laender had not yet set up broad-based, user-friendly registration systems.

Difficulties in registering and obtaining appointments

The large number of complaints received by the AOB shows that there were numerous difficulties in maintaining prioritisation and processing waiting lists, as well as within initial registration procedures.

As a result, in some cases prioritisation was not properly applied, to the detriment of individuals in high-risk groups as other persons were able to gain information concerning vaccine appointments in care homes and hospitals and hence access to vaccine doses.

Styria fails to follow priority ranking under the national vaccination plan

Persons with disabilities supported by disability assistance services and those receiving personal assistance, as well as staff providing direct care to persons with disabilities (e.g. mobile care, nursing care and 24-hour support) should have been vaccinated during phase 1. However, the vaccination campaign for persons with intellectual disabilities living in residential facilities was suspended temporarily in Styria. In addition, persons with disabilities who were not living in institutions and facilities for persons with disabilities were generally ranked behind pedagogical staff.

The regional government of Styria asserted to the AOB that vaccination with the AstraZeneca vaccine, which was predominantly available at that time, was not recommended for persons with disabilities. This argument was unsound. Rather, the National Vaccination Committee merely recommended a vaccination with an mRNA vaccine for persons at particularly high risk of infection. Persons with disabilities cannot under any circumstances be classified as highly vulnerable group in general. The question as to whether they live inside or outside facilities was also irrelevant for determining whether they are highly vulnerable. The AOB therefore recommended that the regional government closely follow the assessment of the National Vaccination Committee and proceed strictly according to the national vaccination plan, which it subsequently assured it would do.

Also elderly persons who wanted to be vaccinated and their relatives complained that it was unclear when and how they could be vaccinated.

Registration by telephone unavailable in Burgenland

Burgenland only offered an electronic pre-registration system in order to book an appointment for COVID-19 vaccination, with no option for registering over the telephone.

System overload in Lower Austria

There were also major difficulties in registering and obtaining appointments in Lower Austria. The (evidently overloaded) system crashed on a number of occasions and those affected reported that it had taken hours to register. People were often unable to obtain a vaccination appointment close to home, with the result that (very) elderly persons were forced to travel for several hours.

Pre-registration in Carinthia was organised by the municipalities, which then passed on data concerning persons over the age of 80 to the Austrian Public Health Insurance Office. On the other hand, pre-registration was also possible through Carinthia's own dashboard.

Age discrimination

In the view of the AOB, it is absolutely unacceptable that, in the vast majority of cases, it was only possible to register for a vaccine electronically. Large numbers of elderly and very elderly persons, who had priority eligibility for vaccination, did not have the necessary knowledge or technical equipment. The AOB considers that it was not acceptable to assume that elderly and very elderly persons could ask friends and relatives to help them with the registration process.

Finally, in Burgenland support was provided by the respective person's municipality of origin, which offered assistance in relation to electronic pre-registration and getting an appointment. Other Laender (such as Lower Austria) informed the AOB that they had simplified the registration procedure for COVID-19 vaccination.

Lack of uniform requirements

During the course of an ex-officio investigative proceeding, the AOB criticised the Federal Ministry of Social Affairs, Health, Care and Consumer Protection for the failure to issue uniform guidelines to the Laender at the outset for managing, implementing and controlling compliance with the recommendations of the National Vaccination Committee.

Decree on compliance with vaccination plan

The issue of a decree by the Federal Minister for Social Affairs, Health, Care and Consumer Protection to the Laender at the start of March 2021, which once again called for rigorous implementation of the national vaccination plan, as well as the prioritisation provided for under it, was a welcome development. It clarified that the COVID-19 vaccination plan constituted a binding guideline for all vaccinating bodies and that the procedures stipulated should be followed when administering the vaccines provided

by the Federal Government, including in particular priority vaccination according to age and risk category.

Proof of vaccination and the "green pass"

Introduction of the „3G" rule

As the pandemic moved into a new stage, it soon became clear that vaccinated persons, those who had recovered and those who had tested negative for the virus (referred to as "3G") could as a general rule be deemed to represent a lower epidemiological risk. Accordingly, following the entry into force of the 2nd COVID-19 Reopening Regulation (2. COVID-19-Öffnungsverordnung), proof of vaccination, recovery or a negative test (known as the "3G" or "2G" rule) was mandated as a requirement for accessing various locations, as well as for gatherings involving more than a certain number of people.

„Green pass" at EU level

Efforts were made at EU level to establish pan-EU criteria for proving low risk to SARS-CoV-2 infection. This resulted in the creation of three certificates (vaccination certificate, test certificate and recovery certificate), which were recognised within the EU and became known as the "green pass".

During this phase of the pandemic the AOB was confronted with a large number of complaints in which persons who had already been infected with SARS-CoV-2 and had also been partially vaccinated against COVID-19 complained that they had not received a vaccination certificate indicating that they had been fully vaccinated (in this case due to recovery plus one vaccine dose).

EU complaint certificate also for „vaccinated and recovered persons"

EU-compliant vaccine certificates for "vaccinated and recovered persons" finally started to be issued in August 2021. They were based on EU Council Recommendation No. 2021/961 of 14 June 2021, which recommended that EU-compliant vaccine certificates should also be issued to this class of persons. The certificates issued referred to the dose administered as "first of one dose".

Lack of clarification for those affected

As is the case under the binding regulations on EU-compliant recovery certificates, a positive bimolecular test (e.g. a PCR test) registered in the epidemiological reporting system is an essential prerequisite for the issue of an EU-compliant vaccine certificate for a "vaccinated and recovered person" ("first of one dose" certificate). Many recovered persons were unaware of this. As a result, in a large number of complaints submitted to the AOB, those affected voiced their uncertainty concerning the prerequisites applicable to the issue of vaccination certificates for recovered persons.

Uncertainty – along with the high volume of complaints received as a result – was also caused by the fact that, following an amendment to the 3rd COVID-19 Preventive Measures Regulation (3. COVID-19-

Schutzmaßnahmenverordnung), proof of antibodies alone (i.e. without vaccination) was no longer accepted throughout Austria as "3G certification" from 8 November 2021. For many people – given a lack of clarification concerning the current state of medical research – it did not make any sense why proof of antibodies should all of a sudden no longer be sufficient in order to demonstrate a lower epidemiological risk.

AOB provides information about the law

The AOB criticised insufficient information provided by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. In a large number of complaints the AOB informed those affected (referring to the results of recent research) concerning the applicable law, both in Austria and throughout the EU.

Early booster vaccinations

Problems arose in relation to the periods between vaccinations required for the issue of vaccination certificates as well as the information recorded in "green pass". Many persons received their third dose fewer than 120 days after their second dose. There were many reasons for this. Some individuals contacted the AOB after having been recommended by doctors to get their third dose earlier.

One person was not only urgently advised to take "early vaccination" at the University Clinic in Innsbruck on account of his cancer, but was also administered the vaccine straight away. Others wanted to receive a booster shot as soon as possible and arranged to receive a third dose before the 120-day interval had passed. They were unaware of the interval and had not been told about the need to wait 120 days by medical staff – either at mass vaccination centres or by family doctors. Some people were vaccinated only one day before the end of this period. The National Vaccination Committee itself issued guidelines stating that anyone wishing to be vaccinated should not be turned away if they were only a few days short of the recommended interval between doses.

Austrian legislation and EU regulation both require registration

The consequence was always the same. If the minimum interval of 120 days was not complied with, it was not possible to include the vaccine dose administered in the vaccine certificate as a "third of three doses" (or in some cases a fourth dose). Those affected received a vaccination certificate indicating "second of two doses", although they have already been administered three doses. The AOB criticised this approach because different rules applied in relation to entry into Austria, vaccine certificate validity and classification as a close contact (with exceptions only applicable following three "immunological events"), depending upon whether a "second of two doses" or a "booster dose" had been received. In addition, the fact that according to both Article 5/2 of EU Regulation No. 2021/953 of 14 June 2021, as well as Section 4e of the Epidemics Act (Epidemiegesetz) the vaccine dose number and the total number of vaccine doses administered within a course of vaccinations must be recorded was also disregarded.

In such cases, the AOB not only initiated investigative proceedings but also attempted to reach a solution with the Federal Ministry of Social Affairs, Health, Care and Consumer Protection within the ambit of the ORF television programme Bürgeranwalt ("Advocate for the People"). In a statement of opinion, the Ministry conceded that administering a third dose before the end of the 120-day interval could be medically indicated and hence sensible in some cases.

Solution found

A solution was reached for the approximately 17,500 persons affected shortly before mandatory vaccination was introduced by reducing the minimum interval between second and third doses from 120 days to 90 days as of 1 February 2022. Those affected automatically received a new vaccination certificate, which correctly indicated the third dose as the "third of three doses" in the "green pass".

Incorrect information in electronic vaccine passes

A number of persons complained to the AOB either because "certificates of recovery" had not been entered into the register of notifiable diseases (EMS register) or because vaccinations were indicated in yellow vaccine passes, but did not appear properly in the electronic vaccine pass. Errors concerned both dates as well as the vaccines administered. In some cases, a vaccination that was reported on the hard copy did not appear in the electronic pass. In its responses, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection referred the issue to the relevant district administrative authorities or ELGA GmbH, which was responsible for implementation, but had not set up a system for making corrections. Problems also arose for those who had been instructed by their employers to get vaccinated at their place of work elsewhere in the EU with a vaccine recognised in Austria. However, in order to obtain a "green pass" in Austria, the vaccination had to be added manually to the national electronic vaccine pass. As a general rule, a retrospective record can be entered at any time upon presentation of proof of vaccination abroad, provided that the vaccine administered has been approved by the European Medicines Agency (EMA). However, some general practitioners and pharmacists refused to do so, and the health authorities took the view that they did not have any competence over the matter. It took some time for the Austrian Agency for Health and Food Safety (Österreichische Agentur für Gesundheit und Ernährungssicherheit) to release forms enabling errors contained in certificates (certificate of recovery, vaccination certificate, certificate of recovery plus vaccination) to be flagged.

Mandatory vaccination

Many were surprised by the Austrian vaccination policy adopted in November 2021 at a meeting between the Federal Government and the governors of the Laender when, despite the previous mantra-like assertions, it pulled back from its previous position that "There will be no

mandatory vaccination". Numerous complaints submitted in the run-up to the entry into force of the COVID-19 Mandatory Vaccination Act (COVID-19-Impfpflichtgesetz) at the start of February 2022 objected to a general vaccine mandate. Since 108,325 statements of opinion concerning the ministerial draft were submitted by private individuals and organisations through Parliament's website as part of the consultation procedure, the AOB will not describe the most frequently raised concerns here. However, it is clear that the creation of an increasingly more seamless "2G" and "2G+" regime, with the hope of nudging people towards getting vaccinated, is not a better or less invasive alternative to a clear vaccine mandate.

