

AUSTRIAN
OMBUDSMAN BOARD



Annual Report

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

2022

Monitoring Public Administration

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Preface

2022 was a very busy year for the AOB in terms of overall workload. Nearly 24,000 complaints were received, which is the highest figure ever for complaints submitted to the AOB. A total of 11,115 investigative proceedings were initiated during the year under review. In its monitoring and controlling capacity, the AOB is an important source of support when problems or misunderstandings arise during interactions with public authorities. The AOB investigated actions by the authorities, and also intervened between the individuals affected and the authorities and successfully found solutions. In cases that did not fall within the AOB's sphere of responsibility, the AOB still made every effort to provide information and support to all relevant persons.

This Annual Report to the National Council and the Federal Council provides an overview of the AOB's work. As before, it consists of two volumes. Volume 1 covers ex-post control of public administration. It also covers the activities of the Pension Commission for Victims of Children's Homes (*Heimopferrentenkommission*), which are covered in a separate chapter. Volume 2 deals with a further core task of the AOB – preventive human rights monitoring. The two volumes in combination provide a complete picture of the AOB's activities.

2022 was also an anniversary year. At the beginning of June, a ceremonial event was held in Parliament to mark 45 years of the AOB and ten years of our mandate to protect and promote human rights in Austria. Leading figures from the worlds of politics, public administration and academia attended the event. July 2022 also saw the fifth anniversary of the mandate of the Pension Commission for Victims of Children's Homes.

At the start of the summer, Ombudsman Werner Amon left the AOB after three years in office and went into regional politics in Styria. National Council member Gaby Schwarz took over his agenda when she assumed office as Chairperson of the AOB. She was sworn in as Ombudswoman in July by the Federal President. We wish to give special thanks to Werner Amon for his work as Ombudsman and for his dedication and commitment.

The AOB focused on various key areas in the second half of the year. These included the publishing of three additional reports, covering the detention of juvenile offenders, the enshrinement of social fundamental rights in the Federal Constitution and the 2020 terrorist attack.

We would like to thank our employees for all their hard work. Without their dedication, it would not be possible to handle such a wide range of tasks. We are also very grateful

to the Federal Ministries and other Federal, regional and municipal bodies for their communication and collaboration during the year.



Gaby Schwarz



Bernhard Achitz



Walter Rosenkranz

Vienna, March 2023

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Introduction

The Austrian Ombudsman Board (AOB) was established in order to protect citizens against the misuse of state power. As an independent institution providing protection under the law, and enshrined in the Constitution, it offers everyone in Austria the option of solving problems with authorities without bureaucracy and free of charge. Such problems might consist of 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.

The nearly 24,000 complaints received in 2022 demonstrate that there is a significant and growing need for such an institution. The crises of the last few years have increased people's need for information and support. Moreover, financial and staff shortages in health care and care, and in the justice system and the police, have worsened and are impacting the quality of the services provided. It is important to bear those circumstances in mind when considering the complaints received.

Number of complaints increased to 24,000

The AOB's task is to help the individuals affected to assert their rights. In many instances, the AOB corrects unlawful conduct on the part of the authorities or finds an acceptable solution for the individuals affected. 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 oriented to citizens' rights. That is the only way to ensure that monitoring of public administration promotes transparent, efficient settlement and clear decision-making processes. At the same time, the AOB can help people gain a better understanding of the law and of how public administration works. In that respect the AOB fulfils the role of intermediary between citizens and public administration.

Problem-solving and role as intermediary

The AOB's monitoring and investigative activities provide insight into the functioning of public administration beyond the details of specific cases. Moreover, the AOB can help bring to light areas where there are weaknesses or undesirable developments. A given case can always provide impetus for general recommendations or legislative amendments and thereby contribute to improvements in public administration. The AOB hopes that its work will help encourage administrative authorities and legislative bodies to make changes where they are needed.

Objective: improvement in public administration

Volume 1 provides an overview of the AOB's ex-post control activities in 2022. The Performance Record in Chapter 1 provides a summary of the various areas of activity and key figures. It also covers 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 being set up in 2017 has handled compensation for children's home victims under the Pensions for Victims of Children's Homes Act (*Heimopferrentengesetz*). This means individuals who suffered abuse and violence as children or teenagers in children's homes receive support from the AOB in pursuing their claims. To date, a total of around 2,800 claims from uncompensated individuals have been submitted. Over 500 new claims were submitted in 2022.

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 area of departmental responsibility. The report covers investigative proceedings that are/were based on individual complaints, and outcomes of investigative proceedings that 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 on areas that often gave rise to complaints or in which large numbers of people were involved. The goal is to describe cases of maladministration, and also to make concrete recommendations for improvements. On the following pages there is a table of legislative recommendations, to provide an overview.

1 Performance record

1.1 Monitoring public administration

The AOB is one of the Supreme Authorities of the Republic of Austria, and monitors and controls public administration in accordance with the Federal Constitution since 1977. Pursuant to Article 148a of the Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*), any individual is entitled to file a complaint with the AOB regarding an alleged case of maladministration, insofar as they do not or no longer have recourse to legal remedy. The AOB is obliged to address every permissible complaint and initiates investigative proceedings to determine whether official decisions comply with the law and with the principles of good public administration. It then informs the individuals affected about the outcome of the investigative proceedings. If the AOB suspects a case of maladministration, it can act on its own initiative and open *ex-officio* investigative proceedings. Furthermore, the AOB is authorised to request the Constitutional Court of Austria (*Verfassungsgerichtshof*) to verify the legality of regulations issued by a federal authority.

In 2022, a total of 23,958 persons contacted the AOB with a complaint. That represents an average of 96 people per working day contacting the AOB to obtain advice and assistance. 16,911 complaints related to administration. Of that figure, in 5,796 cases it was not necessary to contact the authorities. These were cases where it was possible to deal with the problem immediately, or which related to proceedings that had not yet been concluded. A total of 7,047 complaints involved matters that were beyond the scope of the AOB's investigative mandate. In these cases, responsibility lay with independent jurisdiction. In these instances, the AOB provided information about the legal position and supplied the individuals affected with sources of further advice.

23,958 complaints

According to the Federal Constitution, if the AOB has concrete grounds to suspect a case of maladministration, it can act on its own initiative and open *ex-officio* investigative proceedings. In 2022, the Ombudspersons invoked this right and initiated 95 *ex-officio* investigative proceedings.

95 *ex-officio* investigative proceedings

In 2022, 10,508 investigative proceedings were concluded. Of that figure, the AOB identified maladministration in 2,278 cases, which is just under one fifth.

Maladministration in 2,278 cases

Performance record 2022	
Complaints about administration	16,911
Settled without involving the authorities	5,796
Settled with involvement of the authorities	11,115
Complaints outside the investigative mandate	7,047
TOTAL of handled complaints	23,958
Investigative proceedings concluded*	10,508
Cases of maladministration	2,278

* includes investigative proceedings initiated in previous years

Investigative proceedings in federal administration

Federal administration: 8,057 investigative proceedings

The AOB's investigative activities relate to the entirety of public administration. They therefore cover all authorities and departments that implement federal legislation. In addition to direct and indirect federal administration, the AOB's mandate also covers administration acting as a private entity. In 2022, the AOB initiated a total of 8,057 investigative proceedings in federal administration.

Federal Ministry investigated	number of cases	in %
Federal Ministry of Social Affairs, Health, Care and Consumer Protection	1,875	23.3
Federal Ministry for the Interior	1,811	22.5
Federal Ministry of Justice and Data Protection Authority	1,305	16.2
Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology	1,038	12.9
Federal Ministry of Finance	891	11.1
Federal Ministry of Labour and Economy	425	5.3
Federal Chancellery	380	4.7
Federal Ministry of Education, Science and Research	138	1.7
Federal Ministry of Agriculture, Regions and Tourism	111	1.4
Federal Ministry for European and International Affairs	47	0.6
Federal Ministry of Defence	25	0.3
Federal Ministry for Arts, Culture, Civil Service and Sport	6	0.1
TOTAL	8.052	100

Around one quarter of all investigative proceedings (23.3%) related to social affairs and health. As before, key areas in which complaints were received were COVID-19 lockdowns and problems relating to health insurance. The number of complaints received from persons with disabilities remained high.

23% of all investigations in social affairs and health

Over one fifth (22.5%) of all investigative proceedings related to internal security: in this area, 1,811 investigative proceedings were initiated. A large proportion of the complaints related to immigration and asylum law and the police. The number of complaints regarding proceedings for obtaining a residence title remained high, though there was a slight decrease relative to 2021. The number of complaints about the duration of first-instance asylum proceedings rose once again.

Internal security: one fifth of all complaints

Following a sharp increase in 2020, the number of complaints concerning the justice system continued to rise. A total of 1,305 investigative proceedings were initiated in this area in 2022, i.e. 16.2% of all investigative proceedings. In particular, there were 871 cases relating to the penitentiary system and forensic institutions.

1,305 investigative proceedings in the area of justice

Investigative proceedings in regional and municipal administration 2022

In addition to 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 the year under review, a total of 3,058 investigative proceedings related to regional and municipal administration. Vienna, the most populous of the *Laender*, accounted for the largest percentage of investigations (47.3%), followed by Lower Austria (16.4%) and Styria (11.1%).

Regional and municipal administration: 3,058 investigations

Land	2022	in %
Vienna	1,445	47.3
Lower Austria	500	16.4
Styria	339	11.1
Upper Austria	321	10.5
Salzburg	164	5.4
Carinthia	152	5.0
Burgenland	137	4.5
TOTAL	3.058	100

There were various shifts with regard to key focus areas: in 2022, one fifth of all complaints related to citizenship law and the traffic police (21.5%).

Investigative key areas in the *Laender*

Social affairs, such as the minimum benefit system, child and youth welfare services and matters relating to persons with disabilities, accounted for 21.4%. Regional planning and building law accounted for 17.7%, and municipal affairs for 11.6%.

Areas of investigation at the regional and municipal level		
	number of cases	in %
Citizenship, voter register, traffic police	656	21.5
Needs-based minimum benefit system, child and youth welfare services, persons with disabilities, basic level of social services	653	21.4
Regional planning and housing, building law	540	17.7
Community affairs	355	11.6
Finances of the <i>Laender</i> , regional and municipal taxes	235	7.7
Health care sector and veterinary sector	147	4.8
Education system, sports and cultural matters	113	3.7
Trade and industry, energy	112	3.7
Regional and municipal roads	108	3.5
Agriculture and forestry, hunting and fishing law	42	1.4
Office of the <i>Land</i> governments, public services and compensation law for regional and municipal employees	40	1.3
Nature conservation and environmental protection, waste management	35	1.1
Transport and traffic on regional and municipal roads (excl. traffic police)	20	0.7
Science, research and the arts	2	0.1
TOTAL	3.058	100

Citizen-friendly communication

Easy to contact; online complaint form is a popular contact method

The large number of complaints is due to the high level of awareness and acceptance of the AOB among the general population. The fact that it is easy for citizens to reach the AOB plays an important role as well. As a citizen-friendly service and control institution, the AOB is easy and straightforward to contact: complaints can be submitted in person, by post or electronically. Citizens can submit their documents in person at the AOB Information Center. There is also a free service number, which can be used to obtain

initial information. In 2022, this contact method was used 11,793 times, a 7% increase relative to 2021. In addition, an online complaint form is available on the AOB website; in 2022, 2,727 people used this form.

During consultation days, citizens in all of the *Laender* have the opportunity to discuss their concerns directly with the Ombudspersons. Citizens used this option extensively. In the year under review, 116 consultation days with 921 consultations were held; of this figure, 23 were telephone consultation days. As shown in the table below, Vienna held the largest proportion of the consultation days.

Consultation days 2022	
<i>Land</i>	number
Vienna	38
Lower Austria	15
Styria	15
Burgenland	11
Upper Austria	10
Carinthia	8
Tyrol	7
Salzburg	6
Vorarlberg	6
TOTAL	116

1.2 Activities of the Pension Commission

The Pensions for Victims of Children's Homes Act (*Heimopferrentengesetz*) entered into force on 1 July 2017. Since then, individuals who suffered violence in a home, foster family, hospital, psychiatric institution or sanatorium between 1945 and 1999 have been entitled to a supplementary monthly pension. 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. Individuals who have already received a lump sum compensation payment from the operator of the facility can apply for a monthly pension payment after reaching statutory pension age or after their pension start date. Individuals who have not yet been declared as victims of violence and who have suffered violence can contact the AOB's Pension Commission, which has independent status.

AOB handles applications for pensions for victims of children's homes

The Pension Commission, chaired by Ombudsman Bernhard Achitz, consists of twelve experts from different disciplines. The Pension Commission's task is to assess whether the prerequisites for granting a pension are met

and submit 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. Following that, the AOB issues a written recommendation with grounds to the competent decision-maker about whether the respective applicant should be granted a pension for victims of children's homes.

510 applications for pensions for victims of children's homes in 2022

In the year under review, a total of 510 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 240 enquiries from individuals seeking information from the AOB about pensions for victims of children's homes and how to apply.

In order to clarify claims, 188 clearing reports were prepared. The Pension Commission met ten times during 2022; it issued 180 proposals to the AOB. In 174 cases it recommended that a pension for victims of children's homes be granted, and in ten cases it recommended that a pension should not be granted.

1.3 Preventive human rights monitoring

Measures to prevent human rights violations

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 through 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 inhumane treatment. One Federal Commission and six regional commissions work on the AOB's behalf to carry out comprehensive, regularly scheduled monitoring visits to 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, monitoring visits are also made to facilities for persons with disabilities. The AOB also monitors the conduct of authorities that issue direct orders and carry out coercive measures, for example during forced returns, demonstrations or police operations. The basic objective is early recognition and prevention of risk factors for human rights violations.

UN human rights instruments

The AOB's constitutional mandate to protect human rights via the National Preventive Mechanism (NPM) is based on two legislative acts of the United Nations: the UN Optional Protocol to 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.

In addition to the existing six regional commissions, effective 1 July 2021 a separate Federal Commission for the Penitentiary System and Forensic Institutions was set up. Each commission consists of a chairperson and members who are appointed by the AOB; appointments are in accordance with international standards, and duly take into account gender balance and appropriate representation of persons with disabilities, ethnically diverse backgrounds and multidisciplinary expertise. The commissions have unlimited access to all institutions and facilities, and receive all information and documentation required to fulfil their mandate. The commissions report their findings to the AOB.

Seven expert commissions

In the year under review, the commissions carried out 481 preventive monitoring visits in Austria: 460 were at institutions and facilities, and 21 during police operations. In order to obtain as accurate a picture as possible, visits were usually unannounced. Only 7% 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*.

481 monitoring visits

Preventive monitoring 2022		
Land	monitoring visits to facilities	observations of police operations
Lower Austria	107	0
Vienna	106	3
Tyrol	47	3
Styria	47	2
Upper Austria	48	1
Carinthia	33	0
Salzburg	28	9
Vorarlberg	22	2
Burgenland	22	1
TOTAL	460	21
<i>of which unannounced</i>	<i>439</i>	<i>7</i>

The commissions were critical of the human rights situation in 336 cases (i.e. 70% 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 on human
rights**

The Human Rights Advisory Council supports the AOB in an advisory capacity. It assists the AOB 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 Ombudspersons at five ordinary plenary meetings.

A comprehensive account of the AOB's preventive human rights monitoring can be found in Volume 2.

1.4 Budget and personnel

As shown in the cash flow statement, in 2022, the AOB had an available budget of EUR 13,005,000. According to the operating statement, EUR 13,149,000 was available. For the purposes of this report, the cash flow statement only is used, as it represents actual cash flow (see Federal Budget Statement 2022, section 05, AOB).

As shown in the cash flow statement, personnel cost expenditures were EUR 7,845,000 and payments for operating material expenditures were EUR 4,153,000. The operating material expenditures included, for example, expenditures for the commissions and the Human Rights Advisory Council, statutory obligations for AOB member remuneration, expenditures for the Pension Commission and its clearing activities, internships, printing, energy and other expenses.

In addition, the AOB incurred expenses relating to transfers, mainly for the pensions of former Ombudspersons and widows of former Ombudspersons, in the amount of EUR 924,000. EUR 53,000 was available for investment activities and EUR 30,000 for salary advances.

In order to fulfil the AOB's responsibilities incumbent upon it since 1 July 2012 under the Act on the Implementation of the OPCAT (*OPCAT-Durchführungsgesetz*), in 2022, EUR 1,600,000 (2021: 1,450,000) was budgeted for payments for the commissions and the Human Rights Advisory Council. Of that amount, around EUR 1,434,000 was budgeted for reimbursements and travel costs for the members of the commissions and

around EUR 90,000 for the Human Rights Advisory Council. Roughly EUR 76,000 was available for workshops attended by the commissions and by AOB employees engaged in OPCAT-related work, and for expert opinions.

For expenditure for clearing activities carried out on the instructions of the Pension Commission (set up on 1 July 2017 pursuant to Section 15 of the Pensions for Victims of Children's Homes Act), a budget of EUR 160,000 was available in 2022 (2020: 200,000).

Federal budget statement: funds for the AOB in millions of Euros			Budget of EUR 13,005,000
Cash flow statement 2021/2022			
Expenditure	2021	2022	
staff expenditure	7,293	7,845	
operating expenditure	4,145	4,153	
transfers	0,924	0,924	
investment activities and salary advances	0,069	0,083	
TOTAL	12,431	13,005	

According to the federal personnel plan, as of 31 December 2022, the AOB employed a total of 92 persons in permanent positions (2021: 90 permanent positions). In terms of 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 60 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 are not included in the aforementioned staff headcounts.

**92 permanent
positions**

1.5 Public relations

The AOB puts a great deal of emphasis on meeting the needs of citizens and the media for information. It runs an ongoing public relations campaign to increase awareness of its tasks, approaches and day-to-day operations. Key objectives are to provide the best possible support to citizens if they encounter problems with Austrian authorities, and to help ensure that human rights are upheld. The AOB's public relations methods include a comprehensive online presence with a regular newsletter, and the ORF television programme *Bürgeranwalt* ("Advocate for the People"), which is broadcast weekly.

**Information and
support**

In addition, in 2022, the Ombudspersons were available for numerous interviews, media events and background talks. Press releases, press dossiers and press conferences kept journalists informed about the AOB's current agenda.

Due to the pandemic, large-scale events were in many instances not feasible in recent years, but in 2022, such events to some extent resumed. An overview is provided in Chapter 1.6. Particularly in the second half of the year, groups of visitors, especially from schools, were once again able to visit the AOB.

AOB website

**Around 190,000
visits to the website**

Comprehensive information about the AOB is available to everyone on our website www.volksanwaltschaft.gv.at. Website visitors can find out everything about the AOB as an institution and its activities; there are also regular updates about investigative proceedings, along with extensive basic information, publications, activity reports, statements on draft legislation, reports on events and international activities. Citizens make frequent use of the website. In 2022, there were around 190,000 visits to the website, which is essentially on par with the previous year. The online complaint form was particularly popular: in 2022, it was used 2,727 times for submitting complaints.

ORF TV programme *Bürgeranwalt*

The weekly ORF television programme *Bürgeranwalt* ("Advocate for the People") continues to be one of the AOB's most important communication platforms. Since January 2002, the AOB has been informing the public about ongoing investigative proceedings on a regular basis. Following a short ORF film explaining the case in question, Ombudspersons (appearing on an alternating basis) come into the studio to discuss citizens' cases directly with the individuals involved and with representatives from the relevant authorities. One or two current cases are covered, and the "Follow-up" section of the programme revisits older, unresolved cases. This approach often successfully solves the problem in question.

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 broadcaster's online platform *ORF TVthek* for one week (via <http://tvthek.orf.at/profile/Buergeranwalt/1339> or via the AOB website).

The studio discussions are always popular with viewers. In 2022, the average audience figure was 400,000 households, which corresponds to a market share of around 26%.

**Audience figures:
400,000 households**

AOB's reporting methods

As a support body of Parliament and the Diets, the AOB reports to the legislature at regular intervals about the outcomes of its activities. In 2022, the Annual Report 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 *Land* reports on Monitoring Public Administration in Lower Austria, Styria and Carinthia. In autumn, three additional reports were published: a special report on enshrining social fundamental rights in the Federal Constitution, an observation report on detention of juvenile offenders, and a further special report on the 2 November 2020 terrorist attack. All three reports are available on the AOB website.

Three additional reports

1.6 Overview of key events

EU legislation on supply chains: AOB round table

The EU draft legislation on supply chains, for which the EU Commission adopted a proposal in February 2022, was an initial milestone in the protection of human rights, workers' rights, climate and the environment along the, global value chain. In April 2022, the AOB organised a round table to promote exchange between departments, parliamentary groups, interest groups and NGOs in cooperation with the Minister of Justice, Alma Zadić. Discussions focused on key issues concerning the EU Commission's draft Directive. Topics included liability by civil law, human rights and environmental due diligence, and aspects of implementation.

The Minister explained that the new draft legislation is an initial milestone in the battle for sustainable, responsible corporate behaviour to protect human rights, the climate and the environment along the global value chain, and that greater legal certainty and legal protection is required for all parties involved. She emphasised that the draft legislation is an important step in that direction, as companies must uphold human rights and comply with climate and environmental standards. She pointed out that since the topic is of such a socio-political importance, broad and comprehensive involvement of stakeholders will be essential.

Zadić: draft legislation is a milestone

Ombudsman Bernhard Achitz pointed out that the AOB, as the human rights house of the Republic of Austria, is looking forward to further promoting the discussions. He noted that human rights do not end at national borders and

Achitz: strengthening human rights internationally

must be conceived in international terms, being protected in the areas where working people are exposed to the most danger.

During the round table, representatives from civil society gave presentations on three specific topics. Bettina Rosenberger, director of the *Netzwerk Soziale Verantwortung*, spoke about the impact of the COVID-19 pandemic on working conditions in global supply chains; Claudia Saller, head of the European Coalition for Corporate Justice (ECCJ) spoke about the structure of the proposals for the EU supply chain legislation; and Claudia Müller-Hoff of the European Centre for Constitutional Rights gave a report on how Germany's Supply Chain Act (*Lieferkettengesetz*) was conceived and drafted.

Discussion with parliamentary parties regarding the enshrinement of social fundamental rights in the Federal Constitution

The AOB's NGO Forum this year focused on the enshrinement of social fundamental rights in the Federal Constitution. This has been a widely discussed subject among experts for many years. Members of the AOB's Human Rights Advisory Council and representatives from the Austrian Anti-Poverty Network, numerous NGOs and civil society groups were invited. The NGO Forum was held on 12 and 13 May in Vienna, and was opened by Ombudsman Bernhard Achitz.

As a follow-up to the government programme, which proposes that negotiations should be resumed regarding a comprehensive catalogue of fundamental rights, the long-term goal is to ensure that social human rights are provided for by the Federal Constitution. They might not be individually actionable in some cases, but politically it should no longer be easy to ignore them.

Keynote speech by Professor Pfeil

The keynote speech was given by Professor Walter Pfeil of the University of Salzburg. He was critical of the fact that Austria is the only EU country without social fundamental rights set forth in its constitution. He pointed out that there have been numerous proposals, and that one approach would be in certain circumstances to adopt individual provisions from existing EU and national legislation and ascribe them constitutional status.

Proposal regarding constitutional guarantees

Drawing on the topics of poverty prevention, health, social safeguards, accommodation, services and education, the representatives from civil society prepared a proposal as to which constitutional guarantees should ensure which concrete measures. This would include, for example, a complete rethink of the fundamental right to public services. The right to education should mean that choice of school would be based on it actually being free of charge. The fundamental right to health should mean that a treatment guarantee would be introduced, including access to psychotherapy. Moreover, a legal claim to care ought also to be enforceable, it was stated.

The fundamental right to affordable housing should lead to a sharp increase in the construction of social housing. To prevent poverty, all welfare benefits should be inflation-linked on an ongoing basis. Furthermore, false self-employed persons should be brought within the protection of employment and social law.

In his brief presentation of the outcomes of the NGO Forum, Ombudsman Achitz made the proposal that the functioning of the welfare state should fall within the scope of control of the Constitutional Court. The AOB summarised the proposals and published them in autumn 2022 as a special report about the NGO forum on fundamental social rights called "*NGO-Forum Soziale Grundrechte*" (only available in German).

AOB special report

After the working groups had prepared their proposals, Peter Resetarits (ORF) chaired a podium discussion with Ombudsman Achitz, Rudolf Silvan (SPÖ), Peter Schmiedlechner (FPÖ), Agnes Sirkka Prammer (Die Grünen) and Johannes Margreiter (NEOS).

AOB celebrates 10th anniversary of OPCAT mandate – the human rights house of the Republic of Austria

In 2011, Austria became a party to OPCAT (the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). Implementation resulted in amendment to the Federal Constitution, which broadened the AOB's mandate. Effective from 1 July 2012, the AOB took on a National Preventive Mechanism (NPM) mandate to provide protection against human rights violations.

Since then, the OPCAT mandate has formed the basis for the AOB's work in preventive human rights protection. Under the mandate, six AOB commissions with regional responsibility and one Federal Commission conduct visits to places of detention throughout Austria – the mandate covers not only correctional institutions but also nursing homes and a range of other facilities – to monitor whether human rights are being upheld there. The commissions also monitor the conduct of authorities authorised to issue direct orders and carry out coercive measures. The Human Rights Advisory Council provides support to the AOB in its role as an advisory body. It is comprised of representatives from the Federal Ministries, the *Laender* and civil society. The outcomes of investigative proceedings are presented to Parliament each year in the AOB's NPM Report.

To mark the ten-year anniversary of the OPCAT mandate, a ceremonial event was held on 7 June 2022 in what was at that time the plenary chamber of Parliament, the *Grosser Redoutensaal* in the Hofburg. Federal President Alexander Van der Bellen, who was unable to join in person, gave a speech digitally. The President of the IOI, Chris Field, also gave an address. Verena

Ceremonial event in Parliament building

Murschetz, professor at the University of Innsbruck and chairperson of OPCAT Commission 1, and Renate Kicker, professor at the University of Graz and chairperson of the Human Rights Advisory Council, then presented reports on their activities for the AOB. The Ombudspersons held discussions with young representatives of the future – trainees in the police force, the prison service and the care sector – about the role human rights would play in their activities.

**Keynote lecture by
Professor Fremuth**

At the conclusion of the event, a keynote lecture was given by Michael Lysander Fremuth, professor at the University of Vienna and academic director of the Ludwig Boltzmann Institute of Fundamental and Human Rights, in which he discussed current legal scholarship regarding the development and implementation of human rights, particularly under conditions of war and conflict. He also spoke about the AOB's human rights monitoring and control activities, which provide an opportunity to help human rights establish a firm footing. He noted that the AOB is fulfilling that task in an exemplary manner and has received international recognition for its activities. He also pointed out that there is still further potential for developing its OPCAT activities and broadening its mandate.

Musical accompaniment for the event was provided by the recently founded informal ensemble *Rottalsche Kammermusik*, a chamber music ensemble named after the building in which the AOB is located, the Palais Rottal. Vienna State Opera orchestra member Dominik Hellsberg played violin, accompanied by Ombudsman Walter Rosenkranz on guitar. The event was hosted by Danielle Spera.

Ceremonial event in the Hofburg to mark AOB's 45th anniversary

The AOB was established 45 years ago. Since then, under the Federal Constitution anyone who suspects a case of maladministration has been able to contact the AOB. The AOB's early days were somewhat modest – in 1977–78 the AOB employed just 18 people in permanent positions – but over time the number of complaints increased and the AOB's workload increased. Today it employs 92 people in permanent positions. In 2022, almost 24,000 people submitted complaints to the AOB, resulting in over 11,000 new investigative proceedings. The outcomes of these investigative proceedings are presented to Parliament in the Monitoring Public Administration Annual Report.

**Ceremonial event in
Parliament building**

To celebrate the 45th anniversary, a ceremonial event organised jointly by the AOB and Parliament was also held, in what was at that time the plenary chamber of Parliament, the *Grosser Redoutensaal* in the Hofburg. The event was opened with speeches by National Council President Wolfgang Sobotka and Christine Schwarz-Fuchs, at that time President of the Federal Council.

Ombudsmen Walter Rosenkranz, Bernhard Achitz and Werner Amon, who at that time was still in office, gave an overview of the broad range of work carried out by the AOB, including monitoring and control of public administration, its role as a national human rights institution, its international activities and the work of the Pension Commission for Victims of Children's Homes.

These presentations were followed by an address by the President of the International Ombudsman Institute (IOI), Chris Field, as since 2009 the General Secretariat of the IOI has been located in Vienna at the AOB. The IOI is an international organisation that connects and supports global independent monitoring and control bodies at the national, regional and local level.

The event concluded with a keynote speech by Judith Kohlenberger, researcher in social policy at the Vienna University of Economics and Business, who spoke about the connection between democracy and human rights and the role and significance of the AOB. The full text version of her speech can be found in the Appendix of this Annual Report.

Speech by Judith Kohlenberger

Musical accompaniment for the ceremonial event was provided by the *Rottalsche Kammermusik* ensemble, consisting of members of the Vienna State Opera orchestra and the Vienna Philharmonic, as well as Ombudsman Walter Rosenkranz. The event was hosted by Margit Laufer.

Specialist conference on data protection and whistleblower protection at Ombudsman institutions and offices

Following the implementation of the 2018 General Data Protection Regulation and the 2019 EU Whistleblower Directive, the work of Ombudsman institutions as enshrined in the law and the regulations for Ombudsman offices have undergone change. To provide more detailed information about this, a specialist conference, attended by around 60 participants, was held at the AOB on 20 June. The conference was organised jointly by the Office of the Austrian Student Ombudsman, the AOB, the regional Ombudsperson offices of Tyrol and Vorarlberg, the Austrian Agency for Research Integrity and the Network of Austrian Higher Education Ombudspersons. The conference was hosted by retired section head Manfred Matzka.

The focus of the conference was on legal consequences; presentations were given by experts and discussions were held among the conference participants. There was also joint analysis and discussion of the impact on the day-to-day work of Ombudsperson institutions and offices. The goal of the conference was to raise awareness of the handling of personal data, and to discuss measures to ensure that individuals who seek assistance are provided with the necessary protection, and ways in which such measures can impact the institutions involved.

Legal consequences

Following the opening of the conference by Ombudsman Walter Rosenkranz, at that time the Chairperson of the AOB, and an introductory address by Doris Winkler-Hofer (Regional Ombudswoman Tyrol) and Klaus Feuerstein (Regional Ombudsman Vorarlberg), Professor Nikolaus Forgó of the University of Vienna gave a keynote speech about the handling of personal data in electronic public administration.

Specialist presentations

A speech was then given by the data protection officer of the Parliamentary Administration, whose sphere of responsibilities also includes the AOB, about data protection in the AOB's work. A representative from the Federal Ministry of Labour then gave a report about the current status of implementation of the EU Whistleblower Directive in Austria, and a representative from the Regional Ombudsman Office Vorarlberg gave a presentation about plans to implement the Directive from his office's point of view. There were then further presentations on the following topics: whistleblower protection in the work of the Austrian Academy of Sciences; a review of the past five years of the GDPR, from the point of view of the Federal Ministry of Education, Science and Research; the balancing act between data protection and the best possible transparency at the Office of the Austrian Student Ombudsman; and data protection in a study conducted at the AOB.

During the second part of the conference, participants joined together in work groups to address a range of key issues. One work group addressed the question of whether the anonymity of a complaint can constitute an exclusion criterion; another work group addressed the issue of the portrayal of Ombudsman institutions and offices in the media.

"One in Five" lecture series 2022 - violence against women in the workplace

Kick-off event held at the AOB

The 2022 "One in five" lecture series focused on various forms of violence in the health and care sectors. The kick-off event was organised by the Centre for Forensic Medicine at the Medical University of Vienna, the Association of Austrian Autonomous Women's Shelters (*Autonome Österreichische Frauenhäuser*) and the AOB. Since participation figures for the lecture series have been high in recent years, the kick-off event on 23 November 2022 was once again streamed live to allow as many people as possible to participate.

Panel discussion: "Violence against women in the workplace"

The event was opened by Ombudswoman Gaby Schwarz, head of instruction at the Centre for Forensic Medicine at the Medical University of Vienna Professor Andrea Berzlanovich, and director of the Wiener Neustadt women's shelter and the *Wendepunkt* advice centre Elisabeth Cinatl. This was followed by a panel discussion on "Violence against women in the workplace" with Ombudsman Bernhard Achitz, General Secretary of the trade union *vida* Anna Daimler, works council member at *Barmherzige Schwestern Ried Hospital* (Upper Austria) Martina Reischenböck, City of Vienna equal treatment

officer Elisabeth Kromus, and Ombud for Equal Treatment director Sandra Konstatzky. The event was hosted by Miriam Labus. Participants discussed the various forms of violence to which women are exposed in the workplace, and how to counteract those risks. Numerous examples from participants' institutions were discussed, and successful strategies and approaches to combat violence were presented.

Violence against women has been a pressing concern in Austria for many years. According to a 2014 study by the EU Agency for Fundamental Rights (FRA), one in five women living in Austria have experienced physical and/or sexual violence by a partner, ex-partner or stranger since the age of 15 – as reflected in the title of the lecture series. Since the study was conducted, sadly that figure has had to be revised. According to a November 2022 prevalence study regarding violence against women conducted by Austria's Federal Statistical Office, in fact one third of all women in Austria between the ages of 18 and 74 have experienced physical and/or sexual violence since the age of 15.

Revised figure: one in three

To counteract the taboo and silence around the subject, every year 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 the "One in five" interdisciplinary lecture series for students. With a new focus every year, it is held in November and December as part of the "16 days against violence against women and girls" ("*16 Tage gegen Gewalt an Frauen und Mädchen*") campaign.

The lecture series of the year under review "One in five – violence in the health sector" was held at the Medical University of Vienna from 28 November to 14 December 2022. The focus was on the different types of violence that arise in health and care. In particular, there were presentations on the forms of violence inflicted by patients and their relatives on health care professionals, which is a growing phenomenon. Examples were also provided of attacks carried out by physicians and care professionals directed at patients and even colleagues.

Lecture series

One group of topics focused on medical care for victims of domestic violence, in particular carrying out physical examinations, correct documentation of injuries found and forensics. Speakers from various institutions also discussed effective measures for protecting against violence, as well as prevention methods. The presentations can be downloaded from the Medical University of Vienna website.

1.7 International activities

1.7.1 International Ombudsman Institute (IOI)

The International Ombudsman Institute (IOI) is an association of independent institutions for the monitoring and control of public administration at the national, regional and local level. Since 2009, its headquarters have been at the AOB in Vienna. It currently has over 200 member organisations in over 100 countries.

- IOI granted "other international institution" status** Effective from 1 January 2022, by order of the Foreign Minister, the IOI was granted "other international institution" status (*"Sonstige Internationale Einrichtung"*) as defined in Austria's Headquarters Law (*Amtssitzgesetz*). The IOI General Secretariat welcomes this, as it is an important step towards strengthening the IOI as an independent international institution; it will help increase the visibility of Ombudsman institutions at the international level and promote closer collaboration with the UN.
- IOI Board meets in New York** At its annual meeting, the IOI Board of Directors passed resolutions regarding the annual plans for the organisation and applications from new members, as well as other matters. Another key focus point was the activities of the UN working group and the IOI's planned application for permanent observer status at the UN General Assembly.
- Cooperation agreement with UNITAR** In addition, a cooperation agreement between the IOI and the United Nations Institute for Training and Research (UNITAR) was signed, sending a strong message about international cooperation and the further development of Ombudsman institutions. UNITAR is an organisation within the UN that helps increase the institutional and organisational capacity of countries and other UN entities through the provision of training. Now that the cooperation agreement has been signed, a framework has been established for continuing education aimed at strengthening Ombudsman institutions, building informational campaigns for improved mutual understanding, and generating synergies between the UN and the IOI.
- Solidarity and support for Ukraine** When the military action in Ukraine broke out, the IOI signed a statement expressing its profound concern about the plight of the civilian population and the devastation caused by the war. In this statement, the IOI emphasised its unequivocal support for the Office of the Human Rights Commissioner of the Ukrainian Parliament, which continues to perform its institutional activities in this very difficult situation.
- IOI expels Russian member institution** In August, an IOI member organisation was expelled from the IOI for the first time. The membership of the Office of the Human Rights Commissioner of the Russian Federation was terminated by a resolution of the IOI Board of Directors. The grounds were as follows: in light of statements made by current office holders, when conducting its work, that institution no

longer meets the membership criteria in the IOI's By-Laws, including the generally acknowledged professional ethics of Ombudsman institutions and institutional independence.

Due to the continuing COVID-19 pandemic, in 2022, the IOI once again had to use virtual methods for continuing education activities. The IOI offered members an online training course about virtual presentations, which proved popular.

Online training initiatives again in 2022

During the reporting period, the traditionally close ties with the African Ombudsman association AOMA were maintained by employing a webinar approach. In a webinar on how to cope with challenging behaviour among persons who submit complaints, IOI members contributed to the exchange of ideas and presented best practices.

Recently the IOI began bestowing lifetime honorary membership upon individuals who have made outstanding contributions to the organisation. In the course of his participation at the 45th anniversary event, former IOI President and Ombudsman of Ireland, Peter Tyndall, received that honour. By a resolution of the IOI Board of Directors, former Ombudsman and IOI Secretary General, Peter Kostelka, also received that honour. In his speech, IOI Secretary General (at that time) Werner Amon praised Peter Kostelka for his hard work and commitment, and emphasised that it was thanks to him that the IOI has been based in Austria since 2009.

IOI bestows honours

As the new IOI Secretary General, Ombudswoman Gaby Schwarz held discussions with the IOI President and Western Australian Ombudsman Chris Field during his visit to Vienna. The discussions focused on the IOI's ongoing and upcoming projects and activities.

Ombudswoman Schwarz new IOI Secretary General

1.7.2 International cooperation

United Nations

As a National Human Rights Institution (NHRI), the AOB is a member of GANHRI (the Global Alliance of NHRIs), the Geneva-based international umbrella organisation for National Human Rights Institutions.