Not enough effort to combat disinformation

Following intense debates on the prioritisation of initially scarce vaccines and the difficult organisation and implementation of the vaccination strategy, it was hoped in the spring of 2021 that more people would be willing to get vaccinated as soon as the vaccine shortage had been resolved. This forecast proved to be inaccurate. The vaccination strategy had not got through to a lot of people by the start of the autumn and has still not convinced some undecided persons. However, regional disparities in vaccination rates within Austria also suggest that efforts to convince more people to get vaccinated have in many respects (logistics, outreach vaccination, etc.) failed to run in step with practical capabilities. There is still a lack of solid data to explain why vaccination is more vigorously refused in some circles, social groups or regions than in others. It does not go far enough to attribute low vaccination rates exclusively to a failure by one segment of the population to accept their responsibilities. It was not appreciated that a more decisive battle against disinformation and inadequate information in relation to COVID-19 vaccines could have saved some lives.

COVID-19 pandemic management

Frequent changes in the legal position

The COVID-19 pandemic resulted in various changes in the law – which often remained in force for very short periods – also in 2021. The AOB received complaints, enquiries and observations regarding this aspect from persons who thought that the Federal Government had not taken sufficient account of current scientific knowledge on infection dynamics when dealing with the pandemic, that it had acted too late or too hesitantly and that it had not foreseen how its measures can be controlled. Other complaints objected that it was not possible to measure either the goals or their effects. Others in turn considered that, since everybody had been given the opportunity to get vaccinated, all governmental rules to protect against infection should have been abolished in the summer of 2021.

It was clear from enquiries that the information provided by the authorities only raised the general uncertainty. Aside from all of the complaints concerning COVID-19 vaccination (see further p. 202 et seq.), the number

of complaints increased around the start of school year 2021/22 and newly rising infection figures. Complaints spiked with the entry into force of "3G at work", the "lockdown and movement restrictions for the unvaccinated" and the subsequent general lockdown. Those affected provided dramatic accounts of health complications, whether from past SARS-CoV-2 infections or due to postponed dates for surgeries or medical consultations.

AOB involved in legislative consultation process

The AOB submitted its comments concerning the drafts published by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection proposing amendments to the Epidemics Act (Epidemiegesetz) 1950 and the COVID-19 Measures Act (COVID-19-Maßnahmengesetz), referring to problems under constitutional law, which were subsequently considered during parliamentary debates.

Citizens' concerns in part addressed

The amendments to the Epidemics Act 1950 and the COVID-19 Measures Act also addressed concerns that private individuals raised in their complaints to the AOB, such as those of recovered persons, who in legal terms were treated in broadly equivalent terms to vaccinated persons.

Problems with self-isolation requirements

The AOB previously dealt with the issue of quarantine rules during the first year of the COVID-19 pandemic. Once again, in 2021 many people complained about unclear self-isolation requirements, delays in an end to self-isolation and difficulties in contacting the health authorities.

Still a major issue

COVID-19 self-isolation was a major issue for the AOB also in 2021. It continued to call for swift, transparent and lawful action by health authorities. Alongside the large number of investigative proceedings conducted by the AOB in relation to individual self-isolation difficulties, it also initiated ex-officio investigative proceedings in order to flag structural shortcomings in a targeted manner and establish uniform solutions and behavioural guidelines.

New legal basis for appeals

Compared to the first year of the pandemic, it was possible to resolve many problems and (legal) uncertainties in relation to self-isolation. For example, contact tracing staffing levels were boosted and technical structures were created in order to increase efficiency in the issue of self-isolation notices. It was also possible to clarify the legal status of self-isolation notices – although there are still shortcomings in terms of practical implementation. In addition, the AOB previously referred in last year's report to the lack of clarity as regards the ability to appeal against self-isolation notices. In a decision of 10 March 2021 the Austrian Constitutional Court also embraced these concerns and struck down the provision of the Epidemics Act (Epidemiegesetz) concerning appeals against self-isolation notices on the grounds that it was unconstitutional. The decisive issue for the Constitutional Court was that it considered the provision to be too

imprecise in order to infer any clear jurisdiction for the courts. In the autumn of 2021 legislators enacted Section 7a of the Epidemics Act, creating a new basis for appeals against self-isolation notices, which provided for a right of appeal to the regional administrative courts.

In other areas, on the other hand, such as the time taken to issue self-isolation notices and the tracing of close contacts, the AOB identified further room for improvement.

Long waits for self-isolation notices

As a general rule, self-isolation is instructed in the form of an official notice. However, since the Epidemics Act does not set out any unequivocal rule concerning the legal status of self-isolation notices, this resulted in uncertainty and different interpretations of the law by the individual authorities – as previously described by the AOB in the Annual Report 2020, volume "COVID-19" (pp. 22 et seq.). This led to inconsistencies and repeated instances of official action that did not comply with the law.

Ex-officio investigation

In an ex-officio investigative proceeding, the AOB explained to the Minister of Health why a requirement to issue an official notice should be deemed to apply. One particular concern for the AOB in this regard was at least to make it possible to obtain retrospective written confirmation that self-isolation had been completed by those persons who had self-isolated at home on their own initiative following a positive COVID-19 test or suspected infection, but had not received a self-isolation notice (in good time). Such a confirmation or self-isolation notice would not only constitute evidence for the employer but would also be necessary in order to claim for lost earnings.

Self-isolation by official notice

In a statement of opinion, the Minister of Health indicated that, according to Section 7 (1a) of the Epidemics Act, self-isolation may be required either by an official notice or by a de facto ruling (known as an "act of direct administrative power and coercion"). However, in a decision of 23 November 2021, the Supreme Administrative Court of Austria clarified that the only instrument available to the health authorities is the self-isolation notice, and that they have no authority to conduct an "act of direct administrative power and coercion". On the other hand, the Minister of Health accepted the AOB's position regarding retrospective confirmation of self-isolation and instructed all governors of the Laender to identify a quick, user-friendly solution to any self-isolation notice delays and also to issue (retrospective) official confirmations or rulings concerning any period of self-isolation previously completed.

Correction of notices

Despite this clarification, the AOB also received a large number of complaints in 2021 from private individuals who stated that, after having been instructed over the telephone to self-isolate, they had only received

a written notice several weeks or months later. Some of those affected contacted the AOB because the self-isolation period (indicated over the telephone) was not the same as the period indicated in the self-isolation notice. The AOB was able to obtain corrected notices for a woman from Vienna and a man from Burgenland.

A 24-year-old resident of Linz also had problems with her self-isolation. She was living in an assisted social institution and developed mild cold-like symptoms. Based on suspected COVID-19 illness, the Linz health authorities "agreed" with a carer from the facility that she should self-isolate. She did not receive a written self-isolation notice, but rather only an informal email from the health authority. However, since she had justified doubts concerning the lawfulness of her self-isolation, she contacted the AOB which identified a case of maladministration. As also occurred in many other cases, the AOB referred the health authorities to the potential consequences of unclear self-isolation instructions that were not documented in writing. In the specific case, the woman was even threatened with the loss of her place in the residential and care facility owing to an alleged breach of the self-isolation notice.

Letter to parents instead of self-isolation notice

Challenging for parents of school-age children

The Minister of Health adopted special self-isolation rules for schools in order to prevent whole classes from having to self-isolate in the event of one single COVID-19 case. However, in the event that self-isolation is required, it is essential for the health authorities to take action quickly and for clear instructions to be issued to parents.

However, the procedure followed by municipal department MA 15 suggested that the opposite approach was being taken. Instead of an individual self-isolation notice, parents only received a letter from the health authorities, addressed generically to all "legal guardians" for the class concerned. It contained self-isolation instructions for the children. It was indicated that formal self-isolation notices would be issued, although none arrived even after a number of weeks.

Increase of staff resources

The AOB considers it essential to keep expanding staffing levels within health authorities, to improve the technical facilities for recording, and process COVID-19 cases and close contacts quickly. In addition – where necessary – it is important to identify pragmatic and unbureaucratic solutions.

The AOB contacted the City of Vienna in order to take it up on the practice of "self-isolation according to letters to parents" and ensure lawful self-isolation. At the time this Annual Report was finalised, a conclusive statement of opinion had not yet been provided.

Authority with geographical competence over self-isolation

Place of abode as factor establishing competence

Another aspect that has to be taken into account in relation to self-isolation, and which has caused problems, is how to determine the geographically competent and responsible authority. Section 2 (1) of the Epidemics Act (Epidemiegesetz) only establishes the requirement to report each COVID-19 case to the district administrative authority within which "the person infected or suspected of being infected is living".

Since competence over self-isolation is established with reference to the place of abode – and thus in most cases the place of residence – it is possible in the event of COVID-19 cases for instance within a school or a business that different health authorities may have competence over different individuals. Some persons objected that different classifications had been applied and different decisions had been taken in relation to the same facts. One health authority had ordered the self-isolation of all pupils in a class as they have had close contacts, whereas another health authority with competence over other children from the same class did not consider there to be any risk of infection. This resulted in decisions being perceived of as incomprehensible and not based on objective facts.

Working in Vienna, but resident in Burgenland

This fact may become a problem if the health authority that initially takes action does not actually have geographical competence and its announcements or directions are inconsistent with the action taken by the competent health authority. A case of this type arose in a Vienna-based company in April 2021. One staff member tested positive for COVID-19. As she worked largely without wearing a face mask and without keeping her distance in a large office, it was possible that the other staff had also been infected with COVID-19. The Vienna health authority informed the company's managing director in a telephone call that the workers affected would have to self-isolate. The managing director sent them home immediately. It was only after all contact data had been received towards the end of the supposed self-isolation period that municipal department MA 15 established that it did not have any geographical competence at all over the self-isolation of one worker, who was resident in Burgenland. The case was therefore referred to the Oberpullendorf District Authority, which concluded that there had not been any sufficiently close contact. A self-isolation notice was not issued.

The AOB contacted the City of Vienna, the Land Burgenland and the Minister of Health to identify a solution that was satisfactory for the man from Burgenland and the Vienna-based company. In the view of the AOB, in particular those persons who act responsibly from an epidemiological perspective and comply with (credible) directives or recommendations of the health authorities concerning self-isolation should not be left worse

off or suffer any detriment. The AOB has not yet received a conclusive statement of opinion.

Identification and notification of close contacts

During periods in which infection rates are high, it is difficult for health authorities to ensure the fast self-isolation of persons who have tested positive for COVID-19. It is just as challenging to identify close contacts quickly. Numerous close contacts complained to the AOB that they had not been contacted at all or had only been contacted long after having been in contact with a person who had tested positive for COVID-19.