Since April 2022, the AOB has been one of the 89 NHRIs (among a total of 120) accredited with A-status as GANHRI members, in recognition of the fact that they fully and comprehensively uphold the Paris Principles, the international standards established by the UN for NHRIs.

AOB achieves A-status as NHRI

The AOB considers this A-status a major success, as it has been endeavouring to achieve it for over ten years. Institutions with A-status are entitled to speak on the United Nations Human Rights Council, and can speak immediately after their respective country during the Universal

Periodic Review and before various UN treaty bodies. This also means an institution with A-status has participation rights in various UN committees.

Recommendations for further development

A-status institutions have to regularly undergo reviews by the re-accreditation committee. The committee accordingly recommended to the AOB that the appointment procedures for AOB Ombudspersons should undergo further development, that there should be greater transparency regarding the involvement of civil society and increased collaboration with NGOs, and that AOB Ombudspersons and AOB employees should reflect diversity in society to a greater extent.

European Network of NHRIs (ENNHRI)

The AOB is also engaged in the ongoing exchange of views and experiences as a member of the European Network of National Human Rights Institutions (ENNHRI, a regional sub-group of GANHRI). The AOB is regularly represented at meetings of the working group on the UN Convention on the Rights of Persons with Disabilities and the working group on asylum and migration.

European Union

EU twinning project in Albania

As part of the Instrument for Pre-accession Assistance, the EU finances a twinning project for promoting human rights in Albania. The goal of this project is to promote the process of democratisation of society, the principles of the rule of law and good governance.

The one-year project is being implemented by the AOB in cooperation with the Ludwig Boltzmann Institute of Fundamental and Human Rights. Support is being provided for Albania's Ombudsman institution in order to establish new legal foundations commensurate with EU standards, raise awareness of the institution's work in society, improve cooperation with parliament, civil society and public administration, and improve the complaints management system, among other things. To accomplish this, delegations of experts from the two partner organisations pay regular visits, and an expert sent by the AOB works directly on site.

European Care Strategy

At the beginning of September, the European Commission presented a European Care Strategy, aimed at improving the position of caregivers, the quality of care for persons receiving care, early childhood education and childcare. This new strategy was the topic of several events held in Brussels, at which Ombudsman Achitz was a participant.

During a European Parliament session and a panel discussion at Austria's Permanent Representation to the EU, Ombudsman Achitz noted approvingly that the EU is addressing the issue of care. He drew attention to the human rights aspects of care and to a trend perceptible at all care facilities: wherever there are staff shortages, there is an increasing risk of infringement of human rights.

He also called for a broadening of the scope of the European Care Strategy: currently it focuses on elderly care and kindergartens, but does not address areas such as facilities for persons with disabilities. The AOB's view is that an EU-wide care strategy should endeavour to determine care needs in every member state and evaluate where expansion in care is needed. Furthermore, in formal care settings, clear requirements need to be defined for "real-world" staff ratios that take into account long-term sick leave and parental leave.

AOB's view: EU-wide care strategy should be broadened

In April, the annual conference of the European Network of Ombudsmen (ENO) and Petition Committees was held. An expert from the AOB attended the annual conference, which in 2022 focused on the following areas: exchange of best practices for supporting refugees, in particular from Ukraine; digitalisation of public administration; and the role of Ombudsman institutions in monitoring digital developments in public administration.

European Network of Ombudsman (ENO)

Council of Europe

As part of the fifth cycle for monitoring the implementation of the Framework Convention for the Protection of National Minorities (FCNM), the Council of Europe's implementation and advisory committee responsible for that task requested a meeting with representatives of the AOB. Following a brief overview of the AOB's monitoring and preventive tasks, special monitoring cases relating to autochthonous minorities were discussed. The AOB explained its efforts relating to the concerns of various groups, and by way of example gave an account of problems regarding bilingual place name signs in Carinthia and the investigative proceedings carried out by the AOB in the interests of the Slovenian minority. Another example given was the invitations that were specifically directed at members of Roma ethnic groups. The AOB is endeavouring to address this issue via such initiatives and ongoing exchange with NGOs from the area of Roma representation, and is seeking to improve protection against discrimination by implementing concrete investigative proceedings.

Advisory committee for the protection of national minorities visits Vienna

OSCE

The annual conference on the human dimension is an opportunity for discussion of the state of human rights and the overall picture of OSCE responsibilities relating to the human dimension. An expert from the AOB participated in the conference once again in 2022. The areas of focus included democratic elections, freedom of religion and worship, rights of individuals who belong to national minorities, equal treatment of and violence against women, and protection of human rights in the battle against terrorism.

Conference on the human dimension in Warsaw

Other events and bilateral contacts

Conference of the German Petition Committees

The Petition Committees and Ombudsman institutions of the Federal Republic of Germany meet every two years to exchange experiences. Ombudspersons from neighbouring countries regularly participate in these conferences, and that was the case again in 2022: the AOB was represented at the conference by Ombudsman Achitz and another AOB expert. The conference topics were as follows: online petitions as a form of participation in digital civil society; private petition platforms; and the handling of asylum proceedings petitions and scope for action. In his conference speech, Ombudsman Achitz explained the AOB's tasks and work methods, gave insight into the relationship with Parliament, and gave an account of its collaboration with ORF in connection with the television programme *Bürgeranwalt* ("Advocate for the People").

At a meeting with Croatian Ombudswoman Tena Šimonović Einwalter, Ombudsman Amon discussed the special challenges for Ombudsman institutions that have additional mandates alongside their traditional task of monitoring and control of public administration. The pandemic and its impact on the work of Ombudsman institutions was also discussed at the meeting.

Ukrainian human rights commissioner Lyudmyla Denisova visited the AOB in March. The main topic discussed was the dramatic situation in Ukraine. Ms Denisova gave reports of numerous crimes against humanity and gave assurance that despite the situation, her institution is endeavouring to provide a broad, proactive range of support options for individuals affected.

During his visit to the AOB, Hungarian Ombudsman Ákos Kozma reported on the additional tasks being handled by his institution since the outbreak of the war in Ukraine. Hungary is facing a large number of refugees, and the Ombudsman institution is providing direct humanitarian assistance, especially in the border region with Ukraine, as well as giving legal advice.

At an online meeting with the Ombudsman institution of Thailand, a discussion was held about the possibility of increased bilateral cooperation. The Thai Ombudsman institution already collaborates closely with other Ombudsman institutions and would like to include the AOB in that successful bilateral cooperation model. The possibility of a study visit to Austria in autumn 2023 was mentioned so the details of the collaboration could be discussed in greater depth.

2 Pensions for victims of children's homes

In the year under review, the AOB once again received hundreds of cases involving traumatic childhood memories. Since July 2017, the task of the AOB Pension Commission has been to conduct assessments of these cases involving individuals who were housed in children's homes or foster families, and to determine whether they are entitled to the monthly victims of children's homes pension. Recipients of rehabilitation allowance and recipients of the needs-based minimum benefit who are incapacitated for work over the long term are entitled to the victims of children's home pension. In past years, the AOB expressed criticism of the situation whereby individuals who are incapacitated for work and are not entitled to the needs-based minimum benefit due to their family income were not entitled to a victims of children's homes pension. A motion was submitted to Parliament at the end of 2022, with a view to bringing an end to this unequal treatment; at the start of 2023 the motion was passed unanimously by all parties.

AOB has handled around 2,800 applications since 2017

Furthermore, persons are also entitled if, after turning 18 or completing their school education or vocational training, they are incapacitated for work and are covered by public health insurance as a dependent (child or grandchild) and are not drawing a pension. Persons who do not fall into any of these groups are not entitled to a victim of children's homes pension until they turn 60 or 65. In such cases they can submit a declaratory motion. The prerequisites for entitlement then undergo assessment, but the pension is not paid out until pensionable age has been reached.

Systematic violence occurred in municipal, *Land*, church and privately operated facilities and homes. Children also suffered maltreatment in foster families and hospitals (e.g. lung disease sanatoriums or psychiatric wards). The educational style was authoritarian and brutal. Children were often subjected to physical beatings, verbal abuse or humiliation. There were also frequent cases of sexual violence. In the year under review, an especially large number of deaf individuals contacted the AOB. Although deaf children should have received a particular level of support and encouragement, in deaf-mute institutions they were exposed to the sadistic urges of educators and teaching staff in the attached special schools.

Numerous applications from deaf individuals

For these individuals, the purpose of paying a monthly supplementary pension in addition to their normal pension is to provide modest financial compensation for the hardships they have experienced in their lives. Studies on institutionalised children have shown that former institutionalised children are, on average, more frequently dependent on welfare benefits, or only receive a minimum pension. It is clear that violence experienced as a child has a significant detrimental effect during working life.

EUR 367.50 per month The victims of children's homes pension is increased incrementally each year and is currently EUR 367.50 (2023 figure). It is paid monthly gross for net by the responsible pension insurance institution or the Ministry of Social Affairs Service (*Sozialministeriumservice*).

Violence during the period they were housed A prerequisite is that the institution operator has to have paid lump-sum compensation, or the case has to have undergone the clearing procedure at the AOB Pension Commission. An affected individual has to credibly demonstrate that as a child or adolescent, between 10 May 1945 and 31 December 1999, they were housed in a children's or youth home (full boarding school), hospital, psychiatric facility or sanatorium, a comparable institution, in a private institution of that type (in the case of a referral being received from a child and youth welfare facility) or a foster family, and that while they were housed there they were subject to a deliberate violent offence.

Acts of violence that occurred outside a housed setting, e.g. that occurred at school, at a sports club or at home, do not fall within the scope of the Pensions for Victims of Children's Homes Act (*Heimopferrentengesetz*). In such cases, victims of violence can apply for benefits under the Act on Crime Victims (*Verbrechensopfergesetz*).

2.1 Overview of key figures

510 applications in 2022 Following a slight decrease in applications during the COVID-19 pandemic, in 2022 the number of applications received by the Pension Commission was once again over 500. Among those applications there were 87 declaratory motions. Around 80 applications were submitted directly to the Pension Commission. Around 56% of the applicants were men, and 44% women. That figure is comparable to previous years. In 2022 only 2.5% of applications were submitted by an adult guardian (2021 figure: 8%).

Three applicants died before 2022 proceedings could be completed. In the case of eight individuals, no contact was established, and as a result those applications did not undergo processing. In 15 cases it would have been incorrect procedure for the Pension Commission to process the application, because lump-sum compensation had already been paid. Around ten persons withdrew their application. The AOB recommended that 174 applications be approved, and turned down ten applications. 76 individuals were awarded lump-sum compensation by the institution operator, and as a result also became entitled to a pension.

In addition, 50 persons contacted the AOB in writing with questions or complaints relating to the victims of children's homes pension, and 190 persons got in touch by phone. In most cases, the AOB provided information about the prerequisites for a claim, and in particular the possibility of a

declaratory motion. Questions also related to disbursement of the pension to those receiving welfare benefits, or suspension of payment during a custodial sentence.

In 2022, approximately 30 psychologists worked with applicants to prepare 188 reports. As of the end of 2022, around 40 cases were still open.

In 2022, according to statistics, the Pension Commission was aware of over 200 locations where violent acts occurred. These included children's homes and boarding schools, foster families, hospitals and sanatoriums where children were housed. Most of the accounts were of psychological violence (90%), such as being forced to eat vomited food, the threat of physical blows or being locked in a room or dark spaces for hours or days. In 80% of the cases, physical bodily abuse occurred, with blows administered by hand or with an object, flogging, kneeling on sharp objects, kicking or choking. One third of the individuals affected were subject to sexual violence or in some instances rape.

2.2 Pension Commission clearing proceedings

The Pension Commission and the Ministry of Social Affairs Service instruct the AOB to conduct assessments of the applications and issue recommendations. The Pension Commission then conducts a clearing procedure or forwards the applicant to victim support centres for clearing and payment of lump-sum compensation.

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. 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, corroborating reports submitted by other individuals affected, and utilise abundant academic material about out-of-home care and therapeutic education. The necessary documents are supplied to the Pension Commission by the relevant authorities, offices and their archivists, and also by operators of private institutions. 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.

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 Challenges facing victims of children's homes

Federal Government and City of Vienna should pay compensation

Some operators of homes and competent authorities for child and youth welfare and protection pay lump-sum compensation to victims of violence. If necessary, the costs of psychotherapy can also be covered. However, not all former children's home residents or foster family children receive compensation. The City of Vienna and the Federal government have stopped their compensation schemes altogether. Last year, the City of Vienna at least resumed offering free psychotherapy. It has been demonstrated and is a matter of record that children and adolescents were also abused and tormented at Federal facilities, including at Federal boarding schools, institutes for the deaf and the Kaiserebersdorf educational institution. The applicants affected therefore cannot understand why they have not received any lump-sum compensation. Similar unequal treatment is currently occurring in Upper Austria. The *Land* of Upper Austria only pays compensation to affected individuals who were housed in regional youth homes. It does not pay any financial compensation if the Upper Austrian competent authorities transferred the child to a privately operated children's home where abuse had also been documented.

Inadequate assessment of abuse in sanatorium

Up until the 1970s, children had to spend several months in so-called sanatoriums, for example after suffering from pulmonary illness. Moreover, stays in psychiatric wards, so-called therapeutic education units, often lasted several months. Although these facilities and wards were run by *Land* operators, most *Laender* are not paying any financial compensation to the individuals affected. The AOB is in constant contact with the relevant institutions in the hope that there will be a comprehensive assessment of historic cases and that financial payments will be resumed, as highlighted in the recent case of the *Land* of Carinthia, which operated the therapeutic education unit at Klagenfurt Regional Hospital under Dr Wurst from the University of Klagenfurt.

Information campaign for deaf victims of violence

In 2022, associations for the deaf in the *Laender* launched an information campaign for their members. The Pension Commission is proceeding on the assumption that almost every deaf child between the 1940s and 1990s had to leave their parental home for schooling and was housed in what was known as a deaf-mute institution with a school attached. Nearly all deaf children who lived near such a school had to be housed in that manner. At some institutions, the children were able to go home at the weekends, but at others they were only allowed to go home during the Christmas, Easter and summer holidays. Every *Land* except Burgenland had this kind of boarding school for deaf children with an attached school. All the boarding schools were operated by the *Laender*; in Vienna and Lower Austria they were operated by the Federal government. In some cases Catholic orders

also provided care. Individuals affected in Linz are receiving compensation from the Catholic Church, and those in Graz and Klagenfurt are receiving compensation from the *Land* of Styria and the *Land* of Carinthia. These compensation payments are deemed lump-sum compensation payments under the Victims of Children's Homes Act and therefore entitle the recipient to a victims of children's homes pension. The *Land* of Tyrol pays affected individuals who attended the regional deaf-mute institution in Mils in Tyrol a EUR 500 lump sum without the need for further assessment of violent acts. That does not constitute a lump-sum compensation payment as defined in the Victims of Children's Homes Act, because no assessment of the violent acts has been conducted. The *Land* of Salzburg has informed the AOB that it intends to include affected individuals who attended the Salzburg regional deaf-mute institution in its compensation scheme. As of the end of 2022, no decision had yet been made. As mentioned above, affected individuals from the Federal deaf-mute institutions in Speising in Vienna and in Kaltenleutgeben in Lower Austria have been left empty-handed, because the Federal government is no longer paying compensation.

Moreover, the AOB has had to inform victims of violence that the victims of children's homes pension is only payable to those who suffered violence during the period when they were housed. Violence suffered outside the children's home, boarding school, foster family or hospital does not constitute grounds for a pension. Other individuals affected by violence who have suffered serious detrimental effects during their life can have their claims to benefits investigated under the Act on Crime Victims (*Verbrechensopfergesetz*).

In 2020, the Vienna Health Association WIGEV (formerly KAV) – the City of Vienna organisation that manages City of Vienna hospitals – agreed to pay lump-sum compensation to victims of violence at Pavilion 15 of the former Otto-Wagner Hospital (Steinhof). The names of persons with concrete entitlement were, subject to their agreement, sent to WIGEV over a year ago. The AOB has voiced criticism of the fact that to date, no payments have been disbursed.

Questions constantly arise relating to welfare benefits. Individuals who save up their monthly victim's pension instead of spending it immediately, or who receive compensation from a children's home operator where the abuse took place and then have several thousand euros sitting in their bank account, are at present finding that their welfare benefits are reduced because the amount they have saved up is deemed to constitute an asset.

With an amendment to the Vienna law on needs-based minimum benefit, the City of Vienna has now clarified that financial assets resulting from compensation for personal suffering, compensation payments for victims or payments under social compensation law, for example compensation

No entitlement to pension for victims of violence at school and church

Victims of children's homes pension and welfare benefits

payments for victims who were former patients at Pavilion 15 of the former Otto-Wagner Hospital or Rosenhügel, do not constitute assets when needs-based minimum benefit is calculated in Vienna.

The AOB welcomes this clarification. The purpose of the compensation payments is to acknowledge the injustice suffered by the former children's home residents and to compensate them for the damage caused. The payments are financed from the *Land* budget. It therefore contradicts the purpose of the compensation if, as a consequence, ongoing payment of needs-based minimum benefit is stopped or reduced. The AOB hopes that other *Laender* will bring about similar clarification in needs-based minimum benefit legislation. It would be even better if the Federal government were to lead the way with a uniform legislative solution for all of Austria, so that victim compensation does not constitute grounds for reducing welfare benefits.

**AOB continues to
need personnel
resources**

Following a dramatic drop in the number of applications at the start of the COVID-19 pandemic, the recent increase shows that the Pension Commission's activities continue to be in demand. The AOB therefore continues to require the necessary personnel resources to process the applications.

3 Monitoring public administration

3.1 Federal Chancellery

3.1.1 More information about legal aid is needed

Many people are unaware of the fact that they can apply for legal aid when bringing an appeal in proceedings under administrative law. In view of this situation, the AOB asked the Federal Administrative Court and the Regional Administrative Courts to provide information about how often such legal aid requests are submitted.

According to the statements of opinion made by the Regional Administrative Courts, in the period 2019–2020, legal aid requests were submitted in only around 1.5% of all administrative proceedings. In the case of proceedings under the Driving Licence Act (*Führerscheingesezt*) that figure is approximately 1.3%. The figure provided by the Federal Administrative Court for that period was approximately 0.3%, though this figure doesn't just relate to administrative proceedings. In the AOB's opinion, these very low figures for legal aid requests reflect a lack of knowledge about legal aid, and this is confirmed by statements made by individuals affected.

Appeals are rare

The current legal position is as follows: only in certain narrowly defined situations is there a legal obligation for authorities to provide information about the possibility of legal aid or related assistance (see Section 44b of the Administrative Penal Act (*Verwaltungsstrafgesetz*), Section 50 (3) of the Federal Act on Proceedings of Administrative Courts (*Verwaltungsgerichtsverfahrensgesetz*); see also the special provisions in Section 52 (1) of the Federal Office for Immigration and Asylum Procedures Act (*Bundesamt für Fremdenwesen und Asyl-Verfahrensgesetz*). The AOB's assumption is that this current legal position is one of the main reasons for the low legal aid request figures.

In order to promote better access to legal protection, the AOB therefore proposed that an increased obligation should be imposed upon authorities to inform the parties to proceedings about the possibility of applying for legal aid. An obligation of that kind could be incorporated in particular into Section 61 (1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*). Information about which court has jurisdiction for the appeal proceedings and about the decision on legal aid should also be provided. Moreover, in the AOB's opinion, the limitations in Section 44b (2) of the Administrative Penal Act could be deleted without replacement, or at least the amount thresholds could be significantly lowered.

Need for more information

In response to this proposal, the Federal Chancellery's view was that no legal amendment is necessary. It also stated that from a legal policy standpoint, there is no need for any reform: it argues that the costs of proceedings

Federal Chancellery rejected legislative initiative

before the administrative courts are low, and that even individuals who lack knowledge of the law do not usually require legal representation in these proceedings. However, that is contrary to what the AOB has found in practice. The Federal Chancellery rejected a legislative initiative, but the AOB continues to take the view that this is needed, in the interests of transparent, citizen-friendly administration.

3.2 Labour and economy

Introduction

In 2022, the AOB received 425 complaints relating to the Federal Ministry of Labour and Economy. Of that figure, the majority of investigative proceedings initiated by the AOB related to Public Employment Service Austria (*Arbeitsmarktservice*) (266). The number of complaints decreased relative to 2021 (384), but the total figure was within the normal range considering the long-term average. The AOB attributes the decrease to the significantly improved situation on the labour market and the fall in the number of jobseekers. Moreover, there were virtually no more complaints in connection with COVID-19 (in 2020 and 2021 there were complaints on topics such as “one-off payments” from Public Employment Service Austria and mandatory wearing of protective masks). Some individual cases related to reclaiming short-term work subsidies.

Decrease in number of complaints

A total of 136 investigations related to complaints in the area of economic activity. Around two thirds of the complaints concerned plant operating permit law, mainly involving individuals who contacted the AOB having been affected by emissions. One third of complaints were from persons living in the vicinity of hospitality venues. Twelve complaints were about surveying offices, and seven about the Austrian Economic Chamber. By *Land*, the largest number of complaints were about Vienna, followed by Upper Austria and Lower Austria. The *Laender* with the fewest cases were Tyrol and Vorarlberg.

136 complaints in the area of economic activity

3.2.1 Labour market administration – Public Employment Service Austria

Introduction

The complaints and the investigative proceedings covered the full range of services provided by Public Employment Service Austria. They related to its power prerogatives such as blocking of payments or reclaiming of payments in connection with statutory unemployment insurance, and also to the services it provides to the private sector, for example in acting as an intermediary and adviser to jobseekers and the provision of subsidies and financial aid. Just as in previous years, interactions with Public Employment Service Austria were excellent.

Anonymised job offers on eJob-Room

A jobseeker in Vienna contacted the AOB and stated that while conducting job research on Public Employment Service Austria’s eJob-Room platform – an electronic job openings platform operated by Public Employment Service

Unsatisfactory situation for jobseekers

Austria – he was increasingly seeing anonymised job offers from companies. He stated that these anonymised job offers did not give precise details about the company, and that in many cases there was not even any information about the industry in which the company operated. He pointed out that in most cases there was merely a (to some extent cursory) description of the job opening and a telephone number or email address, and that in some instances even those contact details were not provided. He also stated that in such instances, all that was displayed was a message stating that as a registered user of eJob-Room, one could send a message to the company via the job portal.

Lack of legal certainty if refraining from applying

With that in mind, the jobseeker expressed suspicion that these were not even real job offers. He stated that because the company was anonymised, there was also no option for obtaining more detailed information before submitting an application. He also expressed concern that refusing to apply for anonymous job offers might trigger a sanction under unemployment insurance law (a temporary block on unemployment benefits or emergency financial aid).

The AOB duly noted the jobseeker's findings, and after viewing various job offers on eJob-Room, confirmed that his description was accurate. The AOB then contacted Public Employment Service Austria and suggested it should consider making changes to eJob-Room.

Public Employment Service Austria was very cooperative with the AOB, but initially it stated that under the existing terms and conditions, displaying anonymised job offers on eJob-Room was permitted. At the same time, Public Employment Service Austria did point out the following: if a company is unwilling to give up its anonymity, it is unable to view applicants' contact data on the platform, and only after disabling anonymity can a company view applicants' contact data.

Public Employment Service Austria agrees that changes are needed

Public Employment Service Austria agreed that the existing practice to which the jobseeker objected, namely the displaying of anonymised job offers on eJob-Room, should be reformed. The Federal office of Public Employment Service Austria also confirmed that under Section 9 of the Austrian Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*) (own initiative as partial aspect of willingness to work), a jobseeker is not obligated to apply for anonymised job offers on eJob-Room.

Application obligation only if pre-selection process is carried out

Nevertheless, an application obligation does apply if a regional office of Public Employment Service Austria carries out concrete pre-selection for filling an open position on behalf of a specific company. A company can instruct Public Employment Service Austria to carry out pre-selection if the company is willing to disclose to Public Employment Service Austria all relevant company data and all information about the concrete job opening. The company can request that as part of the first step of the pre-selection process, the

company itself remains undisclosed by Public Employment Service Austria to applicants, and that instead only a general description of the job is displayed. The responsible regional office of Public Employment Service Austria then sends individual invitations for pre-selection to jobseeker candidates who appear suitable and are registered with Public Employment Service Austria, and handles the task of pre-sorting applications received for the company. The company then receives information about the most suitable candidates, and the jobseekers then receive all data about the company from Public Employment Service Austria as well.

Waiver of suspension of payments during foreign stays

The AOB handled cases regarding the suspension of statutory unemployment insurance payments (unemployment benefits, emergency financial aid) for unemployed individuals who had spent periods abroad. Basically, the legislation states that claims for unemployment benefits or emergency financial aid have to be suspended during foreign stays, i.e. not paid. The suspension does not shorten the eligible duration of payment; instead, there is a "postponement" of payment. Under Section 16 (3) of the Austrian Unemployment Insurance Act, the regional advisory committees at the regional offices of Public Employment Service Austria have the option to waive suspension, provided certain conditions are met. A waiver may be granted if there are important family or personal reasons (e.g. birth, marriage or death), or if the foreign stay is in the interests of ending the individual's unemployment. As an alternative waiving the suspension, there is also the option of allowing the individual to "take benefits claims with them" under EU law, provided the foreign stay is in an EU member state.

Payment benefits during foreign stays only possible in exceptional cases

In one specific case, in consultation with Public Employment Service Austria, a jobseeker from Tyrol declared his intention to be self-employed. He entered Public Employment Service Austria's business start-up programme and was able to continue to receive unemployment benefits and emergency financial aid. His intention was to work as a mountain/hiking guide and freelance journalist/blogger in the area of mountain sports and outdoor activities. To accomplish this, a foreign stay in Corsica was necessary, to conduct research about hiking tours and establish contacts with partners, with the goal of setting up specific hiking programmes. The jobseeker reported the foreign stay to his responsible Public Employment Service Austria caseworker in the proper manner, but his caseworker neglected to tell him that during the foreign stay, he could under certain circumstances continue to receive unemployment benefits and emergency financial aid.

Insufficient information provided about the legal position

The foreign stay constituted a job-related stay in preparation for self-employment and ending unemployment. Public Employment Service Austria admitted that the individual had not been adequately informed about the possibility of a waiver. After suitable documentation was supplied as

Public Employment Service granted retroactive payment of benefits

verification of the purpose of the foreign stay, Public Employment Service Austria reached a positive decision regarding his application to waive the suspension. In addition, it retroactively upheld the waiver for other foreign stays that similarly had been for the purpose of research and preparation of hiking tours.

Waiver of suspension during move and change of residence

In another case, a jobseeker from Styria explained to the AOB that she had moved from Germany to Austria, and due to various restrictions during the COVID-19 pandemic she initially had been unable to move all of her household goods. She therefore had to fetch them at a time when she had already registered her residence in Austria and was seeking employment in Austria while in receipt of unemployment benefits.

Initially Public Employment Service Austria had ordered a temporary stop to payments for the period when she was temporarily back in Germany. She therefore contacted the AOB. After the AOB intervened, Public Employment Service Austria granted a waiver of suspension under Section 16 (3) of the Austrian Unemployment Insurance Act and ordered that payment of unemployment benefits be resumed.

Reclaiming of COVID-19 short-term work subsidies on grounds of pensionable status

Companies complained about unclear guidelines for financial support

Two catering companies submitted complaints that Public Employment Service Austria was reclaiming COVID-19 short-term work subsidies for pensionable employees. The companies affected complained that they could not comprehend why the granting of COVID-19 short-term work subsidies for pensionable employees had not been permitted, and that Public Employment Service Austria had failed to clearly communicate the prerequisites for financial support. Reference was made to the first Federal Directive of Public Employment Service Austria on COVID-19 Short-Term Work Subsidies (AMF/2-2020), which contained a relatively generalised description of the category of persons eligible for financial support.

Employees who, in parallel with pension entitlement, perform work within an employment relationship, do not fall into the target category of persons eligible for financial support. If the employment relationship ends, due to their pensionable status they do not become unemployed in the legal sense and do not have any entitlement to unemployment benefits. However, the legislation explicitly refrains from excluding this category of persons from short-term work subsidies, and “delegates” to Public Employment Service Austria the task of drawing up precise provisions regarding short-term work subsidies: the Administrative Board of Public Employment Service Austria, in consultation with its Board of Directors, has to establish guidelines on the prerequisites for short-term work subsidies (Section 37b (4) of the Public Employment Service Act (*Arbeitsmarktservicegesetz*)).

The Federal Directive of Public Employment Service Austria on COVID-19 Short-Term Work Subsidies (AMF/2-2020), which entered into force in March 2020, defined very comprehensively and in very general form the category of persons eligible for financial support. According to the definitions, "all employees" were eligible for financial support. In fact, it was even stipulated that the members of a company's managerial decision-making body were eligible for financial support if their employment relationship was subject to mandatory insurance under the General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*). Apprentices were defined as being eligible for financial support if they were covered by the social partner agreement that had to be drawn up in connection with COVID-19 short-term work. According to these definitions, employees with ongoing pension entitlement were also eligible for financial support.

First version of Federal Directive with comprehensive definitions

In the subsequent Federal Directive of Public Employment Service Austria (AMF/4-2020), which entered into force on 20 April 2020, greater clarity was provided, including an explanation of limitations regarding the category of persons eligible for financial support. It was stated that only "employees subject to mandatory unemployment insurance" were eligible for financial support, and a footnote stated that persons with marginal employment and civil servants were not eligible for financial support. However, there was no explicit mention of pensionable employees.

Clarity increased gradually

It was not until 1 June 2020, when the Federal Directive of Public Employment Service Austria (AMF/8-2020) entered into force, that a generally comprehensible and unequivocal explanation was provided. In that piece of legislation, for the first time there was an explicit passage stating that although employees who had reached the statutory pensionable age were in principle eligible for financial support, this was subject to the prerequisite that they did not yet fulfil the statutory requirements for an old-age pension. Thus the definitive Federal Directive of Public Employment Service Austria did contain appropriate clarification, and there was further clarification in the subsequent Directive that entered into force on 1 October 2020. However, in the commitment declaration for companies, which had to be filled out as part of the request for short-term work subsidies, there was no explicit reference to those Directive provisions. It was not until Phase 3 of the COVID-19 short-term work subsidies that corresponding wording appeared in the commitment declaration, and thus it was only after that date that the wording actually appeared in the financial support agreement.

Greater precision in commitment declaration for companies

The conclusion from this was that only reclaims for the period starting 1 October 2020 should be deemed covered by law. For the period before that date, Public Employment Service Austria refrained from reclaiming COVID-19 short-term work subsidies that had been granted for pensionable employees.

Public Employment Service refrained from reclaims

3.2.2 Trade and commercial law

General

Just as in recent years, in the year under review the AOB saw improved performance on the part of public administration. In most instances trade and commerce authorities acted in a citizen-friendly and efficient manner, though in certain individual cases there were weak points and inadequacies (see section below regarding “Tardiness on the part of trade and commerce authorities”).

Public administration: negative image

Nevertheless, since the COVID-19 pandemic, the AOB has noticed that the public administration’s reputation among the general population has deteriorated. People’s level of satisfaction and trust in implementation has fallen, and there has been criticism of slow bureaucracy and lack of flexibility. The AOB endeavours to find citizen-friendly, acceptable, implementable solutions, to reconcile interests and help ensure objectivity.

Declaratory proceedings: farm shop not subject to Industrial Code

As reported in the 2021 Annual Report, the AOB had to address the question of whether farm shops should be subject to the Austrian Industrial Code (*Gewerbeordnung*) or whether they should be considered agriculture and forestry. In one complaint within the jurisdiction of the Imst District Authority, during 2022 a final decision was reached in declaratory proceedings under Section 348 of the Industrial Code 1994, following a petition by the farm shop operator. In the proceedings, the District Authority requested a statement of opinion from the Tyrol Chamber of Agriculture. The Chamber of Agriculture took the view that in light of the available operating data and documents and a site visit, it is indisputable that the products sold in the farm shop are produced and sold within the scope of agricultural primary production as defined in Section 2 (3) and (3a) of the Industrial Code 1994 and within the scope of agricultural processing and treatment as ancillary trade as defined in Section 2 (4) (1) of the Industrial Code 1994, and that the selling activities in the farm shop constitute agricultural operations. In June 2022, the District Authority therefore conclusively declared that the farm shop is not subject to the Industrial Code.

Intrusive ventilation and air conditioning systems

In the year under review, the AOB once again received a number of complaints from neighbours of facilities with ventilation and air conditioning systems. One woman complained about intrusive noise from the ventilation system of a hospitality venue in Vienna. The trade and commerce authorities determined that the sources of noise were the toilet ventilation system, the kitchen outgoing air duct and the dining area air outlet. In administrative notifications dated November 2021 and August 2022, the trade and commerce authorities requested that remodelling plans be submitted. In implementing the administrative notification of November 2021, the hospitality venue owner added a pipe muffler to the toilet ventilation system upstream from the air outlet in the interior courtyard, and as a result the

A-weighted sound level within 1 metre of the air outlet was reduced by at least 10 dB. In addition, the hospitality venue owner agreed to employ a non-flammable sound-absorptive lining to close off the air outlet of the cladding behind which the kitchen outgoing air duct runs, and to work with a ventilation company to resolve the problem as quickly as possible.

In 2022, the AOB handled a number of complaints about automotive workshops. One woman from Linz explained that every day from 7.30 a.m. until 7.00 p.m., in her garden and on her balcony, she was exposed to intrusive noise from engines, grinding, drilling and hammering, and intrusive odours from exhaust gas. She pointed out the lack of compliance with a 2009 legally binding regulatory requirement stating that noise-intensive work (e.g. impact screwdrivers, engine tests) was only allowed to take place inside the workshop area with fully closed gates and windows. She also stated that the Linz Municipal Authority had known for years about the situation but was unwilling to take action.

**Nuisance caused
by automotive
workshops**

The AOB was able to confirm the existence of trade inspectorate permits for an electrical workshop from the years 1920, 1942 and 1943 and for an automotive service station with garages from the years 1951 and 1957. Complaints from neighbours had been received since 1931, and since 2019 there had been an increasing number of complaints, which were now continuing. Between 2019 and 2021, several assessment visits were made to the facilities. In August 2019, the trade and commerce authorities issued a procedural order requesting regulatory compliance as follows: it was no longer permitted to operate the non-compliant items of equipment (automotive paint equipment, automotive paint mixing systems, tyre balancing machine, storage areas in the garages, lifting platforms, gas welding equipment, inert gas welding equipment), and to ensure this compliance, the power supply was to be shut off permanently. As the facility owner did not comply with this procedural order, the trade and commerce authorities issued a September 2019 administrative notification ordering that the non-compliant equipment be shut off. In July 2020, several of the disputed items of equipment (lifting platform, automotive paint equipment, automotive paint mixing system) were once again found to be present and were then sealed off. Other items of equipment (tyre balancing and installation machine, lifting platform, inert gas welding equipment) had already been removed from the facility at an earlier date. The last trade and commerce authority visits took place between July and mid-September 2021. The AOB expressed criticism of the fact that the trade and commerce authorities did not carry out any further checks thereafter, despite the persistent complaints from the neighbours.

Tardiness on the part of trade and commercial authorities

Leoben District Authority

In April 2021, a married couple contacted the AOB and described intrusive noise and water droplets from a neighbouring self-service filling station with self-service car wash bays. They stated that although complaints had been submitted to Leoben District Authority, so far there had been no improvement in the situation. When conducting investigative proceedings, the AOB was able to clarify that in April 2019 the District Authority had issued a trade and commerce authority permit for a self-service filling station with additional facilities and three self-service car wash bays.

Self-service filling station causing nuisance

The married couple first contacted the District Authority in September 2020, which in November 2020 made an assessment visit to the facility; an official noise appraiser and an official air monitoring appraiser were present during the visit. Sound measurements taken on site indicated that it was possible that there may have been detrimental effects on actual local conditions, particularly in the evenings, but the District Authority was not able to find concrete sources of noise. The facility owner agreed to carry out remodelling measures to reduce the intrusive noise and the passage of liquid droplets onto the couple's property to reasonable levels. However, the facility did not take the promised action in a timely manner.

Non-compliant operations

Following the intervention of the AOB, in June 2021 the District Authority, accompanied by an official structural appraiser and an official noise appraiser, made a further trade and commerce authority visit. In doing so, they determined that the facility was being operated in a non-compliant manner. The high pressure water jets were being operated at an excessively high operating pressure, and as a result the equivalent sound level was too high. In addition, the self-service vacuum cleaners were being operated at an excessively high sound pressure level. As an immediate ad hoc measure, during the assessment visit the operating pressure of the high-pressure water jets was reduced, and internal sound absorptive liners were placed inside the self-service vacuum cleaners. The District Authority instructed the facility owner to render the other self-service vacuum cleaners inoperative and to refrain from using them again until they had been retrofitted as necessary.

During the assessment proceedings, the facility owner presented a remodelling project and submitted a plan for emission-neutralising modifications to the facility. In July 2021, the District Authority duly acknowledged the plan for modifications to the facility, consisting of increasing the height of the noise barrier wall along the northern and eastern boundaries of the filling station property from 3 metres to 4 metres, adding a transparent plastic curtain strip to limit the headroom beneath the roof of the self-service car wash bay area to 3.25 metres, and using tarpaulins to close off the gaps in the splash guard walls between the car wash bays.

In February 2022, the couple contacted the AOB again and complained that the remodelling measures had not yet been fully implemented. They stated that the height of the noise barrier wall had not yet been increased, and that although tarpaulins had been placed between the washing bays, the upper section was still open, which meant there was no effective protection against spray. In addition, they complained about intrusive noise resulting from the filling of fuel tanks and the passage of waste onto the adjacent property.

Remodelling project implemented with delay

The AOB once again contacted the District Authority and was able to clarify that the completion date given by the operator for the remodelling project was not until March 2022. The District Authority stated that some of its employees, when making work-related journeys, had observed that the remodelling measures were being implemented and that thanks to the increased height of the noise barrier wall, the passage of water droplets onto the adjacent properties was now further reduced. In addition, the District Authority stated that it had obtained the safety data sheets for the chemical additives used in the high-pressure water jets, that the official medical appraiser had determined that the products were being used in accordance with the manufacturer's instructions, and that when used properly they would not cause any damage to health.