No self-isolation of close contacts

One of these was a father from the district of Hallein in Salzburg. After both his wife and his young daughter had tested positive for COVID-19, the 34-year-old man started to quarantine at home and contacted the health authority. However, he was informed that the health authority was no longer requiring close contacts to self-isolate due to staff shortages. He was presented with the choice between staying away from work – at his own cost and risk – or ending his quarantine and thereby creating a risk for his personal surroundings. The decision was ultimately taken out of his hands when he developed COVID-19 symptoms himself, tested positive, and subsequently self-isolated. However, he did not have documentation to present to his employer for just under a week of self-isolation. After the AOB became involved, the health authority confirmed that it had not been requiring close contacts to self-isolate. According to the Hallein District Authority, this decision had been based on a decree issued by the Land requiring that positive COVID-19 cases be treated as a matter of priority and that close contacts no longer be isolated in the event of insufficient resources. According to the health authority, this meant that the man from Salzburg could not be issued with retrospective confirmation that he had self-isolated as a close contact as he had not been required to self-isolate. As a result, the AOB has recently contacted the Land Salzburg directly and is making efforts to obtain the issue of a retrospective confirmation of self-isolation.

Transfer of official investigation work

A 50-year-old teacher from Lower Austria had a different problem. After testing positive for COVID-19 she was required by the health authorities to provide details of close contacts from the previous 48 hours. She promptly complied with the requirement. In addition to other close contacts, she also provided the names of her school pupils, but informed the authority that she did not have their personal information (telephone numbers, addresses). Rather than contacting the school, the health authority instructed the 50-year-old teacher on several occasions to obtain full contact information, and threatened her with an administrative fine due to the breach of the duty to provide information under Section 5 (1) of the Epidemics Act (Epidemiegesetz). It was only possible to identify and contact the close

contacts after a number of days. The AOB established that the course of action followed by the health authority did not comply with statutory requirements. Although the teacher was obliged to provide information according to Section 5 (1) of the Epidemics Act, she was not herself obliged to identify or procure full contact information. It fell to the authority to carry out the respective enquiries. As a result, the AOB concluded that the course of action followed by the health authority unlawfully shifted the duty to conduct enquiries to the person obliged to provide information.

Announcement of "decrees" on how to deal with close contacts

Official procedure for authorities

Alongside the statutory basis in the Epidemics Act (Epidemiegesetz), decrees have also been relevant in establishing how to deal with self-isolation. This is the case in particular for the decree adopted by the Minister of Health on the "Official procedure for SARS-CoV-2 close contacts: tracing of close contacts" (Behördliche Vorgangsweise bei SARS-CoV-2 Kontaktpersonen: Kontaktpersonennachverfolgung), which is regularly updated and published on the website of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. It establishes for instance who should be classified as a potentially infected close contact, the point in time after which "test to release" is possible, as well as any exceptions to self-isolation rules that apply to particular groups (school pupils, health care staff etc.).

Announcement in Federal Law Gazette II

The AOB has been provided with numerous self-isolation notices that were justified with reference to this decree. In the view of the AOB, there are many reasons to claim that, considering its contents, the body of rules mentioned above does not amount to a decree but rather a statutory regulation (which should correctly be announced in the Federal Law Gazette II). Specifically, the criteria laid down in the decree are evidently not binding only for the health authorities (within the administration), but rather also impinge upon the legal interests of private individuals (who may be required to self-isolate).

According to the Constitutional Court of Austria, classification as a regulation does not depend upon whether a formal class of addressees is indicated, how it is referred to or the manner of its publication, but rather exclusively on the contents of the administrative act. The Constitutional Court bases its assessment as to whether a regulation with substantive legal effect has been issued inter alia on the question as to whether a decree has any legal effects on persons (outside the administration). This is deemed to occur where it has achieved a particular level of publicity, influences the general legal position and gives the impression that it has substantive effects. One important consideration may be the fact that the authority relies on the decree as a basis for its decisions.

Ex-officio investigation

The AOB submitted these legal considerations to the Minister of Health within ex-officio investigative proceedings. The Minister stated that it was not necessary to proceed as suggested by the AOB.

COVID-19 testing possibilities

Testing prerequisite for participation in public life

Since the outbreak of the pandemic the Federal Government and the Laender have stressed that regular testing is a proven means of slowing the spread of the pandemic. What had initially been conceptualised as a proven means of self-testing one's infection status – in particular before meeting other people in private – was gradually transformed into a prerequisite for participating in numerous areas of public life. The expansion of testing possibilities was increasingly accompanied by checks on access to hospitality premises, shops, leisure activities, schools, educational institutes and workplaces.

Vienna offering widely available gargle tests

This meant that easy access to testing possibilities and quick results became much more important. After tests were initially carried out at mass testing centres and pharmacies, even before the summer of 2021 the City of Vienna established the option of free self-administered "PCR gargle tests". Test results were generally provided within 24 hours. In the meantime, neighbouring countries have also been impressed over how challenges can be reliably addressed using this system.

Other Laender only started offering these tests in the autumn of 2021. During this period, demand was increasing sharply due to the "3G rule" for workplaces. Most of the complaints received on this matter from persons living outside Vienna concerned the fact that test results were not being reported within 24 hours. However, complainants in some regions were also particularly annoyed by difficulties in accessing test kits, a lack of options for handing in tests at weekends as well as difficulties in getting tests done at pharmacies.

Complaints were received from Lower Austria that only a 20-minute time window was allowed for collecting test kits in supermarkets. If test kits were out of stock, people had to wait for days before they could collect other test kits.

Lower Austria shifts the blame to those affected

One woman from Lower Austria complained that it was not possible to take a PCR test with a 72-hour validity period close to her home at the weekend, which could be presented on the following Monday or Tuesday. In its statement of opinion the Land Lower Austria has not dealt with this case, and the regional government failed to refute the allegations as well. It was only indicated in a general manner that there were numerous opportunities for testing in Lower Austria. The AOB was unable to follow this argument. In fact, it was informed that many people resident in Lower Austria were using testing facilities in Vienna in order to obtain results in good time.

Styria concedes that system has been overloaded

By contrast, in a statement of opinion the Land Styria conceded that the system had been overloaded at certain points, and that the companies responsible were making efforts to prevent delays.

Problems also at mass testing centres

However, in some cases even results from tests taken at testing centres were not being reported within the required 24-hour period (e.g. in Lower Austria, Upper Austria). People also complained that testing capacity at pharmacies was limited and that popular time slots were quickly taken up (e.g. in Lower Austria).

Vienna: testing mandatory over the age of six

In Vienna the requirement to test six-year-old children introduced at short notice caused outrage. "Home gargle tests" were the only valid self-administered tests. However, many parents encountered difficulties in administering them to their young children.

Major difficulties in other *Laender*

Some people from Lower Austria complained that a mass testing centre had refused to offer throat swabs instead of nasal swabs. In its statement of opinion made to the AOB the Land Lower Austria was unable to clarify the situation or to provide any reason for the refusal.

Evident lack of timely planning

It is clear to the AOB that the individual Laender have been encountering major challenges in organising testing. However, these could have been avoided by timely planning. In the spring and summer of 2021, it was already anticipated by numerous experts, as well as the "Coronavirus Traffic Light Committee" (Corona-Ampelkommission) and the Forecasting Group (Prognosekonsortium), that the situation could become critical again in the autumn/winter of 2021.

Rapid antigen tests for SARS-CoV-2 only for ELGA participants

No free tests after opt-out from ELGA

During the first quarter of 2021, around 100 persons contacted the AOB complaining that anyone who had refused to participate in the system of the Electronic Health File (Elektronische Gesundheitsakte, ELGA) or who had de-registered for the e-medication service was being refused access to free rapid antigen tests. There is no objective justification for this.

Ministry finds solution

Acting in conjunction with public social insurance carriers and the Chamber of Pharmacists, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection eventually found a feasible solution for the approximately 300,000 persons affected. As of 19 April 2021, all persons (born before 1 January 2006) holding health insurance in Austria as well as an e-card were entitled to receive five free self-testing kits each month from a pharmacy. The distribution initiative ended in October 2021.

Reimbursement of costs for COVID-19 tests taken by 24-hour caregivers

Extension of reimbursement scheme

Around 33,000 persons in Austria receive care at home from a 24-hour caregivers. In order to protect this vulnerable group of persons, in the summer of 2020 the Federal Government and the Laender reached agreement concerning the reimbursement of costs for COVID-19 tests taken by 24-hour caregivers. Reimbursement was permitted with retrospective effect from March 2020 and initially limited in time until 31 October 2020. The AOB called for this initiative to be extended by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection until March 2022.

This reimbursement scheme provided for the reimbursement of a maximum of EUR 85.00 per caregivers per month for tests taken in Austria and of a maximum of EUR 60.00 for tests taken abroad. The resources were provided by the Federal Government, whereas implementation was left to the Laender.

Lack of uniform guidelines from the Federal Government

The AOB previously stated in its last report (see Annual Report 2020, volume "COVID-19", p. 34 et seq.) that the Federal Ministry of Social Affairs, Health, Care and Consumer Protection had not issued any guidelines to ensure uniform application throughout the country. The different approaches taken by the Laender resulted in complaints also in 2021. Most related to the fact that, in some Laender, persons receiving care or their families were not able to submit applications, in addition to the caregivers themselves. However, the Ministry has always made it clear that nobody should be prevented from submitting applications.

In Vienna the Economic Chamber was responsible for processing reimbursements. Initially only 24-hour caregivers were entitled to submit an application, even if the costs of the test had been borne by the person receiving care or that person's family. Eventually, agencies were allowed to submit applications for reimbursements on behalf of persons receiving care and their families.

Unlawful approach taken by the *Laender*

Another reason for complaints was that some Laender would only pay reimbursements into an Austrian bank account. This meant that a large number of 24-hour caregivers were de facto prevented from submitting applications, even though they had paid for tests themselves. The AOB pointed out once again that obstacles of this type violate EU law. Lower Austria followed the AOB's recommendation. Only Vorarlberg continued to require an Austrian account.

Late payment of reimbursements

The requirement that applications for reimbursement could only be submitted several months after the agreement had been reached between the Federal Government and the Laender, for instance in Vienna only from December 2020, also caused annoyance. Complaints from other Laender objected to the slow rate at which payments were made.

Early end to reimbursement in some *Laender*

Uncertainty was also caused by the fact that the Laender Upper Austria, Burgenland and Tyrol closed the scheme earlier than other Laender, invoking the administrative cost as justification, as well as the fact that a free screening programme and free tests had become available in the meantime. However, this was associated with a risk that the caregivers might start living with the person receiving care before the test results were issued.

Complaints concerning travel into Austria

Also in 2021 a large number of persons complained about the provisions contained in the COVID-19 Entry Regulation (COVID-19-Einreiseverordnung) and its implementation. They objected to unclearly formulated exceptions and difficulties in providing the evidence required in order to avoid having to quarantine. A father living in Austria was not believed when – upon his return to Austria – he declared that he had been visiting his sick child in Germany.

Unclear formulation

The AOB previously criticised in 2020 that provisions had been unclearly formulated, which resulted in particular difficulties in practice. This did not fundamentally change in 2021.

Alternating family visits

One of those affected lives in Austria, whereas his two children live with their mother in France. His daughter was twelve years old and his son nine years old. The parents had joint custody and were attempting to maintain contact between the father and his children that was as positive and as frequent as possible. Visitation rights were exercised alternately between the two countries. The exception concerning regular travel for family purposes contained in the COVID-19 Entry Regulation would have been applicable to the children, but only if visits occurred at monthly intervals.

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection confirmed to the father that the person in question would have to travel to Austria at intervals of four weeks. Cancelled or delayed flights, which were not uncommon during this period, were irrelevant for the purposes of the assessment and did not establish any entitlement to an exception from the requirement to enter quarantine.

What does „regular" mean?

However, this interpretation was not mandatory, and the AOB criticised various aspects. First of all, the prerequisite of "regularity" for the exception of "regular travel for family purposes" (Section 6a (1) (3) of the COVID-19 Entry Regulation) was not defined in the regulation. The website of the Ministry only stated in the FAQ section that entry into Austria had to occur "at least once each month".

Secondly, the AOB could not understand why "at least once each month" should be similar to a period of "a maximum distance of four weeks". An interpretation of the term "at least once each month" to mean "a period of

four weeks" cannot be justified either on linguistic grounds or in order to ensure compliance with the overall legislative system.

Family not considered as a whole

Thirdly, it was not apparent why the prerequisite of regular travel should apply to entry by one specific individual and not to the family as a whole. The exception for regular travel was not introduced on epidemiological or health-related grounds, but rather due to practical reasons. Previously existing close and regular, cross-border contact between family members should be enabled without imposing quarantine restrictions.

Unclear definition of family

Fourthly, the regulation did not clarify what was meant by "family purposes" or how the term "family" should be construed.

The administrative shortcomings were particularly regrettable as the exercise of the right to family life was significantly impaired by the narrow interpretation of the Ministry.

Three-year-old required to quarantine

In another case, parents were travelling with their three-year-old son from Austria to Bosnia. Before leaving the father enquired with the Austrian Agency for Health and Food Safety whether a medical certificate or a negative COVID-19 test should be presented for his three-year-old upon their return to Austria, or whether he would be required to quarantine at home. He was informed that this would not be necessary. Only the parents were required to present a test. Upon their return the family was checked. The parents presented their negative test results. When asked for a medical certificate for his three-year-old son, the father indicated that he had enquired about it and had been told that it was not required. They were nonetheless only allowed to return after signing a form undertaking to complete self-supervised the quarantine of their son. The father signed the undertaking and called the Austrian Agency for Health and Food Safety on the same day. He was informed once again that his son was not required to quarantine at home.

Lawyers from District Authority agreed with family

Following his return he contacted the Korneuburg District Authority, the legal experts from which also suspected that the border officials had made a mistake since, according to Section 4a of the COVID-19 Entry Regulation, testing was not required for children under the age of six.

Ministry takes different view of law

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection informed the AOB that, although children under the age of seven were not required to take a test, this did not affect the obligation to quarantine. However, in the view of the AOB this interpretation would only make sense in one specific case: tests were only required at that time in the event of arrival from a high-risk country.

However, this requirement had been removed from the amended regulation, although the wording remained the same for children aged under seven.

Given that the wording had remained the same, the interpretation of the new regulation applied by the Ministry no longer made any sense.

Regulations must be clear and understandable

However, the comprehensibility of a regulation is an important prerequisite for its lawfulness. The AOB considered that this prerequisite had not been met. The Constitutional Court of Austria developed the following standard: "If it is only possible to understand which action should be taken through nuanced specialist knowledge, extraordinarily methodological skills and a certain pleasure in solving mental exercises, a regulation must be annulled on the grounds that it is not comprehensible (VfSlg 12420/1990)". As a result, a three-year-old child was required to spend several days in quarantine, and his working parents, who had attempted to act in accordance with the law, were required to care for the child at home.

Visiting rules at health care facilities following births and deaths

Numerous complaints concerning visiting rules

Especially during a pandemic, emotional support from partners, family members and friends can help to prevent mental strain and stress. The State may only interfere with the basic right to private and family life with moderation, and provided that it is necessary and proportionate and that there is no alternative. Numerous complaints relating to visiting rules at retirement and nursing homes concerned the "2G plus rule", which came into force in November 2021. Since the NPM has also considered the issue, it is discussed in greater detail in the NPM Report 2021. In addition, restrictions were also imposed in relation to the ability to visit and access medical facilities, which led to complaints concerning cases involving births and deaths.

There is no indication that the risk of infection with SARS-CoV-2 is generally higher during pregnancy. Women giving birth expect health care facilities to have a safety concept, which enables the woman's partner to be present both during and after childbirth. The recommendations of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection took account of this and provided that women could be accompanied during pregnancy checks and also during and after childbirth.

Father prohibited from being present during childbirth

A man from Vienna contacted the AOB because he had been denied this right. In an investigative proceeding the AOB argued that the 3rd COVID-19 Preventive Measures Regulation (3. COVID-19-Schutzmaßnahmenverordnung), which applied throughout the country at that time, established an explicit exception for the period immediately before and after pregnancy and childbirth. It provided that the prohibition on visits did not apply to accompaniment to health checks carried out during pregnancy, accompaniment before and during childbirth as well as visits after childbirth. The general prohibition on accompaniment was therefore unlawful and disproportionate.

No visits on infection prevention grounds

In its statement of opinion to the AOB, the City of Vienna nonetheless asserted that different prohibitions on visitors and accompanying persons had been set out in the COVID-19 preventive concept by the Donaustadt Hospital, and that these would be applied. As a general rule, accompaniment to health checks carried out during pregnancy was prohibited on infection prevention grounds. The presence of a partner during childbirth was restricted to the delivery room. Visits were not permitted either before or afterwards, i.e. after the mother and child were transferred to the post-natal unit.

Rules inconsistent with 3rd COVID-19 Preventive Measures Regulation

The AOB noted a case of maladministration and recommended that the City of Vienna, as the operator of the medical facility, allow visits and accompaniment in accordance with the exceptions laid down in the 3rd COVID-19 Preventive Measures Regulation, especially as this was not precluded by any specific rules adopted by the Governor of Vienna. This recommendation was not acted upon and the Donaustadt Hospital continued to insist on its own internal rules. As a result, the future father's wish that he be allowed to accompany and visit the mother was not allowed.

3.13.2 Health

Homosexual and transgender persons prohibited from donating blood

Discussions have been ongoing for a number of years as to how the risk of transferring HIV and other infections can be minimised in relation to blood donations without discriminating against those wishing to donate blood. A high safety level must be guaranteed for those receiving blood and blood products (see Annex III to Directive 2004/33/EC implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components). In 2015 the European Court of Justice ruled that a blanket ban on blood donations by homosexual and bisexual men amounted to unlawful discrimination due to sexual orientation and called for differentiated risk assessments to be carried out at national level on the basis of epidemiological data (Case C-528/13, Léger).

Discrimination due to sexual orientation

Austria amended the Regulation on Blood Donation (Blutspendeverordnung) at the end of 2019. Since then, homosexual and bisexual men have no longer been subject to a general lifetime ban on donating blood, although they are banned from doing so for twelve months after their most recent sexual encounter, which is de facto tantamount to a general ban. This was justified on the grounds that the sexual conduct of homosexual or bisexual men per se entails a high risk of infection.

However, it is scientifically undisputed that at-risk sexual conduct by heterosexual and homosexual donors can have the same implications in terms of the risk of infection for blood products. Whereas heterosexual donors are only prevented from giving blood if they admit to having had sexual intercourse with more than three partners during the previous year or to having engaged in casual sex within the previous four months, homosexual men are by virtue of that status assumed to be involved in promiscuous sexual activity. However, the mere fact that a man has been involved in sexual activity with another man does not mean that he automatically belongs to a risk group with a high risk of transmitting infectious diseases. Against this backdrop, a legal question arose as to whether this unequal treatment was justified or whether there were also other ways of guaranteeing blood safety. The AOB already pointed out in last year's Annual Report that the current requirements are discriminatory (see Annual Report 2020, volume "Monitoring Public Administration", p. 166).

Individual at-risk conduct should be assessed

As is also the case for all other people who wish to donate blood, it is necessary to identify any at-risk conduct. Regulations applicable in other countries show that safety can be achieved even without a blanket ban on discriminated groups of people. As Israel, Hungary, the United Kingdom and Brazil have recently started doing, also Bulgaria, Italy, Latvia, Poland, Portugal and Spain assess the suitability of blood donors not according to the gender of their sexual partners but rather according to their personal at-risk conduct.

During the year under review 2021 complaints were made to the AOB by transgender persons, who were also refused the opportunity to donate blood. Despite the major announcements made in the spring of 2021 by the Ministry of Heath, the Regulation on Blood Donation still does not incorporate a ban on discrimination. Although provision has been made to reduce the exclusion for men who have sex with other men from twelve to four months, it is still only a recommendation, which has moreover not been implemented by the Red Cross.

Changes announced

Having thus been queried again concerning the matter by the AOB, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection agreed that an individual assessment of potential donors should be sought after and enshrined in law. It was announced that a health impact assessment would be carried out by Austrian National Public Health Institute (Gesundheit Österreich GmbH) in order to clarify how individual risk assessment could ensure that sexual orientation and identity no longer constitute blanket grounds for exclusion in future. At the time this Annual Report was finalised, the AOB had still not received the results of this study. The AOB expects that the Ministry will follow the example of numerous other countries and guarantee the ability to donate blood free from discrimination.

Inter-sex children: prohibition on early operations

Around one out of every 2,000 children affected

The AOB has consistently supported the concerns of persons of indeterminate gender. According to estimates, each year between 20 and 40 children are born in Austria with a gender diversity that does not coincide with the standard concepts of "male" and "female". A central concern of self-advocates is the prohibition on non-consensual gender correction surgery where it is not medically necessary.

Legislation currently being drafted

In 2020 the UN Committee on the Rights of the Child called on Austria to prohibit any unnecessary and non-consensual interference with sexual characteristics. According to a motion for a resolution, which was unanimously approved in 2021 by the Equal Treatment Committee of the National Council, further measures are required in order to protect inter-sex children. Work is currently ongoing on draft legislation within the Federal Ministry of Justice.

3.13.3 Public health insurance

Inadequate provision for incontinence

New rules adopted by Austrian Public Health Insurance Office

Since the start of 2021 (in Vienna from 1 April 2021), new rules for all persons insured with the Austrian Public Health Insurance Office have applied for the issue of absorbent incontinence care products (nappies, mesh underwear, pants etc.). The aim of these harmonised rules is to ensure that all persons affected throughout Austria over the age of four receive the medically necessary quantity and quality of incontinence products under the same conditions. The Austrian Public Health Insurance Office has concluded a framework agreement concerning the provision of absorbent incontinence care products with the Austrian Association of the Medical Professions (occupational group of orthopaedic technicians). A similar contract has also been concluded with the company Lohmann und Rauscher GmbH.