Regarding the filling of the fuel tanks during the daytime on working days, the District Authority made reference to the 2019 operating permit. That document specified a sound level of around 85 dB for a filling procedure lasting around 30 minutes. In response to the allegation about the passage of waste onto the adjacent property, the operator stated that to prevent this she had voluntarily erected a wire mesh fence. She stated that "in her general experience it did not happen" that napkins, paper cups, drinks cans, newspapers or pieces of cardboard could pass through a wire mesh fence, and that she assumed the waste was coming from the roads.

The AOB's overall finding was that the District Authority had been tardy in taking appropriate action; the AOB informed the married couple and concluded the investigative proceedings.

In November 2019, a neighbour contacted the AOB regarding intrusive noise from a slaughterhouse on the western bank of the River Mur in Graz's industrial zone. The AOB was able to verify that the slaughterhouse has existed since the 1970s and that since being privatised in the 1990s, it has been subject to the Industrial Code. The woman, who lives on the eastern bank of the Mur, is therefore a "resident who has subsequently moved in" as defined in the Industrial Code.

Graz Municipal Authority

Graz Municipal Authority was notified for the first time in October 2019 about intrusive noise and then contacted the slaughterhouse operator. The operator instructed the accredited testing lab TÜV Austria to prepare a report regarding "sound propagation level peaks in loading yard (Delivery Bay South)". In its report dated January 2020, TÜV Austria proposed that

Intrusive noise from slaughterhouse

a noise barrier wall should be erected in the vicinity of Delivery Bay South as a noise prevention measure. In February and June 2020 the official noise protection appraiser and the official medical appraiser issued affirmative statements of opinion. In the official medical appraiser's opinion, the noise barrier wall would have significant benefits for the neighbourhood east of the River Mur, and also that the noise level would decrease perceptibly for the neighbourhood. This would significantly reduce potential noise-related effects such as interrupted sleep at night or disruption of work requiring high levels of concentration. In an April 2021 administrative notification, the trade and commerce authorities duly acknowledged the modifications to the facility consisting of the erection of a noise barrier wall in the delivery bay area. The AOB informed the neighbour and concluded the investigative proceedings.

Intrusive odours In January 2022, the woman contacted the AOB again and complained about intrusive odour from the slaughterhouse. She stated that several times a week there was "an intrusive odour of rotten eggs", and that the trade and commerce authorities were taking no action.

The AOB once again requested a statement of opinion from Graz Municipal Authority. The trade and commerce authorities reported that when the official exhaust air appraiser from the City of Graz Environmental Office conducted assessments in June and July 2021 and in January and February 2022, no odour of waste material or decomposing material, nor any odour from the rendering of slaughterhouse tallow, were found in the area east of the Mur. The Environmental Office doubted that the assessment threshold of 10% of the annual odour hours for odours with high intrusiveness potential (under *Land* of Styria odour guidelines) would be exceeded. Moreover, the Inspection Office of the City of Graz Buildings and Facilities Authority did not detect any odours in the residential area east of the Mur during its assessment visits in December 2020 and March 2022.

Conflict between industrial and residential zone This case was covered on the ORF television programme *Bürgeranwalt*. During the programme the AOB pointed out that such disputes arise because the industrial zone on the west bank is in close proximity to the residential zone on the east bank, and that such problems are often the result of planning during zoning proceedings.

A woman contacted the AOB and described unreasonable and intrusive noise from a neighbouring apartment complex. She stated that in August 2022, she had informed Zell am See District Authority that the noise barrier wall which, in accordance with an August 2020 facility operating permit, was to be erected along the boundary of the property had not yet been erected and that a mesh wire fence had been erected instead.

Noise barrier wall not erected - District Authority failed to take action As a result of the AOB's intervention, in October 2022, the District Authority made an assessment visit and determined that it was true that the planned noise barrier wall had not been erected. The operator stated that it would erect a noise barrier wall by the end of April 2023 at the latest. The District

Authority was satisfied and raised the prospect that compulsory measures would be taken and administrative penalty proceedings would only be initiated if the noise barrier wall had not been erected by the promised date. As the District Authority did not immediately take the measures stipulated in the Industrial Code to bring about compliance, the AOB expressed criticism of Zell am See District Authority's failure to take appropriate trade and commerce authority action and declared that maladministration had occurred.

In July 2021, a neighbour contacted the AOB for the first time about nuisance caused by an adjacent casual dining venue. He complained about intrusive noise from the ventilation system and air conditioning unit, intrusive odours and noise passing through open doors, and goods deliveries after 6.00 p.m. He also stated that Bludenz District Authority, which has jurisdiction, was not responding to neighbours' complaints.

Bludenz District Authority

The AOB was able to determine that the casual dining venue was in possession of a facility operating permit issued in 2013. The operating hours are Monday to Sunday, 7.00 a.m. to 11.00 p.m. Delivery of goods is permitted between 7.00 a.m. and 6.00 p.m, approximately five or six times per week. According to the stipulated requirements, the enclosure of the ventilation systems and air conditioning unit, any vents for ventilating the technical systems room, and the outgoing ventilation ducts from the ventilation system must be installed in such a manner as to ensure that during the night, a sound pressure level of 35 dB is not exceeded at the property boundary with the neighbour. Entrance doors and windows must be kept closed during operating hours, and the entrance doors must be self-closing.

Intrusive noise and odours from casual dining venue

Following complaints from neighbours in November 2020 and January 2021 about intrusive noise, the installation of a new, even louder air conditioning unit, blocking of the entrance door closing mechanism and non-compliant goods deliveries, the District Authority instructed the official trade and commerce engineering appraiser to conduct an assessment visit. In February 2021, he determined that the facility was being operated in a non-compliant manner and that the air conditioning unit, which had been installed outdoors, was causing unreasonable nuisance. In March 2021, the trade and commerce authorities issued a procedural order stating that the air conditioning unit that had been installed outdoors had to be rendered inoperative. With regard to the door closing mechanism and the goods deliveries, the District Authority drew the operator's attention to the need to comply with the facility operating permit and initiated steps under administrative criminal law.

Non-compliant air conditioning unit

In September 2021, the District Authority issued a trade and commerce permit for the new air conditioning unit. To ensure that an A-weighted sound level of 35 dB would not be exceeded at the nearest property boundary, the trade and commerce authorities stipulated that a sound protection hood with a minimum sound absorption rating of 18 dB had to be installed.

The AOB informed the neighbour that during assessment visits carried out at varying times, the trade and commerce authorities had not found any blocking of the entrance door closing mechanism, nor any non-compliant goods deliveries; the AOB concluded its investigative proceedings in October 2021.

Defective ventilation system

One month later, the neighbour submitted a further complaint about intrusive noise passing through open doors and from the air conditioning and ventilation systems. The District Authority first informed the AOB that the District Authority's inspectorate, which had been instructed to make regular unannounced assessment visits at various times, had always found the doors closed. The District Authority stated that in January 2022, the operator had submitted a letter from a specialist ventilation company stating that during checking of the functioning of the ventilation system, various problems had been rectified, and also stating that motor mounts of the ventilation motor had been defective and had now been replaced, and that a sound protection hood had been installed on the outdoor unit of the air conditioning system. When air quality assessments were carried out at the casual dining venue in March and April 2022, no typical odour emissions were found in the vicinity; however, the official air quality appraiser agreed with the operator's ventilation technician that maintenance of the ventilation system filter elements should take place at more frequent intervals, namely quarterly.

In January 2022, the ventilation company sent proof of compliance with the required sound pressure level. It stated that at a distance of 5 metres, a sound level of 31 dB was not exceeded when the ventilation system and air conditioning unit were in operation, and that there would be compliance with the administrative notification requirements stipulating a maximum of 35 dB at the property boundary.

Administrative notification: immediate shut down of venue

However, when an official trade and commerce engineering appraiser conducted a sound assessment, the measured base level (LA, 95) when the ventilation system was in operation was around 42 dB and thus significantly above the prescribed level of 35 dB. Thus, there was an 11 dB difference relative to the figure provided by the ventilation company, and this corresponded to a doubling of the subjective perceived sound. Given the actual noise coming from the system, it was incomprehensible that the ventilation company had provided such data. Since there was continuing non-compliance with the 2013 facility operating permit requirements, in May 2022, the District Authority issued an administrative notification stating that the casual dining venue must be shut down immediately.

In July 2022, the neighbour informed the AOB that as before, the entrance doors were often still open until midnight and that the door closing mechanism was blocked. He stated that he was still exposed to intrusive noise, though in the meantime various work had been performed on the

ventilation unit (insulation in the equipment room, cap on the air inlet, sound muffler on the air outlet). He also stated that the operator had also installed a new air conditioning unit without a sound protection hood and that since July 2022 it had been operated in a non-compliant manner. Following further enquiries by the AOB, it emerged that the District Authority had revoked the order to shut down the casual dining venue.

In August 2022, an official trade and commerce engineering appraiser conducted a further assessment including sound measurements; he found that cuts had subsequently been made in the air conditioning unit sound protection hood near the sound-intensive ventilators, which meant the hood was no longer functioning. The permitted 35 dB at the property boundary was being exceeded by 10 dB. The District Authority then ordered the air conditioning unit to be rendered inoperative. During an inspection, Bludenz police station determined that the air conditioning unit was not being used. Due to continued complaints from neighbours concerning the air conditioning unit, in September 2022, the outdoor component of the air conditioning unit was disconnected from the power supply by an electrician and the disconnected power connection was sealed off by the authorities.

Air conditioning unit rendered inoperative

During a sound assessment of the ventilation system in September 2022, the official trade and commerce engineering appraiser determined that the ventilation system was now being operated in compliance with the facility operating permit. During unannounced visits in September and October 2022, Bludenz police station and Bludenz municipal police were able to establish on several occasions that the toilet windows were tipped open and the entrance door of the venue was wedged open. Steps under administrative criminal law were initiated.

The District Authority did look into the numerous complaints from neighbours insofar as it arranged inspections by Bludenz police station, the official air quality appraiser and the official trade and commerce engineering appraiser, and furthermore it did issue and implement administrative notifications to shut down the venue, and it did initiate administrative criminal law proceedings. However, as the venue operator frequently fails to comply with the requirements in administrative notifications, the District Authority will be instructed again in future to ensure that it takes action as set forth in the relevant legislation, to bring about compliance.

AOB calls for a sustainable solution

3.2.3 Surveying offices

As in previous years, in 2022 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

Explanatory information

Boundaries Land Register, and about the fact that civil surveyors are not within the AOB's sphere of responsibility for investigations.

**Innsbruck
surveying office**

A man complained that in May 2021 he had contacted the Innsbruck Surveying Office but had not yet received any response. Only after the AOB intervened did the man receive a response letter from the Surveying Office, in April 2022. The AOB was critical of the delayed response.

3.3 Education, science and research

3.3.1 Education

Introduction

In 2021, the number of cases in education (schools) and culture reached a high point (152); in 2022, there were 94 cases, which is roughly on par with the level prior to 2021 but is nonetheless a relatively high number compared with the long-term average. Around one third of the cases concerned the COVID-19 pandemic. As in 2021, most of the individuals affected felt that actions taken by schools in response to COVID-19 were unjustified or disproportionate. In terms of subject matter the cases could be broken down as follows: 66 cases regarding school instruction, 16 concerning employment law, and 12 relating to other matters (e.g. financial support for the arts, culture law).

94 cases; one third related to COVID-19

During 2021–2022, the Constitutional Court of Austria heard various appeals against the COVID-19 School Regulation (*COVID-19-Schulverordnung*). In most instances, the Constitutional Court did not uphold the appeals and accepted the measures stipulated in the Regulation; in some instances, the proceedings had not been concluded as of the editorial date of this Annual Report. The AOB was therefore only able to investigate correct implementation of the measures.

Constitutional Court accepted actions taken by schools

Problems in carrying out school COVID-19 tests

In the Annual Report 2021, the AOB reported on the problems of or overreactions to individuals who refused to comply with schools' COVID-19 containment measures. In 2022, there were also cases where individuals suffered disadvantages, despite wishing to meet governmental requirements in the efforts to fight the pandemic.

In one case, a pupil in the first year at a higher-level technical educational institution (HTL) in Vienna stated that at the beginning of December 2021, he had had to complete a test in German studies as well as some urgent remedial lessons. He submitted his PCR test in a timely manner and was double vaccinated, which meant that by the standards of that time he had been fully immunised. However, for reasons for which he was not to blame, the test result was not available in a timely manner. He was therefore not permitted to enter the school, even though he was willing to take an alternative approach (e.g. antigen test with more rapidly available results). His mother was very dismayed that a pupil who was complying with all requirements had to suffer these disadvantages. This case appeared on the ORF television programme *Bürgeranwalt* ("Advocate for the People").

Disadvantages at school despite vaccination and willingness to take test

After the AOB intervened, the Federal Ministry of Education, Science and Research clarified that the school should have allowed the pupil to participate in instruction (including the test) after his antigen test (supplied by the education authority) came out negative. The school administration emphasised that this was an isolated case and regretted that it had occurred. The clarification was therefore in the pupil's favour, but it was not possible to rectify the unpleasantness he had suffered.

Which PCR tests are recognised by schools?

A woman contacted the AOB because a new secondary school in Lower Austria refused to accept current PCR throat swab tests, which her daughter was using as well.

In response to the woman's complaint, the Lower Austria Board of Education cited the COVID-19 School Regulation 2021/22 issued by the Federal Ministry of Education, Science and Research and argued that the school administration's approach was justified, because self-administered tests carried out privately did not fulfil the "authorised test provider" criterion. The Board of Education stated that there was an essential distinction between on-site testing and recognition of external test results, that an authorised test provider such as the school had to supervise or perform the testing itself, and that the school administration's approach was therefore compliant with the legal requirements.

However, after the AOB intervened, the Ministry clarified that the school should have accepted the PCR test used by the mother and her daughter, as "proof of low epidemiological risk". Evidently there was a misunderstanding in communication between the Board of Education and the Ministry, and as a result the Board of Education misinterpreted the Ministry's Regulation. The AOB therefore suggested that the Ministry should contact all Boards of Education to clarify the legal position, to ensure uniform implementation throughout Austria.

Discrimination against pupil who was critical of COVID-19 measures

"Conspiracy theories" in religious studies class

A pupil at a commercial academy in Upper Austria had a reputation as a critic of school COVID-19 measures. Ironically, in Catholic religious studies he became a victim of discrimination: he was given an assignment in which he had to watch a documentary about "conspiracy theories" and then discuss it during class.

The Ministry initially did not deny the allegations in the complaint. However, after the AOB expressed criticism, the Ministry stated that the assignment had been given to his fellow pupils as well. The AOB doubted the truth of this version of events, which was presented only later and contradicted the version of events consistently presented by the pupil.

The Ministry argued that there was an appropriate connection between the assignment and the religious studies syllabus. In the AOB's opinion, the key point is the fact that the assignment was given to this pupil only. He had an existing reputation for rejecting school COVID-19 measures – views that, under the principle of freedom of speech, he was entitled to hold. The fact that the assignment was given to him only appeared to be a way of suggesting that (only) he was susceptible to "conspiracy theories". This unfair approach meant the pupil was shown in a bad light in front of his fellow pupils, and the AOB was critical of this.

The pupil received a "Good" in religious studies, but was very dismayed by this, as a "Good" in religious studies is generally viewed as a "poor" grade. In response, the Ministry's first statement of opinion merely contained a basic quote from the legal principles. The AOB therefore had to request that concrete grounds be provided. Specifically because of the unfair treatment of the pupil, the AOB also investigated whether the grade received by the pupil was fair. The AOB therefore requested a comparison with the grades received by his fellow pupils, to determine whether the grading regulations were being uniformly applied.

Disadvantage in terms of grading

Despite receiving a clear description of the requested information, the Ministry ultimately refused to supply all of the documents. Furthermore, it did not give any grounds for this breach of duty to collaborate under Art. 148b (1) of the Federal Constitutional Law. In the AOB's view, the lack of transparency was an indication that the complaint was justified, including with regard to the alleged discrimination in grading.

Shortage of secondary school places in the Feldbach area (Styria)

The shortage of places at secondary schools is an ongoing matter of concern that has frequently been covered in the AOB reports (see for example Annual Report 2019, regarding the Deutschlandsberg (Styria) area). In early 2022, a total of around 30 parents contacted the AOB to complain about the shortage of secondary school places in the Feldbach area. At the Feldbach Federal Upper Secondary School, since the 2020/21 school year, one grade per school year has been opened up as academic secondary school long-form (BRG). However, due to increasing numbers of applications, the places had already all been taken up, it was stated. Particularly in comparison with Deutschlandsberg, where two grades per school year have been authorised, the fact that in Feldbach only one new long-form grade has opened per school year constitutes a disadvantage.

After being contacted twice by the AOB, the Ministry admitted that in the application process for the current school year there were significantly more applications than available places: at least 27 pupils were not offered

a place. However, the Ministry argued that this was not a problem, as there are other educational options available, particularly the *Privatschule Wirtschaftskundliches Realgymnasium der steirischen Wirtschaft des Steirischen Hotelfachschulvereins*, a private academic secondary school with additional practical subjects in hotel management in Bad Gleichenberg.

**Contravention
of the Federal
Constitutional Law
and the UNCRC**

The AOB argues that although under Austrian law there is no formal legal right to a secondary school place, Art. 14 (6a) of the Federal Constitutional Law stipulates a differentiated school system, particularly at secondary level. Moreover, according to Art. 28 (1) (b) of the United Nations Convention on the Rights of the Child (UNCRC), signatory states must “encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.” . The shortage of secondary school places is a contravention of those objectives. In the interests of equal opportunity, which is an explicit objective of Art. 28 (1) of the UNCRC, the AOB is committed to ensuring that secondary school places are made available to all children who have the appropriate abilities.

For obvious reasons, the private secondary school mentioned by the Ministry cannot be deemed an equivalent alternative to a state secondary school. First, the aforementioned private secondary school has a very specific commercial focus; and second, during economically difficult times, the school fees (as shown on the info sheet on the school’s website) are a significant barrier to entry for middle-income families, especially those with more than one child.

First positive steps

Following the AOB’s intervention, measures are being taken to provide enough school places. Those measures include setting up a separate secondary school site in Feldbach, with a view to setting up dual-track school administration. Nonetheless, the AOB has criticised the fact that this did not take place sooner, as the need for additional secondary school places was obvious.

Groundless endangerment notice sent to child and youth welfare services

A woman invoked the right to home-school her son. However, due to problems with sitting exams as an external pupil, the Lower Austria Board of Education issued a prohibition notice for the 2022/23 school year. The mother submitted an appeal to the Federal Administrative Court to contest this prohibition notice and the fact that her son had been assigned to a public primary school in Lower Austria; the appeal had suspensive effect. Therefore, she was not acting unlawfully when she refrained from sending her son to school at the start of the school year.

The primary school nonetheless sent an endangerment notice to the child and youth welfare services, pursuant to Section 48 of the School Education Act (*Schulunterrichtsgesetz*). Because the appeal proceedings were at that time ongoing, the endangerment notice was unjustified. Such actions always have unpleasant consequences for the family affected, who for example may have to justify their actions to the child and youth welfare services or may suffer social stigma. One reason the endangerment notice was sent was that it was not until the end of September 2022 that the Board of Education, as the authority handling the proceedings, informed the primary school about the submission of the appeal in August 2022. The Board of Education was therefore in breach of its internal school administration duties.