No general quantitative restriction

It is necessary to quantify various parameters in order to ascertain the medical requirement. The number of items per day as well as the selection of the necessary absorption capacity of the incontinence product are dependent upon actual circumstances (e.g. the amount of fluids imbibed or frequency of going to the toilet). The medical requirement should be ascertained by specially trained staff, with the involvement of the Medical Service of the Austrian Public Health Insurance Office. Although a prescription issued by a general practitioner or a specialist doctor is required, there is no quantitative restriction.

Special rules for pants

However, specific medical criteria need to be fulfilled and approval by the Austrian Public Health Insurance Office is required in order for pants to

be provided. According to these criteria, pants may be provided in cases involving mild to moderate incontinence due to dementia or specific functional impairments or neurological disease, subject to the requirement of self-reliant mobility and independence. Pants cannot be issued to persons who are confined to their bed or who experience severe incontinence. The supply is limited to two pairs of pants per day or, in the event that a mix of products is provided, a maximum of one pair of pants per day. Approval must be obtained from the Austrian Public Health Insurance Office by the issuing companies, which need to obtain the necessary information in order to do so.

Numerous complaints on inadequate supply

The AOB received numerous complaints during the period under review, stating that this goal of adequate supply with high-value products (nappies, absorbent inserts, slips, pants etc.) is not being achieved in practice. It is not understandable why supplies are not continuing on the usual scale. It is also apparent that the specific circumstances of those affected have not been assessed correctly when information is obtained by contractual partners, with the result that the amounts supplied have in some cases been significantly lower than the quantity required for dignified living. Moreover, the criteria for obtaining a supply of pants are often not transparent for insured persons. Where a supply of pants is not approved, this results in a significant deterioration in quality of life.

Decisions not comprehensible

It is not apparent for insured persons who is ultimately responsible for establishing specific needs, for rejecting higher needs or for pants. For instance, insured persons are often referred to the Austrian Public Health Insurance Office by contractual partners, and then by the Austrian Public Health Insurance Office back to contractual partners. This leads to significant delays in processing objections, or to the issue of incomprehensible and insufficiently reasoned decisions.

In the investigative proceedings, as a general rule it was only possible to secure an adequate supply for those affected that reached the previous level, or to obtain approval for any necessary increase in quantity or for pants, after the AOB became involved and after a new detailed examination of the necessary criteria by the Medical Service of the Austrian Public Health Insurance Office.

In the view of the AOB, it must generally be assumed that – as a result of the new rules – problems or adverse consequences have arisen for those affected in many cases.

Flexible assessment of needs required

The AOB therefore recommends that the circumstances of those affected not be assessed schematically according to a pre-determined template, but rather in a flexible manner with reference to the actual circumstances and needs of insured persons. Moreover, processes must also be structured more transparently and a contact centre with specific competence must

be established for insured persons in order to clarify any problems and to resolve any discrepancies. This must be communicated to insured persons in a clear and understandable manner.

Gaps in medical care

Problem with paediatric and adolescent medicine

The current situation with regard to medical care in the field of paediatric and adolescent medicine is extremely difficult. This is attributable amongst other things to the fact that too few specialist doctors are being trained in paediatric and adolescent medicine. In addition, increasing numbers of doctors are choosing to work as doctors without a contract with public health insurance offices. They are consulted in order to avoid long waiting times, even though public health insurance carriers cover only a small portion of the costs.

Permanent positions unfilled in St. Pölten

An investigative proceeding initiated by the AOB identified a care shortfall for doctors with a contract with public health insurance offices in the St. Pölten district. Out of a total of four permanent positions in the public health insurance scheme (St. Pölten City: 3, Purkersdorf: 0.5 and Böheimkirchen: 0.5) as at 1 January 2021 only the one-half permanent position in Böheimkirchen was filled. It has not been possible to fill the unoccupied permanent positions in the city of St. Pölten, which have been advertised in parallel as individual surgeries and as a group practice. A care shortfall of this severity within the field of paediatric and adolescent medicine in the capital city of a Land is unacceptable for many insured persons.

Action taken by the Austrian Public Health Insurance Office

The Austrian Public Health Insurance Office informed the AOB that attempts are being made to make permanent positions in the public health insurance scheme more attractive and to offer a better working environment to doctors who have a contract with public health insurance offices. This can be helped by new cooperation arrangements (group practice models, primary care centres, employment at doctors' offices that have a contract with public health insurance offices, enhanced rules on substitutes), part-time opportunities as well as using electronic applications to cut red tape. In addition, several extraordinary pay rises for specialist doctors with a contract with public health insurance offices working in the field of paediatric and adolescent medicine have been agreed upon. Targeted pay rises were awarded in particular in 2017 (+6%), 2018 (+10.23%) and 2019 (+13.67%). The Austrian Public Health Insurance Office has also launched discussions with the Health Agency of Lower Austria with a view to covering vacant positions in hospitals according to cooperation models. This would involve making up for unoccupied permanent positions by providing out-patient clinics with doctors employed by the hospital, where available.

Further efforts required

The AOB welcomes these efforts by the Austrian Public Health Insurance Office, which should be stepped up in the interests of patients in order to fill care gaps in the field of paediatric and adolescent medicine throughout the country with a sufficient number of doctors with a contract with public health insurance offices. It would also be worth considering whether to create additional permanent positions in the public health insurance scheme, for instance in urban areas with a growing population.

Too few dentists in rural areas

There are also gaps in the provision of care by specialists in dentistry, oral medicine and orthodontics with a contract with public health insurance offices. As at 1 October 2020, there were 193.5 unfilled permanent positions out of a total of 2,627. For 88.5 positions, it was stated that there was no need as at the reference date, or that an alternative solution has been found, or that the position was soon set to be filled. However, 105 critical permanent positions are still unfilled. The Austrian Public Health Insurance Office concedes that there are areas in which the necessary dentistry care cannot be provided, for instance due to their isolated location.

The position in relation to dentistry is strained in Tyrol where (as at 1 February 2021) 48 out of 228 permanent positions are unoccupied. For instance, in the Tyrolean Unterland (districts of Schwarz, Kufstein and Kitzbühel), 33 out of 76 positions were unoccupied. The district of Kitzbühel is particularly heavily affected. Here only 50% of permanent positions are filled. Out of 4 positions in the district capital Kitzbühel, only one is filled. Alongside attempts to make the medical profession more attractive, the Austrian Public Health Insurance Office is endeavouring to promote alternative forms of care provision (e.g. expansion of public health insurance scheme's own facilities or conclusion of contracts with independent private out-patient facilities).

The situation is not likely to become less critical over the next few years as large numbers of retirements are expected. The upcoming generation appears to have a different view of the work-life balance, which will result in further problems in filling permanent positions in the public health insurance scheme. These changing needs should be taken into account by providing for job sharing where doctors are only able or willing to work part time.

Educational capacities and primary care centres

However, the existing restrictions on access to medical studies should also be reviewed in order to counter a shortage of new starters into the profession. Furthermore, it is urgently necessary to quickly implement the planned expansion of primary care centres.

High contribution to costs for patient transport

A woman from Styria complained to the AOB because the Social Insurance Institution for the Self-Employed had charged her mother a contribution

to costs of more than EUR 3,000 for patient transport to radiotherapy in Leoben Regional Hospital in relation to the cancer she was suffering from. The AOB was able to convince the Social Insurance Institution to cover this cost element out of the support fund, due to the individual's low income status. However, following an examination of social need, a reasonable patient contribution should be calculated. Any outstanding contribution to costs must be settled before any support payment is made.

Unequal treatment of persons insured with insitution for the self-employed

This case also made clear general unfairness for insured persons under the farmers' health insurance scheme. Where a claim is made against the scheme, according to Section 80 (2) of the Farmers' Social Insurance Act (Bauernsozialversicherungsgesetz), insured persons must pay a cost contribution in the amount of 20% of the costs arising for the insurer. This contribution is also required in the event that a claim is made for radiotherapy or chemotherapy. On the other hand, self-employed workers, who are also insured with the Social Insurance Institution for the Self-Employed, qualify for an exemption under Section 86 (1) of the Social Insurance Act for Self-Employed Persons in Trade and Commerce (Gewerbliches Sozialversicherungsgesetz), which provides that a rate may be set at between 0% and 30% for cost contributions towards benefits claimed. No such provision is contained in the Farmers' Social Insurance Act. As a result, the Social Insurance Institution for the Self-Employed does not provide for any general exemption from contributions to the costs of transportation for chemotherapy or radiotherapy for this class of insured persons. This difference between the applicable rules has led to an incomprehensible difference in treatment, and is also at odds with a harmonisation of benefits for all persons insured with the Social Insurance Institution for the Self-Employed.

Change in the law necessary

The AOB therefore takes the view that the Farmers' Social Insurance Act should incorporate a provision equivalent to Section 86 (1) of the Social Insurance Act for Self-Employed Persons in Trade and Commerce so that equivalent rates can be established for all persons insured with the Social Insurance Institution for the Self-Employed for the reduction or removal of cost contributions.

Joint cover under public health insurance for third country nationals

No joint insurance prior to the grant of residence permit

A man complained to the AOB because the Austrian Public Health Insurance Office had refused joint cover under public health insurance for his wife, a Brazilian citizen, as a relative within the meaning of Section 123 of the General Social Insurance Act (Allgemeines Sozialversicherungsgesetz). Health insurance protection was urgently necessary as she required medical assistance for an acute illness after giving birth.

The refusal to recognise her status as a relative was justified on the grounds that a residence permit is a mandatory requirement for joint cover under public health insurance. This ran contrary to the otherwise standard practice of the Austrian Public Health Insurance Office, according to which the submission of an application for a residence permit is sufficient in order to obtain joint insurance.

Prerequesite for ordinary residence

From a legal perspective, it must be pointed out that, according to Section 123 (1) (1) of the General Social Insurance Act, being ordinarily resident in Austria is a prerequisite for relatives' entitlement. However, in order to establish whether a person is ordinarily resident, it is immaterial whether that residence is permitted or voluntary. On the contrary, the place of residence must constitute the focus of the individual's life, economic existence and social relations, and the duration of residence may be referred to as an indication as to whether this is the case. Therefore, a detailed examination of the circumstances of the individual's life is required in each individual case in order to be able to conclude whether the individual is ordinarily resident in Austria. This means that a residence permit is not a mandatory prerequisite for the purpose of establishing ordinarily residence within the meaning of Section 123 (1) (1) of the General Social Insurance Act, and hence for recognition of status as a relative. It must also be considered that it may be difficult to obtain the issue of a residence permit if the Austrian Public Health Insurance Office has not previously recognised that the individual qualifies for joint cover under public health insurance.

The Austrian Public Health Insurance Office ultimately accepted the AOB's argument and confirmed the individual's status as a relative after receiving confirmation that a residence permit had been applied for.

AOB calls for detailed examination in each individual case

However, the Austrian Public Health Insurance Office conceded that, even if an application has not yet been submitted, an examination must be carried out in order to establish whether there are any other indications that could plausibly establish ordinarily residence in Austria, and that any other reasons that could account for possible delays in submitting an application should be taken into account in the assessment. The AOB therefore recommends that a detailed examination be carried out as to whether the prerequisites have been met for joint cover under public health insurance for third country nationals.

Costs for wound managers not covered

Wound management only by specific medical providers

The costs of health care can only be covered by health insurance carriers if they are provided by particular medical providers, which are set out in social insurance legislation in closed lists. This means that the costs of wound care are only covered if it is provided either as health care by office-based doctors or as an alternative to hospital admission within the ambit

of medical nursing care at home on the instructions of a doctor by members of senior staff for health care and nursing.

However, a consequence of this legal situation is that the costs of wound managers, who are increasingly working on a self-employed basis at wound management centres, must be borne by patients themselves, which can result in considerable hardship.

AOB obtains support payments

The AOB received numerous complaints in 2021 in which insured persons were able to set out plausible reasons as to why they had availed themselves of wound managers. They stated that qualitatively satisfactory wound care by office-based doctors or at medical facilities had not been possible, as the available contractual partners of the health insurance carrier were not always sufficiently specialised in the field of wound care. In some cases, the AOB was able to achieve at least a payment by the support fund, after referring to special circumstances. The AOB once again recommends that the Ministry of Health make provision to recognise care by wound managers as a qualifying benefit under public social health insurance and that it draw up uniform national quality standards.

Concerns of Ministry of Social Affairs, Health, Care and Consumer Protection

The Ministry of Health stressed to the AOB that it is particularly committed to improving care for patients with chronic wounds. However, treating services provided by members of senior staff for health care and nursing equally to the services of a doctor, by supplementing Section 135 of the General Social Insurance Act (Allgemeines Sozialversicherungsgesetz), would represent a major change and require consideration to be given to quality assurance alongside financial aspects. In addition, the blanket acceptance of members of senior staff for health care and nursing who have completed advanced training in "wound management" would have adverse consequences for members of this professional group with other comparable specialist qualifications. In addition, wound care should be guaranteed through primary care facilities and by appropriately qualified members of senior staff for health care and nursing working alongside doctors from the primary care centre.

AOB once again recommends a change in the law

Since the existing independent wound care centres are making an important contribution to achieving high-quality care and closing existing gaps in care, the AOB recommends that arrangements be put in place enabling them to be used at the cost of public social health insurance.

No reimbursement for the costs of necessary implants

Feeding only possible with a tube

A man from Tyrol was required to undergo an upper jaw resection to remove a malignant tumour. His face was left deformed after the successful operation and functions that were normal for healthy people, such as speaking, swallowing and chewing, represented a major problem for him. He therefore increasingly avoided appearing in public. It was intolerable for

him that he was unable to share lunch even with his family or to eat solid food in the company of close friends. He could only be fed through a tube, which took up to three hours each day.

Social Insurance Institution for the Self-Employed refused to cover costs

In order to be able to eat again, it would be necessary to insert four implants. The estimated cost was EUR 5,000, which the man was unable to afford. An application asking for the costs to be covered was refused by the Social Insurance Institution for the Self-Employed without providing reasons and without hearing the insured person.

Mistake corrected

The man was desperate, was unable to understand the decision made by the Social Insurance Institution for the Self-Employed and stressed in his complaint to the AOB that the situation represented a major burden not only for him, but also for his wife and children, as he was battling depression and had lost his interest in life.

Immediately after the AOB became involved the Social Insurance Institution for the Self-Employed contacted the clinic with a view to obtaining cover for the costs. It was apparent that a mistake had been made by an official from the Social Insurance Institution, who had refused the application without any consideration of the medical findings. The Social Insurance Institution for the Self-Employed apologised for this mistake.

Low cost reimbursement for treatment by massage therapist

Following the removal of a malignant tumour from his face, a cancer patient from Vienna suffered from considerable pain and swelling on the left-hand side of his face. His attending doctor prescribed him ten lymphatic drainages and recommended physiotherapy.

Insurance Institution only covers small share of costs

After completing the recommended physiotherapy, which had the desired effect, the 60-year-old man sought to obtain reimbursement for the costs from the Insurance Institution for Public-Sector Employees, Railways and Mining (Vesicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergau). However, out of the total costs of EUR 750.00, it was only willing to cover EUR 8.00 for each treatment session, thus totalling EUR 80.00. The patient was informed that the reason for this was that the lymphatic drainage had not been carried out by a physiotherapist, but rather by a massage therapist. According to the regulations of the Insurance Institution of Public-Sector Employees, Railways and Mining, it was therefore not possible to pay a higher contribution to the costs.

Patient cannot know who is allowed to provide treatment

The AOB once again demanded that, in the interests of insured persons, uniform cost contributions should be paid for equivalent services provided by physiotherapists on the one hand and massage therapists on the other hand. It is not understandable to patients why different cost rates should apply to equivalent treatments, where they are successful. In addition,

it is not clear to insured persons what training the therapist providing treatment has received.

Lack of options for treatment at home

No options for patients

People with particular metabolic diseases require enzyme replacement therapy. This medication is vitally important and can only be administered in the form of a weekly infusion lasting for several hours. These infusions are provided in hospital in most cases. Aside from the mental stress, these weekly hospital visits take up a considerable amount of time and require a major organisational effort by patients and their families. Moreover, they are difficult to reconcile with everyday life for the families affected. Accordingly, the AOB has long advocated for the option of providing such therapy in the home setting, if desired by the patient and approved by the attending doctor.

Insurance carriers handle approvals differently

The practice in relation to approvals differs significantly between insurance carriers. Even within the same insurance carrier, applications for treatment at home can be handled differently, depending upon the Land and the specific individual case. The insurance carrier justified the refusal of treatment at home on the grounds that patients require constant monitoring by a medical professional while the medication is being administered. However, the refusal was also based on the fact that the costs of the medication are covered by the financing fund for medical facilities in the event of administration in hospital, and no additional costs arise for health insurance carriers.

The Austrian Public Health Insurance Office previously announced in 2020 in a letter to the AOB that work was being carried out on a uniform national approach. Although the Austrian Public Health Insurance Office has already existed since 1 January 2020, there are still no uniform national rules for enzyme replacement therapies.

Model project in Vienna

In the summer of 2021 the Vienna Health Association and the Austrian Public Health Insurance Office agreed that enzyme replacement therapy could also be administered at home, at least in Vienna. However, this only applies for enzyme replacement therapies that are provided in a Vienna hospital.

AOB calls for uniform national rules

The AOB calls for this model project to be expanded from Vienna to the whole of Austria. The approval of treatment at home must not be dependent upon the Land in which the patient lives and which particular insurance carrier is competent.

Difficult rehabilitation for parents

It is often impossible for single parents to complete an in-patient rehabilitation programme, even if it is absolutely necessary from a medical perspective. There are only a few rehabilitation facilities for adults that also accept children as accompanying persons. Even in these facilities, there is a lack of childcare. Parents are therefore forced to rely on local nurseries. However, there is often no prospect of securing a nursery place for the duration of the in-patient rehabilitation programme. The situation has become more difficult as a result of the COVID-19 pandemic.

No in-patient rehabilitation programme for s ingle mother

A single mother with severe impairments and in employment complained to the AOB. She was referred for an in-patient rehabilitation programme with a view to maintaining her residual mobility, but her stay had already been postponed several times due to the pandemic. The rehabilitation facility refused to accept her two-year-old child and her assistant. Due to the pandemic, it was not possible to arrange for the child to be cared for during certain times of the day outside the facility in a local nursery or with a nanny.

Following numerous discussions between the AOB and all parties involved, the single mother was able to start her in-patient rehabilitation programme along with her child and her assistant.

AOB calls for options to be offered parents

The AOB calls on the insurance carrier to ensure that facilities are available that can also accept children and that also offer in-house childcare, at least during certain periods of the year. This would ensure that parents who do not have the option of leaving their children with family members for extended periods of time also have the opportunity to obtain the necessary in-patient rehabilitation.

3.13.4 Pension insurance

Pension splitting only for past periods

Pension splitting agreement

Parents are able to agree to "voluntary pension splitting" for those years that have been dedicated to childcare for up to seven years after the birth of a child, arranging for up to 50% of one pension account to be transferred into the pension account of the parent primarily involved in providing childcare. This is only possible if neither parent is receiving a pension from his or her own insurer or an old-age pension. The application must be made by the transferor parent.

Transfer when the ruling takes legal effect

In March 2021 one couple concluded an agreement concerning voluntary pension splitting for calendar years 2014 to 2023. The husband submitted the application. However, within a formal legal procedure, the Austrian

Pension Agency (Pensionsversicherungsanstalt) decided only to transfer partial credits for calendar years 2014 to 2020, arguing that a transfer could only be made in respect of past periods.

New application for future transfers

The Austrian Pension Agency argued to the AOB that all pension insurance carriers had agreed with the Federal Ministry of Social Affairs, Health, Care and Consumer Protection concerning this approach. Although parents can validly conclude agreements with future effect, the respective debits or credits would only be irrevocably applied periodically for periods lying in the past after the transfer ruling has taken legal effect. As a result, new agreements would have to be submitted for the future calendar years.

Adverse consequences for women in work

The woman affected complained that both she and other women – who were in general working part time – could suffer adverse consequences under pension insurance law as a result. Whereas, under the terms of their agreement, they must limit their work in order to care for their children also during subsequent years, thus losing income from gainful activity as a result, the transfer of pension credits conceived of as compensation for this would only be made after the children's father had made a new application. The mothers were thus forced to bear the risk that the men might not abide by the agreements concluded.

Explanatory notes stress the avoidance of disputes

The explanatory notes on the government bill regarding Section 14 of the General Pension Act (Allgemeines Pensionsgesetz) appeared to contradict the Austrian Pension Agency's interpretation of the law. The explanatory notes state that: "The reliance on the declaration by both insured persons, coupled with the absolute individual time limit for filing an application, is intended to make the provisions easier to apply. This should also prevent subsequent disputes concerning the transfer of credits in relation to the provision of childcare. Such applications should be considered by the pension insurance carrier by a notification issued within a formal legal procedure".

The AOB therefore asked the Federal Ministry of Social Affairs, Health, Care and Consumer Protection for a statement of opinion. The relevant department conceded that there might be differences of approach between individual pension insurance carriers, in which case coordination would be required. A conclusive statement of opinion had not yet been issued at the time this Annual Report was finalised.

No consideration of retrospectively paid pension contributions

A 66-year-old wine trader was awarded a pension from 1 April 2017. As there were contribution arrears at the retirement date, the pension calculated for the self-employed individual did not take account of the period falling between 1 March 2005 and 30 April 2007. However, the outstanding debt was settled by amounts withheld from the pension until

2019 and the contribution arrears were settled in full. However, his pension was not increased. Those affected cannot understand why the subsequent payment of contributions does not result in a recalculation of the pension. The pensioner in this case would have understood the approach, if the Social Insurance Institution for the Self-Employed had paid out the lower pension and refrained from collecting the outstanding contributions. However, it seemed unfair to him that he had to settle it in full, but that his pension was not increased as a result. As his business was hardly earning any money over the years running up to his retirement, he was also unable to take out a loan in order to pay the outstanding contributions.