Lower Austrian Board of Education informed primary school too late

The primary school was aware of the proceedings before the Board of Education, though it may not have been aware of all of the details. It therefore should have proactively obtained information from the Board of Education about the status of proceedings. It would then have been clear to the school that there were no grounds to send an endangerment notice at the start of the 2022/23 school year.

Sending an endangerment notice without first obtaining reasonable clarity under internal school administrative procedures (which does not require much effort) is a breach of Section 48 (2) of the School Education Act, because under those circumstances there is no “clear” infringement of the parental duty of care. Moreover, the primary school’s approach was in contravention of the requirement that attempts must be made to reach mutual agreement with the parents before an endangerment notice is sent. Without much effort, the primary school could have obtained information about the status of proceedings.

Primary school failed to obtain reasonable clarity

The Ministry argued that the parents should have informed the primary school about the suspensive effect of their appeals and that their son was therefore going to continue home-schooling. However, the Ministry’s argument is inaccurate. It is clear from the wording of Section 48 (1) of the School Education Act that the school has an active obligation to reach mutual agreement with the parents before sending an endangerment notice. Moreover, it was reasonable for the parents to assume that communication between the Board of Education and the primary school was functioning properly.

The provisions in Section 48 of the School Education Act are in line with life’s realities, especially as there are situations in which parents who are conscientiously fulfilling their duty of care are unable (without being culpable) to inform their child’s school about why their child is not at school (e.g. serious road accident and subsequent hospitalisation, in some cases abroad, when returning home at the end of the holidays; serious illness, especially during a pandemic). To prevent the unnecessary sending of

Breach of the principles of good school partnership

endangerment notices, the school should therefore always clarify the situation with the parents, including in the absence of legislative provisions to that effect. That approach would be in the spirit of the general principles of good school partnership.

Delay in proceedings regarding home-schooling request

At the beginning of July 2021, a man submitted a registration request to the Vienna Board of Education, with the intention of home-schooling his daughter. It was not until November 2021 that he received a letter from the Board of Education stating that it duly approved home-schooling and informed the relevant district school. This delay caused months of legal uncertainty as to whether home-schooling had been approved, and also brought an additional disadvantage: the parents were only able to obtain school books via the free school books initiative after receiving the letter.

Legal uncertainty; delay in obtaining school books

In endeavouring to provide an explanation for the delay, the Board of Education stated that it had had to prioritise prohibitions and invitations to language level tests, to ensure that cases where home-schooling prohibitions were likely would be processed as quickly as possible.

Up until 2018, according to Section 11 (3) of the Compulsory Schooling Act (*Schulpflichtgesetz*), after receiving a registration request an authority was given one month in which to issue a home-schooling prohibition (if applicable). The specific purpose was to provide the authority, the parents and the child with certainty as quickly as possible, to allow appropriate planning. After 2018, the provisions that specified that one-month deadline ceased to apply.

According to the materials accompanying the legislative amendment, the purpose of that amendment was to allow home-schooling prohibitions to also be issued during the course of the school year, in order to protect the child's welfare in the event of cases of maladministration. In other words, moving away from the existing rapid decision-making process was not the goal of the legislative amendment. The long duration of proceedings in the present case is thus an infringement of the legislation, and creates uncertainty in planning and organisation, which is a disadvantage to all parties concerned.

Proceedings need to be speeded up

The AOB therefore suggested the following: the home-schooling prohibitions process and the approvals process should both be speeded up, at least to an extent that will ensure that school books are reliably available at the start of the school year.

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

This subject was covered in last year's Annual Report. In 2022, the AOB once again received various complaints in this area. That is an indication that personnel administrators at the Ministry and at Boards of Education have still not yet (completely) got a grip on the situation that arose in connection with the European Court of Justice ruling dated 8 May 2019, C-396/12 (the *Leitner* ruling).

The complaints that were concluded this year by the AOB related to the *Pädagogische Hochschule Wien* (teacher training college in Vienna) and the Vienna Board of Education. One individual affected had to wait more than three years for a decision after submitting her request. Another individual affected had been waiting around two and a half years, while two others had been waiting for over a year. The AOB's intervention seems to have speeded up proceedings somewhat. It is also worth pointing out that no further complaints have been received by the AOB recently. The AOB hopes this is a sign that structural improvements have been made.

Boar of Education and teacher training college Vienna affected

Incorrect grade for High School Certificate thesis

A pupil preparing for his *Matura* (High School Certificate) contacted the AOB concerning the grade he received for his pre-scientific thesis. Although the thesis was initially given an "Excellent" under the grading scheme, in the end it only received a "Sufficient". The pupil was very disgruntled about this.

According to the case documents, the thesis examiner decided the competencies were essentially "well above the required level", as per the applicable grading scheme. It is worth noting that the Ministry's grading scheme is merely a non-binding guide for orientation purposes, to help assess the candidate's competences. Nonetheless, the grading scheme can be used to help generate additional detail in the form of descriptors regarding the required competencies. The goal is to come up with a comprehensive evaluation of competencies and thereby produce an overall assessment of the thesis.

Grading: lack of transparency and shortcomings from a content standpoint

An independent educational appraiser who was consulted by the Vorarlberg Board of Education stated that "it would be surprising and in fact puzzling if this *Matura* thesis were to receive anything other than an "Excellent". Subsequently the appraiser of the oral and written performance stated that the overall performance "definitely deserved a 'Good'". However, the Board of Education only increased the grade from "Sufficient" to "Satisfactory" rather than to "Good".

The Ministry argued that one of the reasons for the disputed grade was the partial inadequacies in the topic originally assigned (and in that regard the Ministry concurred with the board of examiners). The AOB disagreed with that argument, however, especially as it was not sufficiently supported by the evaluation documents and conflicted with the findings of the Board of Education's independent appraiser. In any case, partial inadequacies in the assigned topic should have been addressed in the planning phase, to give the pupil a chance to make modifications.

Processing of formal complaint took too long

The AOB was also critical of the fact that processing of the formal complaint took a long time. The pupil submitted the formal complaint to the Ministry in April 2020, and two and a half years later had still not received a response or decision. The Ministry admitted to the delay in proceedings, and stated that the case would prompt it to improve its own internal procedures for handling formal complaints.

3.3.2 Science and research

Introduction

In 2022, 44 complaints related to science and research. Most of the complaints (18) related to the implementation of regulations in the area of academic affairs. Ten complaints related to student grants.

No back payment of salary for university employees

In the Annual Report 2020 (volume "Monitoring Public Administration", p. 65 et seq.) the AOB reported on complaints from 13 civil servants employed by the University of Applied Arts Vienna. When they were first appointed as lecturers by the predecessor organisation the College for Applied Art (*Hochschule für angewandte Kunst*) between 1994 – 1996, they were assigned too low a classification in the salary scheme. Initially the individuals affected did not notice the error, and the university's HR administrators did not notice it until 2016.

Loss of income due to employer's error

In other words, the university employees had been paid too low a salary for over 20 years. They also suffered losses on their subsequent retirement pay. The employer did not start paying the correct amount of active salary until 1 October 2016. Back payment over and above that was refused, as it was argued that their claims were subject to the statute of limitations. The AOB presented detailed arguments as to why there were no legal obstacles to indemnifying the individuals affected, and why the principles of frugality, efficiency and expediency in administration also did not present an obstacle.

Ministry refuses indemnification

Unfortunately, the Federal Minister of Education, Science and Research, as the highest administrative authority with responsibility for the university's

civil servants, ultimately did not concur with the AOB's arguments. The Minister stated that the Ministry, having duly considered the legal options, did not deem it within its sphere of responsibility to tackle this employment law and remuneration law issue. Therefore, the only remaining option for the university employees affected will be to try to pursue their claims via employment law proceedings.

Appointment process for university professorships

An unsuccessful candidate for a professorship at a public university submitted a complaint stating that the Federal Minister as the overseeing authority had not upheld his petition to rescind decisions made by the Rector in an appointments process.

The unsuccessful candidate asserted that the decision should be rescinded, in particular because the professorship had been specifically tailored to the ultimately successful candidate. He argued that this was a contravention of the provisions in Section 99 (3) of the Universities Act (*Universitätsgesetz*), which stipulate that the Rector must make an appointment after an appointments process that meets "international competitive standards". According to Section 45 of the Universities Act, the universities are subject to the legal oversight of the Federal Minister of Education, Science and Research. That section of the Universities Act stipulates that the Minister must rescind decisions made by university bodies if the decision in question contravenes applicable laws or regulations.

Job description tailored to applicant?

After viewing the case documents, the AOB was convinced that the Rector had already envisaged or favoured the other candidate for the position before drafting the job advertisement. The job advertisement reflected that preference.

Preference was very evident

Nevertheless, the Minister pointed out that a professorship under Section 99 (3) of the Universities Act is reserved for the lecturers at the university in question, thereby creating a career model for an existing group of candidates. The Minister emphasised that a job advertisement cannot be deemed unlawful just because de facto only a very small group among the relevant faculty – in some cases in fact just one person – has a good chance of getting the job.

He argued that "international competitive standards", if conceived as a form of quality assurance, should merely ensure that the career step of the chosen person does not take place arbitrarily, but rather on a performance-based and transparent basis. Moreover, the Minister pointed out that in this concrete instance those prerequisites were met, and that there were therefore no grounds to rescind the Rector's decisions on the selection and appointment of the candidate.

Ministry's opinion: nothing unlawful

Does the Minister's interpretation accord with the legislator's intent?

The AOB agreed that the Minister's legal arguments were reasonable, as the legislative provisions were open to interpretation. However, it is questionable whether the Minister's interpretation, particularly regarding the use of the term "international competitive standards", accords with the legislator's intent. Under such an interpretation, it would be possible for a so-called "competitive" selection process to be oriented to a specific person. If that was not the legislator's intention, the term "international competitive standards" should be rendered more concrete, especially as the term appears elsewhere in Section 99 of the Universities Act.

Diacritics in degree documents

Incorrectly written version of last name

A student asked the University of Vienna to ensure that her last name, complete with its correct diacritics as shown in her passport, was entered in that manner in the university computer systems. She was concerned that the incorrectly written version of her last name as used by the university might lead to problems in legal communications, especially because the administrative notification regarding the awarding of her bachelor's degree contains her name. Examples of diacritics are small characters added to letters, such as dots, dashes, ticks etc.

Correction was made

However, in response to her request she merely received the following message from the university: "Hello, unfortunately the special characters you requested are not available in our database. Best wishes, Your support team". The University of Vienna informed the AOB that it would immediately send the student the corrected degree documents. In addition, it stated that the university's instruction and examinations administrative services had taken action to ensure that "deviations in the spelling of actual names caused by the functionalities of our technical systems will be corrected before student documents are issued".

When asked why the student initially received the message that the desired special characters were unavailable in the university database, the university made no comment. The AOB therefore expressed criticism of the message issued by the university.

Student grants – mobility grand awarded

Father's income too high

A man contacted the AOB because the student grants office had turned down his request for a mobility grant for a master's degree course in England. The reason given by the grants office was that the student's father's income was too high for the student to be eligible for support.

However, the grants office had not duly taken into account that the father had never met his maintenance obligation and was still not doing so. As evidence, the student submitted documents regarding judicial maintenance

proceedings and numerous unsuccessful enforcement attempts. He stated that unless a grant was awarded, he would be unable to begin his studies.

According to Section 56d of the Student Support Act (*Studienförderungsgesetz*), mobility grants are for the support of studies that take place entirely at recognised post-secondary institutions outside Austria in the EEA, the UK or Switzerland.

The prerequisites are essentially the same as those for student grants. In particular, there has to be a social need, which is assessed based on (among other factors) the income of the parents who have the maintenance obligation and the maintenance that they can reasonably be expected to pay.

Prerequisite of social need

According to Section 28 of the Student Support Act, the reasonable maintenance contribution is assumed to be lower if the student demonstrates that the maintenance paid by one parent does not reach the amount calculated by the student grants office. As evidence, court decisions and specific documents regarding unsuccessful enforcement attempts have to be submitted.

As the AOB was unable to find clear evidence that the student grants office had duly taken the applicant's documents into consideration in its decision, it asked the Ministry of Education, Science and Research to (further) investigate the matter. The Ministry arranged for the matter to be investigated, and ultimately the mobility grant was awarded.

Grant ultimately awarded

3.4 European and international affairs

Introduction

Visa proceedings In 2022, the AOB handled a total of 47 complaints concerning areas relating to the Federal Ministry for European and International Affairs. The complaints mainly related to visa proceedings handled by Austrian embassies abroad; the Austrian Embassy in Tehran accounted for the largest number of complaints.

VFS Global A number of complaints were about the private service provider VFS Global and the lack of assistance from the relevant Austrian embassies when problems arose. VFS Global, acting on behalf of individual Austrian embassies, handles the task of accepting visa applications and the associated documentation. The responsible Austrian embassy then handles decision-making based on the contents. Individuals affected complained about the outsourcing of the receipt of visa applications, and also about VFS not making enough appointments available for visa applications. In addition, several times individuals expressed suspicion that private third parties were buying up VFS appointment slots and forwarding them to visa applicants in return for payment.

Information about submitting a new application The AOB noted that when visa applicants' applications were rejected, the Austrian diplomatic representations often informed them that submitting a new application at any time is permitted. The individuals affected tend to view this as superfluous, as new costs are incurred for each new application (e.g. flights and hotel reservations). For many visa applicants, a new visa application is too great a financial obstacle.

Withdrawing applications The AOB also noticed a trend among applicants: withdrawing their visa applications from ongoing proceedings, to prevent a possible negative decision from the Austrian diplomatic representations.

Diplomatic representations' duty to provide information The AOB suggested to the diplomatic representations that more information should be provided ahead of an application, explaining the documents and files required to ensure a positive decision, and also that the opportunity to improve an application should be made clear during the application process itself.

3.4.1 Repatriation from Syria – Federal Ministry for European and International Affairs

Camp Roj in north-east Syria In the 2021 Annual Report the AOB reported on the request received from an Austrian married couple in Hallein (Salzburg) who are hoping for the repatriation to Austria of their daughter and her two minor children from Camp Roj, a Kurdish detention camp in north-east Syria.

The young woman emigrated to Syria as a minor to join “the Caliphate”. For several years, with her parents’ assistance she has been trying to return to Austria to get a fair trial here.

**Radicalisation
as a minor**

The AOB asked the Ministry for European and International Affairs to look into the possibility of repatriation and also to explain why to date the outcome of individual assessment of her case under Consular Law (*Konsulargesetz*) has not been in favour of the Austrian woman and her Austrian children. In particular, the AOB emphasised the risk to the welfare of the two minor children, who are growing up in unreasonable circumstances in Camp Roj. In light of the Ministry’s general remarks, the AOB has several times asked for further details about deliberations during the individual assessment.

At present, the Salzburg woman, who is now 26, and her two sons are still in Camp Roj. The Ministry is essentially sticking to the arguments that it presented at the start: it argues that the young woman is herself to blame for her current difficult humanitarian position, and for that reason the outcome of individual assessment has not been in her favour. Moreover, the Ministry points out that the security situation in north-east Syria is still volatile and dangerous, which means that in the event of a repatriation effort there would be potential risk to the life and limb of the personnel engaged in the effort.

**Ministry: security
situation is volatile**

In view of the recent European Court of Human Rights (ECHR) judgement of 14 September 2022 (Case of H.F. and others vs. France, Application nos. 24384/19 and 44234/20) and other developments, and given that other European countries have carried out repatriations, the AOB’s opinion is that further efforts to repatriate the Salzburg woman and her two minor children from Camp Roj are urgently needed. Naturally, it would be very important to ensure the safety of personnel engaged in the repatriation.

**ECHR judgement of
14 September 2022**

All measures concerning the children must be carried out in the best interests of the children involved, as defined in the United Nations Convention on the Rights of the Child (UNCRC). In the AOB’s opinion, if the children were to remain in Camp Roj, this would constitute a breach of Art. 3 UNCRC and of Art. 1 of the Federal Constitutional Act on the Rights of Children and of the right to education under Art. 2 of the 1st Additional Protocol to the European Convention on Human Rights. Furthermore, in the AOB’s view, the separation of the children from their mother as proposed by the Ministry in the assessment proceedings and repatriation of the children alone would be a breach of Art. 9 UNCRC and of the right to respect for private and family life under Art. 8 ECHR and of Art. 1 and 2 of the Federal Constitutional Act on the Rights of Children.

**Breach of human
rights**

The AOB suggested that the Ministry should continue to evaluate the situation on the ground and should continue to look into the possibilities for repatriation.

AOB recommendation

3.4.2 Homosexuality in Iran – *VFS Global* and Austrian Embassy Tehran

An Austrian man and a male Iranian citizen got married in Austria. To celebrate, the homosexual couple wished to invite the Iranian citizen's parents and sister to Austria. In Iran, applications for visitor visas are handled by the private service provider *VFS Global* rather than by the Austrian Embassy Tehran. Living openly as a homosexual person is considered a serious offence in Iran. It is subject to imposition of the death penalty, which may be judicially executed. For that reason, the homosexual couple wanted to ensure that their Iranian family members would not be asked by local *VFS* employees about the reason for their visit to Austria. The couple assumed that local *VFS* employees might be obligated to report the matter to the Islamic Republic of Iran. They therefore requested that their Iranian family members should be permitted to submit their visa applications directly to the Austrian Embassy Tehran, rather than via the usual method via *VFS*. The couple felt that any questioning of their Iranian family members by *VFS* would be too risky.

Direct application to Austrian Embassy Tehran?

After making several unsuccessful attempts by phone, the Austrian party sent an email to the Ministry describing the homosexual couple's concerns and once again requesting in writing the possibility of contacting the Austrian Embassy Tehran directly. The Austrian man immediately received the following response from the Austrian Embassy Tehran: "[...] although we are naturally aware of the problems in Iran, we do not see anything for you to be worried about. We will handle the visa proceedings of your parents-in-law in the same way as all others, and the question of the sexual orientation of the inviter is irrelevant. Yours sincerely, Austrian Embassy Tehran."

Risk of persecution

The Iranian husband's family members then had to submit their applications via *VFS*, and in accordance with its instructions also had to make statements about the wedding to local *VFS* employees. The couple complained about this to the AOB. As a consequence of their family members' appointment with the Iranian employees of *VFS*, the couple now feels they can no longer visit Iran without suffering persecution. They are also worried that the Iranian husband's family members might suffer persecution.

Death penalty

In light of numerous media reports stating that living openly as a homosexual person in Iran is still a crime punishable by persecution and the death penalty, the AOB's view is that the request to the Austrian Embassy Tehran ahead of the application was very prudent. In the AOB's opinion, it was completely understandable under the circumstances that they wanted to submit the personal documents directly to the Embassy and to communicate directly with the Embassy if questions arose. Moreover, in the AOB's view the aforementioned message sent by the Embassy stating that the couple's concerns were unfounded was very unsatisfactory.

In its statement of opinion, the Ministry stated that in individual instances "it is in principle feasible" for the Austrian diplomatic representation to also accept applications directly. The Ministry emphasised that the sexual orientation of the couple had no influence on the visa proceedings, and drew attention to the confidentiality and data protection obligations in the service agreement with *VFS*. The Ministry nonetheless stated that this case would prompt it to re-evaluate its procedures for handling sensitive applications and that it intended to raise awareness among colleagues.

VFS Global: duty of confidentiality

The AOB proceeded on the assumption that sexual orientation had no influence on the visa proceedings themselves, and found no evidence of actual disclosure of sensitive data by *VFS Global* employees.

Nevertheless, the AOB's view is that regardless of the basic fact of collaboration between a member state and the external service provider *VFS Global*, in exceptional cases it should be made possible for applications to be submitted to the Austrian diplomatic representation directly, at least in individual cases where there are appropriate grounds.

At present, Section 6 of the Preamble of the Visa Code states that as a matter of principle, member states "should not be obligated" to provide the possibility of submitting applications directly to the consulate in places where an external service provider handles the task of receiving visa applications on the consulate's behalf. This wording does not preclude the possibility of offering that option voluntarily in exceptional cases, in the AOB's view.

Visa Code Preamble

Because openly living a homosexual life is still punishable by the death penalty in Iran, submitting the application directly should have been offered as an option in the present case. The refusal, and the written response stating that disclosing homosexuality to local employees was not a cause for concern, displayed a lack of sensitivity and a lack of awareness of local conditions.

Case of maladministration

The AOB recommended to the Ministry that in countries where imprisonment and even the death penalty are judicially imposed and executed, the Ministry should instruct Austrian diplomatic representations to continue to (voluntarily) allow direct applications. In view of the homosexual couple's understandable lack of confidence about returning to Iran or visiting their relatives, given that their homosexuality has been disclosed to local *VFS* employees, the AOB advised the Austrian Embassy Tehran to explicitly apologise to the couple. In the meantime, the couple's Iranian family members have been able to arrange a direct appointment and submit their application directly to the Austrian Embassy Tehran.

AOB recommendation

3.4.3 Outsourcing to *VFS Global* – Austrian Embassy Moscow

The Austrian husband of a Russian citizen complained about the fact (per se) that receiving visa applications is outsourced to *VFS Global*. He pointed out that *VFS* is headquartered in Dubai and is not a company under Austrian or European law, and that therefore the appointment bookings are not transparent. He emphasised that during times of war, it would instil a feeling of confidence if one could submit one's application directly to an Austrian diplomatic representation.

The AOB stated that for visas for travel to Austria, as a matter of principle the Austrian diplomatic representation with responsibility for the applicant's lawful place of residence bears responsibility, and that in some countries, submission and receipt of visa applications can be handled by external service providers. In return for a processing fee, they receive the application and forward it to the Austrian diplomatic representation that bears responsibility. The external service provider plays no role whatsoever in the decision-making process. The legislation that authorises this outsourcing is the EU Visa Code (Regulation (EC) No. 810/2009 of the European Parliament and of the Council dated 13 July 2009 establishing a Community Code on Visas).

Direct submission of application should be made possible

In this man's case, the AOB upheld its own view that it ought to be made possible for the relevant Austrian diplomatic representation to voluntarily accept applications in exceptional cases, regardless of the basic fact that there is outsourcing to *VFS Global* and regardless of Section 6 of the Preamble of the Visa Code.

3.4.4 Suspicion that appointments are being set up in return for payment – *VFS Global* and Austrian Embassy Dublin

No appointments available and no support

A visa applicant living in Ireland wished to attend a wedding in Austria and over a period of several weeks tried unsuccessfully to get an appointment with *VFS Global* to apply for a tourist visa. The Austrian Embassy Dublin did not respond to his request for support and merely advised him to "make further attempts". As the visa applicant was worried he might miss the wedding, he contacted the AOB.

During the investigative proceedings, the applicant did in fact receive an appointment. He informed the AOB that he did not get the appointment via the *VFS Global* booking portal: given the urgency of his application, he had in the end contacted a senior employee of *VFS Global* directly via a social platform, and the employee had helped him. In the waiting room of *VFS Global*, he had been told by various people waiting that they had paid third

parties EUR 80 per person to obtain their appointments. After hearing this, the visa applicant informed the AOB that he had a suspicion that third parties were buying up and reselling all the appointment slots. The AOB asked the Ministry to issue a statement of opinion concerning these serious suspicions and to look into the matter.

The Austrian Embassy Dublin informed the Ministry that as soon as it had become aware of the technical problems with setting up appointments, it had contacted the visa applicant and *VFS* Dublin. The visa applicant was then immediately given an appointment and the desired visa was issued, it stated. The Embassy also stated that it was in constant contact with *VFS* Dublin to ensure that the technical problems with the appointment booking system were rectified as quickly as possible, that the appointment booking system is now subject to continuous monitoring by *VFS Global's* IT department to prevent abuse of the system by third parties, and that in response to the AOB's enquiry, the following message now appears on the *VFS* Dublin website: "CAUTION: Appointments for Schengen visas are free of charge! Please book appointments through *VFS* website and not through travel agents. There are no additional fees to be paid apart from the Visa and *VFS* fees."

Monitoring of the appointments booking system

The AOB welcomed the measures that were taken. The visa applicant emphasised several times that the Austrian Embassy had not provided any help, and that it was only after the AOB intervened that the Embassy had contacted him and apologised. He stated that in his opinion there has been no improvement in *VFS Global* Dublin's appointment booking system, and that the message "No appointments available" still appears.

The Ministry followed up by saying that the Embassy, in collaboration with the relevant specialist department and *VFS* Dublin, has made further modifications to the appointment booking system and taken various measures. An example of this is that the *VFS* service charge now applies as soon as one obtains an appointment rather than at a subsequent stage when one submits the application. Experience has shown that making this change causes the number of no-shows (i.e. people who fail to attend booked appointments) falls dramatically, which means more appointment slots are available. For the Embassy and the responsible specialist department, the suspicion that a third party might be charging people for appointments is a very serious matter, and immediately after the suspicion came to light, *VFS* was notified so that action could be taken. It is now explicitly indicated on the *VFS* website and the Embassy website that there is no charge for setting up an appointment. In addition, the appointment booking software has been adapted.

Responses from the Dublin Embassy

The AOB welcomed the responses to the complaint. Nonetheless, since it was alleged that there are still no appointments available on the website, the AOB emphasised that further monitoring is still needed.

3.4.5 Suspicion that appointments are being set up in return for payment – VFS Global and Austrian Embassy Tehran

No help given An Austrian woman informed the AOB that there was a lack of available appointments for visa applicants at *VFS Global* in Tehran and that she suspected that appointments were being set up in return for payment. She stated that her husband is an Iranian citizen, that they wanted to invite his mother to Austria and had already submitted an electronic letter of guarantee, and that booking an appointment with *VFS Global* for an application for a travel visa (C) was completely impossible, as no appointments were available on the website. Neither *VFS* nor the Austrian Embassy Tehran were able to provide any information about when an appointment might be available. The Embassy had simply advised her to “keep trying”, she stated.

“From unofficial sources” the Austrian woman had heard that in practice, appointments at *VFS* can only be obtained through “middlemen” who set up appointments in return for payment. She forwarded this shocking allegation to the Austrian Embassy Tehran and the Ministry. The Embassy did not respond to her message; the Ministry merely replied that it needed further information, in particular her information source.

Suspicion that appointments were being set up in return for payment

Subsequently the Austrian woman stated that she and her husband had in the meantime found numerous websites (in Persian) where Iranian travel agencies offered to book an appointment in return for payment. She stated that this confirmed the suspicion she had voiced earlier. She pointed out that the situation was unacceptable and that she considered it unlawful that the Embassy had not terminated its collaboration with a private partner that allowed such methods.

The AOB, drawing attention to similar allegations in other investigative proceedings, asked the Ministry to provide a statement of opinion and to look into the serious suspicions that appointments were being set up in return for payment.

Limited number of appointments

The Embassy and the Ministry pointed out that general demand for appointments for visa applications is high, waiting times are therefore long and that large numbers of people want to travel from Iran to the EU. They emphasised that the number of available appointments at embassies of Schengen countries is limited, that Austria cannot single-handedly compensate for that, and that the Austrian Embassy Tehran is trying to optimise its appointment booking system in collaboration with the responsible specialist department and *VFS* Tehran. It was stated that measures to improve the situation have already been taken – one such measure being that receipt of applications has been outsourced to *VFS* – and that the relevant judicial authorisation of this is set forth in the EU Visa Code.

It was also stated that attempts have been made to reduce the number of appointment no-shows, and that to achieve this, *VFS* demands a refundable deposit when an appointment is booked: when an appointment is booked online, a deposit of around one million Iranian rials (approximately EUR 31) has to be paid by bank card. This is stipulated in the *VFS Global* terms and conditions and helps to reduce the number of no-shows. When the actual visa application itself is subsequently submitted, the *VFS* fee itself of around EUR 40 is paid in cash and the deposit is refunded to the applicant. The Ministry stated that it would be grateful for any information indicating that trading of appointments is taking place.

The AOB welcomed the efforts that the Ministry had already made. The Austrian woman was advised to contact the Ministry directly, to mention the AOB's investigative proceedings and to describe her concrete findings to the Ministry and keep the AOB updated on the matter.

Request for precise information

3.4.6 Phone messages "advising" that visa application should be withdrawn – Austrian Embassy Tehran

The AOB received numerous complaints from affected individuals stating that the Austrian Embassy Tehran had "rejected their visa application by telephone" or had "compelled them" to withdraw their application and documents. The AOB always points out that the rejection of a visa application must be issued in writing and that "rejecting a visa application by telephone" is not an option under the law. The AOB also always emphasises that if it finds in the proceedings files a "withdrawal of application" form signed by the applicant, the AOB has to close the investigative proceedings, because it is not possible to determine whether verbal information of a particular nature was provided, and that a form signed by hand gives the impression of a voluntary withdrawal.

Impression of voluntary withdrawal

An Iranian man living lawfully in Austria stated that the Austrian Embassy Tehran had informed his parents, who four days earlier had submitted their visa applications, that their applications had been rejected. The man alleged that his parents had been advised by telephone to withdraw their applications and to fetch their documents from the Embassy. It is important to duly note that if an administrative notification was issued, his parents could have submitted an appeal against it. The Iranian man alleged that his parents' case was not an isolated one, and that the Austrian Embassy Tehran was persuading people, in particular those not well versed in the law, to withdraw their applications. He also alleged that rejection notifications were basically acting as a threat to visa applicants, who were essentially being told that if their application had officially been rejected, then for the foreseeable future they would no longer have any chance of obtaining a Schengen visa.

The man alleged that this was a way for the Embassy to ensure that an application would be deemed withdrawn and would therefore not have to issue an administrative notification. He also alleged that the only reason his parents had withdrawn their application and documents was that they had been intimidated.

**Applications
"rejected by phone"**

In another case, a married couple living in Austria informed the AOB that their Iranian relatives had been notified by phone by the Austrian Embassy Tehran that their applications had been "rejected". The couple asserted that their parents and parents-in-law had not received an administrative notification, and that the grounds for rejection were unclear, and that it was not possible to contest the Embassy's decisions. In this case too, the proceedings files contained signed withdrawal forms.

In response to these two cases and other similar allegations, the AOB informed the Ministry about the frequent allegations regarding the Embassy's "advice" to withdraw applications. The Ministry pointed out to the AOB that as a matter of principle an improvement instruction should be issued first. In the Embassy's statement of opinion to the Ministry, it emphasised that it was not advising, persuading or compelling applicants to withdraw their applications. It explained that in practice, applicants often opt for a withdrawal as defined in Section 13 (7) of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*) if they are "unable to comply with the embassy's improvement instruction", because it is in their interest to ensure that the visa information system (VIS) does not hold any evidence of a rejection. That is because when a visa application is rejected, all other Schengen country diplomatic representations take that into account when making an overall assessment of a new application, the Embassy pointed out.

**No evidence of
improvement,
instructions or
memoranda**

The AOB is certainly not insinuating that the Austrian Embassy Tehran actually pressures or persuades visa applicants by telephone to withdraw their applications. Furthermore, the AOB informed the Ministry that in most instances the proceedings files sent by the Embassy contained no clear evidence with respect to the actual sending of improvement instructions. All that could be found in the proceedings files was the standard application withdrawal form signed by the applicants. These standard forms in most instances contained no memoranda or notes concerning phone calls ahead of application withdrawals.

AOB recommendation

The AOB recommended that in future the Embassy should issue written improvement instructions as defined in Section 13 (3) of the General Administrative Procedure Act. In the interests of good public administration, the AOB also recommended that in cases where information about the possibility of improvement is sent prior to a "voluntary" withdrawal, or a phone call is made about imminent rejection, a written memorandum should

be used to record instructions issued prior to an application withdrawal under Art. 23 (4) of the Visa Code in conjunction with Section 13 (7) of the General Administrative Procedure Act, or a short written record should be kept concerning the circumstances and content of verbal instructions. The Ministry responded quickly and forwarded the AOB's recommendation to the Embassy. According to the Ministry, the Embassy has been advised to provide all employees who handle consular tasks with suitable training as necessary.

3.4.7 Petition to Federal Administrative Court – Austrian Embassy New Delhi

Two Nepalese citizens submitted applications for the issue of a travel visa (C). The Austrian Embassy New Delhi issued administrative notifications rejecting both of their applications; both of the Nepalese citizens then submitted an appeal. In both cases the Embassy issued a preliminary decision regarding the appeal, and then rejected the appeals due to alleged failure to meet the deadline for improving the appeals.

Preliminary decision regarding the appeal

Alleging that they had not missed the deadline and had submitted all documents in a timely manner, the two visa applicants then submitted petition requests to the Embassy. Despite enquiring several times in writing as to whether their petition requests and their appeals had been forwarded to the Federal Administrative Court, the Embassy did not send them a notification pursuant to Section 15 (2) of the Proceedings of Administrative Courts Act (*Verwaltungsgerichtsverfahrensgesetz*).

According to the provision cited above, , the authority must send the Administrative Court the petition request and the appeal, along with the proceedings files, and at the same time must send the parties a notification regarding the submission of the appeal to the Administrative Court. That notification must contain a statement that the pleadings – starting with the submission of the appeal – are to be sent directly to the Administrative Court.

The fact that the notification pursuant to Section 15 (2) of the Proceedings of Administrative Courts Act was not sent constituted a case of maladministration on the part of the Austrian Embassy New Delhi. The Ministry stated that the error had not caused the two visa applicants any disadvantage. In response, the AOB argued that the error meant that the pleadings (starting with the submission of the appeal) were not sent directly to the Federal Administrative Court.

Failure to send notification pursuant to Section 15(2) of the Proceedings of Administrative Courts Act

In the AOB's opinion, what made the situation worse was that the Embassy did not submit the two petition requests to the Federal Administrative Court until four weeks later. Even though the failure to send the notification

pursuant to Section 15 (2) of the Proceedings of Administrative Courts Act did not have any impact on the appeal proceedings per se, the late submission of the appeals and the petition requests by the Embassy did have an impact on the legal proceedings before the Federal Administrative Court, especially as the court's decision-making period under Section 34 (1) of the Proceedings of Administrative Courts Act does not begin until the appeal has been received (see Ruling dated 22 November 2017, Ra 2017/19/0421).

Late submission Section 15 (2) of the Proceedings of Administrative Courts Act does not stipulate a deadline within which the authority must fulfil its duty to submit the appeal and the petition request. Nonetheless, when an application is submitted for a tourist visa for a specific period defined in advance, if several weeks elapse (groundlessly) between the petition request and the actual submission by an embassy, this can have a detrimental impact for the visa applicant. The Embassy's delay in submitting the appeals and petition requests along with the proceedings files pursuant to Section 15 (2) of the Proceedings of Administrative Courts Act thus constituted a further case of maladministration.

3.4.8 Obstacles when marrying in Sri Lanka – Federal Ministry of European and International Affairs and Federal Ministry of the Interior

**"Austrian
bureaucracy"**

An Austrian citizen submitted a complaint to the AOB about obstacles when marrying abroad, stating that in his view the certification process for getting married is outdated. He pointed out that his certificate of no impediment bore a total of six different certification stamps, and that the Federal Ministry of European and International Affairs had not been able to enter its certification on the certificate of no impediment until it had been certified by the registry office, the District Authority and the *Land* Government. To finalise the document, the Austrian Embassy Sri Lanka also had to provide a signature.

**No English on
"international" forms**

He also stated that the "international" forms that he required in order to marry abroad caused difficulties, as they were not translated into English. To marry abroad, one requires an international birth certificate and an international certificate of no impediment. In Austria, these two documents are printed in only two languages on the front (German and French). On the rear, in small print, there are translations into 15 other languages. The forms in German and French were of no use to the registry offices in Sri Lanka, and they therefore demanded an English translation, but obtaining a translation quickly involved considerable effort. If a version of the two international forms had been available in three languages, as is the case in countries like

Germany, it would have been considerably easier for the young couple to marry abroad, the man pointed out.

The AOB asked the Federal Ministry of European and International Affairs for a statement of opinion concerning the certification process, and asked the Federal Ministry of the Interior for information about whether there are plans for an English translation of the two aforementioned "international" forms. In the AOB's opinion, adapting the forms and providing the English translation on the front would not involve much administrative effort and would make it easier to marry abroad.

The Federal Ministry of European and International Affairs stated that there has been no streamlining of the certification process between Austria and Sri Lanka, and that "full diplomatic certification" is required. It stated that the Federal Minister of European and International Affairs carries out diplomatic certification pursuant to the Federal Act on Authentications by Consular Authorities (*Konsularbeglaubigungsgesetz*), and that the authentication process within Austria (District Authority administration department and Office of the *Land* Government) is within the sphere of responsibility of the individual *Laender*. In response to the criticisms of "Austrian bureaucracy", the AOB pointed out that this is probably attributable to Austria's federal system and to the lack of a convention between Austria and Sri Lanka regarding the certification process. The federal principle conflicts with the centralist principle in which legislation and implementation are entirely centralised. In Austria, federalism is enshrined in the Federal Constitution, based on the principle of a federal state.

**Fundamental
federalist principle**

The Federal Ministry of the Interior stated that it intends to follow the AOB's recommendation that the box headings in the aforementioned forms should also contain an English translation. It was agreed that the documents will be brought in line with the Annexes of the relevant Conventions of the International Commission on Civil Status, and that the modified forms will then be made available in the Central Civil Status Register for use by registry offices.

**AOB recommendation
implemented**

The AOB welcomed the Federal Ministry of the Interior's swift response and is proceeding on the assumption that the announced adaptation of the two forms will make marrying abroad easier in future.

3.4.9 Content of visa decision – Austrian Embassy Nur-Sultan (Astana)

An Austrian man invited his wife's niece from Uzbekistan to Austria. In his opinion, the Austrian Embassy Nur Sultan acted arbitrarily in rejecting the visa application.

**Allegation that
decision was made
arbitrarily**

During the AOB's investigative proceedings, it was evident that the Austrian man had submitted an electronic letter of guarantee that was deemed to meet the relevant criteria. His wife's niece initially received an improvement instruction from the Austrian Embassy Nur Sultan in which she was asked to submit additional documents. She then submitted additional documents but received a negative decision without preliminary proceedings. The stated grounds for this were that she had not provided evidence of sufficient financial resources to cover living costs for the duration of the planned stay and return to her country of origin, and the justifiable doubts that she was intending to leave Austria at the end of her stay.