However, the approach taken by the Social Insurance Institution for the Self-Employed is consistent with the legal situation. Contributions that are paid after the retirement date for any period other than the last calendar quarter directly prior to the retirement date, and for the calendar quarter during which the retirement date falls, are disregarded for the purposes of the benefit associated with the insured event (Section 118 (1) of the Social Insurance Act for Self-Employed Persons in Trade and Commerce). The reason for the contribution arrears is immaterial. Accordingly, the Supreme Court of Justice has ruled (OGH 12 September 2013, 10 ObS 100/13y) that there is no need to examine whether the payments were unduly withheld due to purely speculative considerations or whether the failure to pay the contributions was attributable to a financial emergency for which the individual affected was not at fault.

Contributions paid after retirement date are disregarded

The AOB is aware that setting aside this rule would entail an increase in administrative costs, as it would mean that the pension would have to be recalculated. The AOB recommended to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection that the legal situation be changed. The Minister of Social Affairs has stated that he intends to clarify this with the Social Insurance Institution for the Self-Employed. The result was not yet known at the time this Annual Report was finalised.

3.13.5 Social affairs

Deficient assessments of entitlement to care and nursing allowances

Inadequate classification of persons with cognitive impairments

The reference and minimum figures contained in the Classification Ordinance under the Federal Care Allowance Act (Einstufungs-verordnung zum Bundespflegegeldgesetz) are based primarily on the need for assistance and care in the event of bodily impairment. The need for care of persons with a mental disability is not sufficiently described in the Classification Ordinance. In addition, the situation has not been changed much by the hardship allowance for persons with a severe mental disability, which has been available since 1 September 2009.

The AOB thus demands – as previously set out in detail in the Annual Report 2019 that the Classification Ordinance be reviewed, the hardship allowance be increased and the quality of specialist reports be improved.

Dementia allowance does not reflect life circumstances

The hardship allowance for persons with dementia of 25 hours per month does not cover additional costs associated with care and support. While relatives providing care report credible accounts of how they have to be prepared around the clock in order to provide support at any time to relatives with dementia, the Classification Ordinance does not consider this aspect. It frequently occurs that, as a purely physical matter, persons receiving care and nursing allowances may be capable of attending to everyday chores themselves, but are, however, unable to do so independently. The increased need for support does not in fact result from physical impairments. It is primarily due to impairments of a neurological (such as memory problems), psychiatric (anxiety states, depression, confusion) or psycho-social (lack of structure) nature as well as complicating factors from their own lives (death of spouse or another key person, loneliness etc.), which need to be considered holistically. Classification criteria that take account of all of this would provide a more realistic picture of the everyday lives of those affected and their relatives providing care. A further development of the care and nursing allowance system established in mid-1993 is one of the core points of the reform of care and nursing services contained in the government's programme.

Children also affected by inadequate assessment of entitlement to care and nursing allowance

A second group that is frequently affected by deficient assessments of entitlement to care and nursing allowances are children with disabilities. A hardship allowance has been available for children and adolescents under the age of 15 with severe disabilities since 1 January 2009, and a specific Children's Classification Ordinance (Kinder-Einstufungsverordnung) has applied since 1 September 2016. However, insurance carriers frequently disregard the Children's Classification Ordinance in that, for instance, – despite being required under Section 10 of the Classification Ordinance – they do not involve any specialist doctors in paediatric and adolescent medicine in their assessment or do not consider the hardship allowance within their assessment of the care needs of children with the most severe disabilities. Many problems relating to the care of children and adolescents with complex multiple disabilities arise from a variety of disorders with multi-factoral origin, which may have functional, relational and psycho-dynamic effects, and also exacerbate developmental delays.

Level 1 care and nursing allowance for a five-year-old despite multiple disabilities

One mother, for instance, complained to the AOB in relation to her five-year-old son suffering from severe early-childhood autism. Owing to behavioural problems and cognitive developmental disorders, it is difficult for him to understand and follow everyday routines. The hyperactive child cannot be calmed down, fights against the attempts to help him, has no perception of danger and cannot speak; his behaviour cannot be controlled. Although the

expert concluded in her opinion that the prerequisites were met for a higher care level and the hardship allowance, the Austrian Pension Fund refused the application for an increase in the care and nursing allowance. The child thus continued to receive only the level 1 care and nursing allowance.

Section 4 (3) of the Federal Care Allowance Act (Bundespflegegeldgesetz) provides for a hardship allowance for children and adolescents under the age of 15 with severe disabilities. Its aim is to take account of the particularly high level of care required for children with severe disabilities. This hardship allowance is payable according to Section 4 (4) of the Federal Care Allowance Act if there are at least two independent, severe functional impairments as a result of the disability. Both severe mental developmental disorders as well as severe behavioural problems are expressly included in the list contained in Section 4 (4) of the Federal Care Allowance Act. The fact that the two severe functional disorders are causally linked to each other does not preclude a finding of independent functional impairments within the meaning of Section 4 (4) of the Federal Care Allowance Act. (Greifeneder/Liebhart, Pflegegeld4 (2017) para. 7.106 et seq.). Nevertheless, the medical superintendent of the Austrian Pension Fund refused to grant the hardship allowance.

Children are often disadvantaged within assessments of entitlement to care and nursing allowances because the assessment is heavily focused on the needs of adults. The AOB thus calls on insurance carriers to involve specialist doctors in paediatric and adolescent medicine within their assessments and to make actual use of the hardship allowance in order to enable children to receive at least a generally appropriate assessment of entitlement to care and nursing allowances.

In the case described, the Austrian Pension Agency ultimately revised its decision and retrospectively increased the care and nursing allowance for the five-year-old child to care level 4.

Appraisals at the Sozialministeriumservice (Ministry of Social Affairs Service)

Ex-officio investigation concerning *Sozialministeriumservice*

A large number of individuals complained to the AOB concerning procedures under social law, including in particular in relation to experts. Complaints were directed both against the procedures themselves as well as against the result of medical assessments. Complaints reported a lack of sensitivity on the part of doctors carrying out the assessments in addition to major time pressure and an unwillingness to engage with individual concerns. Some of those affected felt as if they had been a mere object within the procedure, and that they had been dealt with as if on a production line. In response to these complaints, the AOB initiated an ex-officio investigative proceeding focusing on procedures under the Austrian Federal Disability Act (Bundesbehindertengesetz) for obtaining a disability pass or the

additional annotation concerning "unfitness to use public transport due to a long-term mobility impairment as a result of disability", which is required in order to obtain a disabled badge for a car. The following table provides an overview, based on information provided by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, of the applications received over the last four years along with procedures with negative outcomes.

More than 182,000 applications in four years

Procedure for obtaining a disability pass or additional annotation required for a disabled badge for a car		
Year	Number of applications	Procedures with negative outcomes
2017	45,372	9,703
2018	46,148	9,338
2019	49,872	10,118
2020	41,369	6,525
TOTAL	**182,761**	**35,684**

90% provided by self-employed experts

The decisions taken by the Sozialministeriumservice, which is the competent authority, are based on expert medical opinions. 90% of these assessments are provided by self-employed experts, whereas only 10% of them are carried out by doctors working for the authority.

55-90 minutes spent by experts

Those affected often had the impression that the experts did not take enough time. According to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, the average investigation for an assessment lasted for 15 to 30 minutes, with 10 to 20 minutes' preparation time and 30 to 40 minutes' follow-up work.

The initial reason for the dissatisfaction is the invitation issued to those affected to undergo an assessment according to the Austrian Federal Disability Act. This invitation indicates the competent expert and states which documentation and items should be taken along to the examination. However, it does not contain any further information concerning the conduct of the examination. Those affected are often unaware that the expert has already obtained information concerning their physical condition from the available findings. They also do not know anything about the follow-up work. They assume that the actual examination lasting for 15 minutes represents the total amount of time dedicated to them by the expert.

Federal Administrative Court corrects 26% of decisions

As part of this investigative proceeding the AOB also approached the Federal Administrative Court, which hears appeals against decisions taken by the Sozialministeriumservice as the appellate body with competence over matters pertaining directly to the federal administration. The Federal Administrative Court indicated that a total of 5,434 proceedings concerning disability passes has been brought before it between 1 February

2017 and 1 February 2021. Out of this total, as at 31 January 2021, 411 proceedings were still outstanding and 5,023 proceedings had been concluded. It is also possible that multiple (individual) decisions (rulings) are required in order to bring proceedings to a conclusive end. In around 26% of decisions the court confirmed the legal arguments made by those affected. This means that around one quarter of the rulings adopted by the Sozialministeriumservice that are challenged by those affected were flawed.

Errors in assessments

The AOB assessed around 320 decisions issued by the Federal Administrative Court itself and established that most of the mistakes made by the Sozialministeriumservice were attributable to the way in which the assessments were drawn up. For instance, in one case the Sozialministeriumservice only obtained a general medical assessment, even though a specialist medical assessment would have been required on account of the specificity of the pain asserted. Depending upon the nature and extent of the impairments asserted, it may be necessary for the authorities to involve specialist experts from a variety of medical fields; however, this is often not done. In other cases the assessments obtained by the Federal Administrative Court contradicted the initial assessments by the Sozialministeriumservice. However, this may be attributable to the fact that a new clinical picture emerged during the court proceedings or the individual's physical condition had deteriorated.

Lack of support for persons with impaired hearing

Hearing impairments can range from a hearing loss through hardness of hearing to permanent deafness. They may have been present since birth or may have arisen during the course of a person's life. With appropriate support, it is possible to have as independent a life as possible and to participate fully in social life under any circumstances. Sign language is recognised in Austria as a separate, fully-fledged language enabling good communication.

No option of retraining for deaf persons

Deaf people are often reliant on sign language interpreters when pursuing education and training. If there is a lack of financial support, this results in exclusion from the opportunity to retrain or pursue advanced training.

In 2021 a deaf woman complained to the AOB because she had completed training in nursery education at a private college. Her application for assistance towards interpreting costs was rejected by the Sozialministeriumservice (Ministry of Social Affairs Service) and the Federal Ministry of Social Affairs, Health, Care and Consumer Protection on the grounds that she had already completed vocational training and had been engaged in employment relations. However, she had never previously claimed funding for interpreting costs. In addition, there is a major workforce shortage of nursery teachers with sign language skills.

According to Section 9.5 of the Guidelines on Individual Support for the Incorporation into the Workforce of Persons with Disabilities (Richtlinien Individualförderungen zur Beruflichen Eingliederung von Menschen mit Behinderung), it is only possible to cover sign language interpreting costs if the aim of the funding is to obtain or secure gainful employment or if the funding is essential for vocational training and education (e.g. master's examination).

As a result, deaf persons are put at a disadvantage in choosing a career and their advanced training opportunities not only compared to the population in general, but also compared to persons with other disabilities, who are not reliant on a sign language interpreting service. According to Section 12 of the Guideline on Personal Assistance in the Workplace (Richtlinie Persönliche Assistenz am Arbeitsplatz), personal assistance in the workplace may also be granted for retraining or advanced training if the individual concerned has already completed training and is in gainful employment, and the retraining or advanced training would be beneficial for that individual's professional development.

AOB calls for guidelines to be amended

Due to the general exclusion of funding, the AOB considered the guidelines to be discriminatory and asked the Federal Ministry of Social Affairs, Health, Care and Consumer Protection to amend them. The relevant department announced that the funding guidelines would be revised in order to enable individual decisions to be taken. In future deaf persons should not be precluded access to retraining in the event that interpreting costs arise as a result, provided that the retraining sought is relevant for the labour market.

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection ultimately granted funding to the woman concerned and covered a significant proportion of the sign language interpreting costs.

No funding for taking over a tobacconist's despite prerequisites being met

A man from Vienna has had a 100% disability since falling ill with leukaemia. In April 2020 he was granted an allowance in order to take over a tobacconist's in Vienna.

Previous self-employment as a reason for refusal

The man submitted an application to the Sozialministeriumservice (Ministry of Social Affairs Service) for funding paid out of resources from an employment campaign. However, it was refused on the grounds that he had "already been self-employed for an extended period of time".

In actual fact the individual concerned had previously operated a tobacconist's from July 1991 until April 2003. He had been managing director in his father's business from January 2005 until November 2018. He had never received funding for any of these activities. In addition, it was

not apparent from the relevant guidelines (concerning individual funding for the incorporation into work of persons with disabilities) that previous self-employment would prevent the approval of funding. Since the man also fulfilled the other prerequisites for funding, he questioned the decision by the authorities to reject his application.

AOB able to obtain a review

The investigative proceeding initiated by the AOB showed that – contrary to the authority's original assessment – the man was eligible for funding in the form of "assistance in achieving financial independence". He was invited to file an application to that effect with the Sozialministeriumservice and advised that it was likely to result in a positive decision.

3.13.6 Act on Crime Victims

Amendment to the Act on Crime Victims concerning victims and their rights

Statutory assistance payments too low

The AOB has already contacted the competent social department in the past concerning an amendment to the Act on Crime Victims (Verbrechensopfergesetz). In 2021 the AOB received complaints regarding this matter as well. It transpired once again that the Act on Crime Victims needs to be amended urgently as regards victims and their rights. The level of statutory assistance payments is too low, especially for the victims of serious violence and abuse. Those affected need support in particular in financing psychotherapy, receiving lump-sum compensation for pain and suffering, covering the costs of crisis interventions as well as loss of earnings and maintenance. The AOB therefore recommended to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection that the law be changed, and that clarification and equal rights be provided for the victims of terrorism guaranteed in the Act on Crime Victims.

Short period results in forfeiture of claims

A nine-year-old child was a victim of serious sexual assault and attempted serious coercion. The application for lump-sum compensation for pain and suffering was rejected as it was filed shortly after the expiry of the three-year period. It is often not possible to exercise procedural rights, or to do so in good time, on account of the extraordinary emotional strain. The three-year period provided for by law following the completion or cessation of the criminal proceedings is not always long enough in order to apply for support. The failure to comply with the time limit should not result in the forfeiture of the claims available to an injured party suffering from lasting and serious trauma.

Reliant on discretionary decision in hardship cases

Although, thanks to the efforts of the AOB, it was possible to carry out a closer examination of the prerequisites according to the rules on hardship settlements, the AOB nonetheless takes the view that a change in the law would be appropriate in order to ensure legal certainty. Victims should not

have to rely on discretionary decisions in hardship cases. In addition, the rules on hardship settlements are very rarely applied.

Limited temporal scope

Applications for lump-sum compensation for pain and suffering are frequently rejected on the grounds that the criminal offences were committed before 1 June 2009. The AOB calls for the temporal scope of lump-sum compensation for pain and suffering to be expanded, and amounts paid as compensation under the Act on Crime Victims increased.

Psycho-social crisis can also occur at a later stage

In a case concerning a man from Upper Austria, the offence was committed before 1 April 2013, with the result that an application to cover the costs of crisis intervention was rejected. The crisis intervention rules only apply to criminal offences committed after 1 April 2013. Crisis intervention involves acute assistance after the offence was committed. Section 4 (5) of the Act on Crime Victims provides for assistance in relation to psychotherapy, even for offences committed prior to this date. The AOB takes the view that the law should be changed to extend the qualifying period of time also for the crisis intervention rules as a psycho-social crisis can be triggered not only in the immediate aftermath of a criminal offence but also following a report or a court ruling concerning it.

Terrorist attack: clarification of definition of victim

On 2 November 2020 the centre of Vienna was hit by a terrorist attack. As a solution could not be found with reference to the options under the Act on Crime Victims, the Federal Government set up a compensation fund for the victims of terrorism. It has been apparent at the latest since this terrorist act that the Act on Crime Victims needs to be subject to a general review. The AOB therefore urged the Federal Ministry of Social Affairs, Health, Care and Consumer Protection to clarify who qualifies as a victim under the Act on Crime Victims in the event of a terrorist attack. Terrorist offences have particularly serious psychological effects for those who have been directly exposed to danger. They should therefore be regarded as direct victims of the offence. As a result, it was recommended that the class of entitled persons under Section 1 of the Act on Crime Victims be clarified. Any persons who have been close to the location at the time of a terrorist offence or who have witnessed an act falling under paragraph 1 should be expressly covered by the Act on Crime Victims.

Expansion of assistance payments

Section 2 of the Act on Crime Victims contains a closed list of assistance payments. The AOB called for this provision to be expanded in order to incorporate assistance payments consisting in "compensation for the costs of the clean-up of the crime scene" and "compensation for the costs of changing locks which, owing to the circumstances of the offence, is intended to protect the victim".

The AOB also takes the view that the offsetting of compensation for loss of earnings (under the Act on Crime Victims) against pensions for victims of children's homes (under the Pensions for Victims of Children's Homes Act)

is an inappropriate adverse consequence and should therefore be cancelled.

AOB recommendations to be incorporated

In the AOB's opinion, the lawmakers are now requested to act. The Federal Ministry of Social Affairs, Health, Care and Consumer Protection has announced that it intends to incorporate the recommendations of the AOB regarding the scope and reasonableness of assistance payments into the amendments of the Act on Crime Victims.

3.13.7 Animal protection

Legal basis for keeping pigs not compliant with EU law

EU requirements only partially implemented

The Animal Husbandry Ordinance (Tierhaltungsverordnung) provides that pig pens must be built in such a manner as to allow pigs access to a sufficiently large area to lie down at an appropriate temperature. As the AOB previously described in greater detail in its Annual Report 2019, this formulation is not entirely consistent with the corrected version of Council Directive 2008/120/EC of 18 December 2008, which lays down minimum standards for the protection of pigs and was published in the EU Official Journal in February 2016.

AOB calling for change since 2019

Austrian regulations must comply with EU law. As previously, this is still not the case, even though a publicly funded research project has addressed issues relating to structural design, animal welfare, value for money and the production security of keeping animals in boxes. The concluding report of VETMED (the University of Veterinary Medicine Vienna), which has been available since 2017, has been transmitted to the competent ministries (Federal Ministry of Health and Women's Affairs and Federal Ministry of Agriculture, Forestry, Environment and Water Management). As early as July 2019, the AOB was informed that the EU Directive was set to be amended and an amendment to the 1st Animal Husbandry Ordinance was planned. Delays in implementation were justified, amongst other things, on the grounds that an audit report of the European Commission concerning pig tail docking had not yet been received.

Tail docking should not be routine

However, this audit has also been available for some time. It shows that the tail docking of piglets amounts to an intervention that, according to Council Directive 2008/120/EC laying down minimum standards for the protection of pigs, should not be routinely carried out. As a result, the audit report states that pig-keeping businesses should be obliged to analyse their husbandry processes regularly in order to identify risk factors for the emergence of tail biting as well as the scale of tail biting in their livestock. The AOB takes the view that a solution that is compliant with EU law can only be found if a switch is made to more animal-friendly husbandry systems.

Animal Husbandry Ordinance still not compliant with EU law

In March 2020 the Federal Minister competent for animal protection informed the AOB that an amendment to the 1st Animal Husbandry Ordinance was being prepared by ministry officials, and that it would be subject to a review procedure "soon". This has not yet occurred.

However, the ordinance had still not been amended at the time this Annual Report was finalised. This is incomprehensible for the AOB, especially as it is beyond doubt that the applicable legal situation needs to be changed in order to comply with EU requirements and considering the fact that farmers also need politicians to ensure long-term planning security.

Legislative recommendations

Federal Ministry for Agriculture, Regions and Tourism

Legislative recommendation	Reaction Department	Details
The AOB recommends clarifying if the right to access woodlands pursuant to Section 33 (1) of the Forest Act includes dogs.	The Federal Ministry for Agriculture, Regions and Tourism considers this included.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 195 et seq.
The AOB recommends creating a legal basis for cleaning up flotsam and driftwood as well as its financing.	The Federal Ministry for Agriculture, Regions and Tourism refers to the necessity of financing by the Federal Government, the Laender and the municipality from the disaster fund.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 193 et seq.

Federal Ministry of Family and Youth

Legislative recommendation	Reaction Department	Details
In the AOB's opinion, obstacles to the implementation of the so-called „Dad's Month" should be eliminated.	The AOB's recommendation for were rejected.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 82 et seq.

Federal Ministry of Finance

Legislative recommendation	Reaction Department	Details
Accounts Register and Accounts Inspection Act: Notaries who function as court commissioners in probate proceedings should be able to obtain information from the Accounts Register.	The Federal Ministry of Finance rejected this recommendation.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 86 et seq.

Federal Ministry for Social Affairs, Health, Care and Consumer Protection

Legislative recommendation	Reaction Department	Details
The AOB recommends extending the entitlement to a children's home victim pension to all victims with an incapacity for work, before they reach statutory pensionable age.		Annual Report 2021, Volume „Monitoring Public Administration", pp. 35 et seq.
The AOB recommends that an exemption from contributions to the costs of transportation for chemotherapy or radiotherapy is incorporated in Section 80 (2) of the Farmers' Social Insurance Act (equivalent to Section 86 (1) of the Social Insurance Act for Self-Employed Persons in Trade and Commerce).		Annual Report 2021, Volume „Monitoring Public Administration", pp. 227 et seq.
The costs for wound care provided by specialists in wound management centers should be covered.	The Federal Ministry for Social Affairs, Health, Care and Consumer Protection did not agree to the proposed change.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 229 et seq.
In the AOB's opinion, retrospectively paid pension contributions should be considered in the Social Insurance Act for Self-Employed Persons in Trade and Commerce.	The recommendation is being examined.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 234 et seq.
The AOB recommends amending the Act on Crime Victims concerning victims and their rights.	The recommendation is being examined.	Annual Report 2021, Volume „Monitoring Public Administration", pp. 241 et seq.

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