The visa applicant submitted a remonstrative appeal in which she drew attention to things including the documents she had submitted. She asserted that she had submitted a confirmation proving she had to return to her job in August 2022. She also stated that she had supplied all documents concerning her income, holiday and salary, along with a confirmation regarding her condominium in Tashkent and the birth certificates of her two minor children who live with her in Uzbekistan. She stated that her aunt's husband was covering all costs during her stay, including the cost of the air tickets and insurance.

Grounds for rejection Subsequently the application was rejected by the Embassy via an administrative notification citing the aforementioned grounds. After quoting the relevant provisions of the Visa Code (Art. 32 (1) (a) (iii) and (b)), the Embassy cited the following grounds for the rejection: the applicant had not submitted a confirmation of wage payments for the last three months, had not provided correct proof of her pension scheme payments for the last six months, and to date had not received a Schengen visa.

Adequate electronic letter of guarantee not duly taken into account The Austrian man submitted a complaint to the AOB, specifically regarding the fact that the Embassy had not duly taken into account his electronic letter of guarantee. He drew attention to his regular income, the house he owns, and his adequate cash resources, and emphasised that he would have covered all expenditures in Austria and for his wife's niece's departure. He was very dismayed that it had been assumed that her intention was to overstay after her visa expired and leave behind her minor children and elderly mother in Uzbekistan.

The Ministry agreed that as the electronic letter of guarantee had been deemed to meet the relevant criteria, "one of the reasons for the rejection, namely lack of financial own resources, was inapplicable". However, it asserted that "other potential reasons for the rejection, for example regarding the assurance that the visa applicant would return to her country of origin" needed to "undergo assessment independently thereof", and that the visa application had "left various questions unresolved". The Ministry also pointed out that the affected individual had been unable to verify information regarding her employment in Uzbekistan, as the submitted confirmation

of pension contributions was from her employer and not from the official Uzbek online system, and that no account statements had been submitted. Furthermore, the Ministry noted that contrary to her assertions, when her application was assessed, no prior stays in the Schengen Area during the last five years could be found and also that she had been unable to prove that information regarding her job was correct. The Ministry pointed out that the visa applicant could submit a new application for a travel visa, and that this would be advisable if there had been a change in the circumstances underlying the application or if suitable proof could be supplied to overcome the earlier concerns. It stated that, in particular, proof would be needed of financial roots in the country of origin and an assurance that the applicant would leave Austria.

In the AOB's legal opinion, the rejection grounds in the Embassy's administrative notification were unfounded. The Embassy's assertion that "evidence of sufficient financial resources to cover living costs for the duration of the planned stay and the return to her country of origin was not provided" made little sense, as an electronic letter of guarantee that met the relevant criteria had been submitted and a fully paid return air ticket were in the proceedings file.

When an assessment is made of an applicant's intention to leave the country at the end of their stay, the general conditions in their country of residence and their personal circumstances have to be taken into account. With that in mind, the AOB drew attention to recent rulings of the Supreme Administrative Court of Austria. For example, in its Ruling dated 5 July 2012 (2011/21/0046), the Supreme Administrative Court of Austria ruled that the very fact that Article 32 (1) (b) of the Visa Code emphasises "justifiable doubts" means one must not make the blanket assumption that a foreign national will (unlawfully) overstay in the Schengen Area after the expiration of their visa and thereby disregard the law on foreign nationals.

Assumption

The proceedings file contained the visa applicant's wage slip from her employer for 2021, proof of condominium ownership in Tashkent and the birth certificates of her two minor children in Uzbekistan and of her mother, along with confirmation of a booked and paid return air ticket. Admittedly, a verifiable booking of a return ticket is not in itself suitable for proving the visa applicant's intent to leave Austria; nonetheless, in the present case she emphasised in particular her strong family ties in her country of origin and provided proof in the form of the birth certificates. The Embassy completely disregarded that evidence, and appeared to have made an unverified assumption that she did not have family ties in Uzbekistan.

Regarding the Embassy's assertion that the visa applicant had provided incorrect information concerning her job, the AOB once again pointed out that there was no need for further assessment of the financial resources covering her financially assured stay in Austria and departure from Austria,

Adequate electronic letter of guarantee obviated need for financial assessment

because the man who had invited her to stay had already provided an electronic letter of guarantee that met the relevant criteria. The Embassy's insistence that she should supply bank statements therefore seemed unjustified. In the AOB's opinion, the supplied evidence of the applicant's salary in 2021, and the proof of condominium ownership in Uzbekistan, constituted proof of a certain economic rootedness in the country of origin, which should have duly been taken into account in assessment of intent to leave Austria.

The AOB also pointed out that in light of the Embassy's seemingly arbitrary decision, the Ministry's advice in its statement of opinion, advising that the visa applicant could submit a new application for a visa, was inappropriate. The AOB asked the Ministry to notify the Embassy about the outcome of the investigative proceedings and the fact that a case of maladministration had been found.

3.4.10 Length of proceedings problematic – Austrian Embassy Islamabad

**Remonstrative
appeal not processed**

A Pakistani citizen submitted a complaint regarding the excessively long duration of proceedings at the Austrian Embassy Islamabad. As a citizen of a beneficiary third country, she was entitled to a visa under Section 15b of the Aliens' Police Act (*Fremdenpolizeigesetz*); however, it was not until January 2022 that the Austrian Embassy Islamabad issued its rejection of her application for a travel visa, which she had submitted in July 2021. She immediately submitted a remonstrative appeal against this administrative notification. The Embassy made no progress in processing the case thereafter, it was stated.

After contacting the Embassy, the Ministry confirmed to the AOB that at the beginning of January 2022 the applicant had decided to contest the Embassy's decision without preliminary proceedings and had submitted a remonstrative appeal in a timely manner. The remonstrative appeal had been recorded but had not been processed, the Ministry stated. The Embassy expressed regret about the error and moved ahead with processing of the case.

**Disagreement over
responsibility**

In another case, a complaint about the Austrian Embassy Islamabad's failure to process a case was received from an Afghan citizen living lawfully as a resident in Austria. In an April 2022 decision, the Upper Austria Regional Administrative Court had granted his wife a Red-White-Red Card plus residence permit. He stated that he had immediately forwarded the decision to the Austrian Embassy Islamabad, so that his wife would be granted an exit permit. However, the Embassy insisted that the Municipal authority of Linz must first contact the Embassy and forward the Upper Austria Regional

Administrative Court decision. The Municipal authority of Linz repeatedly pointed out that evidently the Embassy had already received a copy of the decision and should now issue a border recommendation and exit permit. It was emphasised that the Afghan woman had been in Pakistan for three months and was anxious she might be deported back to Afghanistan if the proceedings went on any longer.

The AOB asked the Ministry to immediately contact the Embassy. Attention was drawn to the months of delay resulting from the Embassy's failure to process the case, and the fact that despite having been granted the residence permit for Austria, the Afghan woman had had to stay in Pakistan for several months and was worried she might be deported back to Afghanistan. It was determined that the Embassy's failure to process the case constituted maladministration.

Risk of forced return to Afghanistan

In the meantime, the Embassy issued a long-stay visa to enable the residence permit to be picked up, and the Afghan citizen is now with her husband in Austria.

3.4.11 Technical problems – Austrian Embassy Tehran

An Iranian citizen was granted a residence permit, and municipal department MA 35 informed her that it was available for pick-up in Austria. In order to be able to attend the pick-up appointment, she applied for a visitor visa.

Her husband, who is resident in Austria, complained to the AOB that he had sent several emails to the Austrian Embassy Tehran requesting that the visa be issued as quickly as possible, and that the Embassy had informed him that due to "technical problems" in Tehran it was currently unable to issue any visas at all. The husband suggested his wife could pick up the visa elsewhere. The Embassy did not respond. The AOB then initiated investigative proceedings.

Violence

The Ministry informed the AOB that it had immediately contacted the Embassy. The Ministry pointed out that operations at the Embassy were temporarily very limited because the internet was down, probably due to the government crackdown against protests in Iran, which meant the notification from the Austrian authority concerning the positive outcome of the residence permit proceedings had unfortunately arrived at the Embassy late. In the meantime, the Embassy had reached a positive decision regarding a new application for a long-term visa (D), to allow the residence permit to be picked up, the Ministry stated. The AOB welcomed this swift response.

Pick-up delayed

3.5 Family and youth

Introduction

In 2022, the AOB handled over 350 cases involving complaints relating to family allowance, childcare allowance and maternity benefit.

ECJ revokes index linking of family allowance

In the area of family allowance, the AOB welcomes the European Court of Justice's June 2022 ruling, which revokes the Austrian provisions on index linking. Under those provisions, which had been in force since 2019, the amount of family allowance for parents whose children live in another EU country had to be adjusted depending on the price level in the member country in question. The AOB criticised this during the review proceedings regarding the Amendment of the Family Allowance Act (*Familienlastenausgleichsgesetz*), and stated that it constituted a breach of EU law. The European Court of Justice has now ruled that the provisions constitute indirect discrimination based on citizenship, for which Austria was unable to present any objective justifications. The legislator responded by revoking (with retroactive effect) the provisions regarding index linking, and established a statutory basis for back payment of family allowance for the group of individuals affected by "downward" indexing (Federal Law Gazette I No. 135/2022). The back payments started automatically in August 2022 and did not require an application. The "upward" indexed additional amounts of family allowance for various countries (e.g. Belgium, France and Sweden) do not have to be paid back.

Constitutional Court revokes repayment provisions in Childcare Allowance Act

The AOB also welcomes the Constitutional Court of Austria's 28 September 2022 ruling (G181/2022 inter alia), which revokes the provisions concerning the obligation to pay back childcare allowance under certain circumstances, which were introduced as supplementary provisions in 2016. Under Section 31 (2) of the Childcare Allowance Act (*Kinderbetreuungsgeldgesetz*), parents must pay back childcare allowance paid to them in error by the authorities, even if there is no way they could have been aware of the error and were not under any obligation to be aware of it. The Constitutional Court does not as a matter of principle see any constitutional objections to repayment provisions of this kind if they are merely oriented to objective circumstances, and in fact there are provisions of that kind in the area of family allowance. However, in the case of childcare allowance, the Constitutional Court deemed that there are special circumstances, namely the legislator's goal of recognising and partially compensating for the parents' provision of childcare. That provision of care places constraints on the parents' professional life and thus on their income, and childcare arrangements cannot be reversed in the event of an error made by the authorities of which they were unaware. The Constitutional Court sees no objective reason why parents should bear the risk of an error by the authorities. The revoking of the provisions takes effect

at the end of October 2023. The AOB will observe how it is implemented by the authorities.

Another positive development is the Inflation Relief Package (Federal Law Gazette I No. 174/2022). Under this package, effective 1 January 2023, childcare allowance, the family time bonus, family allowance, the multiple-child supplement and child tax credit will be adjusted each year based on inflation. For 2023 that means an increase of 5.8%. After a period of many years during which there were no index-linked adjustments based on inflation, this long-term measure was urgently needed.

AOB welcomes index-linked increases in family benefits

It is encouraging that following the AOB's intervention, various errors by the authorities were corrected. For example, in the case of a Burgenland woman, a compensation payment for family allowance (which had already been granted) underwent further investigation. It became evident that for a period of 1 1/2 years, family allowance benefits in Slovakia had been deemed applicable, even though the Slovak authorities acknowledged that they had never been paid to the mother. The excessively large amounts deemed applicable were corrected, and the mother received back payments accordingly.

Error corrected and back payments made thanks to AOB's intervention

When a 24-hour carer stopped working in Austria, she reported this to the Tax Authority Austria in the proper manner. The Tax Authority Austria then demanded that she pay back the family allowance she had received for the period during which she was working. The error was corrected and the woman received back payments accordingly.

Due to the long duration of cross-border proceedings regarding childcare allowance (see Section 3.5.6. for further discussion of this topic), and because she could not be co-insured under a family member's policy, a mother had to obtain her own insurance through public health insurance. She subsequently had to wait several months for reimbursement of the amounts she had paid for this. After the AOB intervened, she was immediately refunded a total of EUR 3,800. It was evident that the authority had not received enough information to be able to do this automatically.

A young man who is doing an apprenticeship as part of an on-the-job qualification programme run by Public Employment Service Austria was refused family allowance. The AOB was able to prove that the programme constituted vocational training as defined in the Family Allowance Act, which means he is entitled to family allowance. The administrative notification rejecting his claim was revoked and he received back payment.

By law, persons who have insurance coverage from more than one provider are entitled to stipulate in their application which health insurance provider will be responsible for childcare allowance. However, in practice this option is not available if one submits the application online. A woman had submitted

her application online to the Austrian Public Health Insurance Office (ÖGK). However, it was processed by the Social Insurance Institution for the Self-Employed (SVS), which meant she was responsible for paying insurance excesses. The Federal Ministry for Women, Family, Integration and the Media alleged that it was not possible to correct this.

3.5.1 Family allowance processing time still lengthy in 2022

Problem exacerbated by inflation

Relative to 2021, there was a drop in the number of complaints about lengthy processing times for granting family allowance, but the AOB nonetheless handled around 110 cases where families had to wait for several months before receiving family allowance. The backlog at the Tax Authority Austria was a consequence of the COVID-19 pandemic. For the period up to March 2021, the benefit was paid automatically, without the applicant having to submit supporting documents, but once those provisions expired, the Tax Authority Austria had to process around 200,000 responses from applicants. Organisational changes as part of the Tax Authority Austria reform were probably another contributory factor. The media reported that the backlog had been processed by the autumn of 2021, but in 2022, the AOB received numerous complaints from parents. The situation was exacerbated by the general effects of inflation. The inflation rate has more than trebled since 2021, with a 14.5% increase in the average price of what's referred to as a mini-basket (a typical weekly purchase with consumer goods and services including fuel), following an above-average increase in 2021 (5.7%). As a result, parents are increasingly reliant on family benefits, and the relatively long wait times at the Tax Authority Austria, in conjunction with the aforementioned sharp increase in costs, caused dismay among those affected.

Delay in granting higher-tier family allowance

In one case, higher-tier family allowance for a girl with Down syndrome was not disbursed until one year after the application was submitted. The reason given by the Tax Authority Austria was that the case involved cross-border EU subject matter. However, it was evident from the investigation that important procedural steps – such as assigning the Ministry of Social Affairs Service (*Sozialministeriumservice*) the task of preparing an expert report – were not carried out until the AOB intervened. The Tax Authority Austria apologised for the lengthy proceedings.

For many individuals affected, there were delays in family allowance extensions in cases where an application was required, e.g. because an age threshold had been reached, or due to a change in educational status, or because the end of a limitation period had been reached. In one case, a Styrian man waited nine months until the benefit was disbursed again for his two children; in another case involving an applicant who works as a carer in Austria, processing of her case took a total of nine months.

As family allowance is a prerequisite for the granting of childcare allowance, in some cases the individuals affected had to also wait for their childcare allowance. For one family from Vienna, this caused difficulties with public health insurance coverage for their baby. This is always problematic in cases where coinsurance under the coverage of the other parent is not feasible. Thanks to the AOB's intervention, seamless public health insurance coverage was provided, and family benefits were swiftly granted.

Problems with childcare allowance and public health insurance

Just as in 2021, multi-child families were particularly affected in 2022. One single-earner father of three children had to urgently apply for family allowance in January 2022, as his employer was no longer paying the bonus payment for families and his savings had already been used up. The benefit was not disbursed until August 2022. The authority blamed the delay on the applicant's failure to provide supporting documents, but in actuality he had submitted the supporting documents in February 2022. Processing of his case continued for a further five months until the family allowance was eventually disbursed.

Multi-child families affected in particular

The AOB also received complaints from young people who had recently moved out of the parental home. Family allowance is particularly important for such individuals, especially given the general impact of inflation. For one young man, family allowance was not disbursed until over five months had elapsed after he moved out from his parental home. He had applied for the benefit for himself due to the lack of parental maintenance contributions.

In most cases where the AOB received a complaint, processing of the case was eventually completed shortly before the six-month deadline, after which an appeal can be submitted for breach of the duty to reach a decision. That deadline in itself tends to cause dismay among families affected, who generally take the view that it is too long. The AOB hopes that proceedings will be further speeded up next year.

Processing completed shortly before six-month deadline

3.5.2 Problems with granting of higher-tier family allowance

In 2022, the AOB handled more than 20 cases relating to higher-tier family allowance. Affected families often have to spend significant sums on therapy, care and aids and are therefore particularly impacted by delays in the processing of cases. Moreover, it can often be difficult to supply proof of the prerequisites for higher-tier family allowance, particularly regarding the chronological aspects of the onset of the disability and permanent incapacity for work. The incremental amount (2022: EUR 155.90 per month) on top of family allowance is only payable for grown-up children in cases where "the onset of the disability occurs before the person turns 21 or during subsequent vocational training and in all instances no later than the person's

Chronological aspects of disability often difficult to prove

25th birthday, as a result of which the person is permanently unable to maintain themselves" (Section 2 (1) (d) of the Family Allowance Act).

Autism spectrum disorders

Particularly in cases where the individual suffers from a mental disorder (e.g. individuals who are on the autism spectrum), symptoms are sometimes present for many years, yet a diagnosis with demonstrable findings may not come until later. Autism spectrum disorders are serious developmental disorders that involve, among other things, reduced interest in social contact and reduced awareness of social situations. There may also be speech-related symptoms or constraints, particularly in speech development or the practical use of speech. On the autism spectrum there are various symptoms, characteristics and degrees of severity.

Correct diagnosis often comes late

The AOB was contacted by the mother of a 17-year-old girl with early childhood autism. A diagnosis was eventually received and higher-tier family allowance was granted one year later. The girl had, however, suffered from the disorder since childhood: she displayed social anxiety, learning difficulties and school problems, and had had to repeat one year of primary school. As a child she was given occupational therapy and speech therapy, but because the correct diagnosis had not at that point been received, there were no historic findings for use as supporting evidence.

According to Supreme Administrative Court of Austria rulings, in such cases the applicant has an increased duty to collaborate. If the situation relates to periods in the past, the person preparing an expert report has to rely on various indications, particularly existing findings, when seeking to determine the date of onset of serious disability. The burden of proof therefore lies primarily with the applicant, who must clearly and unambiguously demonstrate the accuracy of the facts. The precise nature of the disorder and the details of the individual case will always be a key factor, as is evident from a recent Federal Tax Court decision. The case involved a young man with Asperger's syndrome (a variant of autism). Because he was unable to submit any findings from the period before he turned 20, the Tax Authority Austria refused to grant higher-tier family allowance. The Federal Tax Court's view was that given the nature of the disorder, the absence of documentary evidence – a consequence of the fact that the young man and his parents had previously shown no interest in medical support – was not a decisive aspect of the case. Instead, the court felt that the young man's well-documented life, with interrupted training and a few short-lived attempts at working, were evidence of permanent incapacity to work that stretched back into his younger years. The family was therefore awarded higher-tier family allowance.

Tax Authority Austria demands repayment of EUR 6,000 of family allowance

In another case, a mother from Upper Austria was asked by the Tax Authority Austria to pay back EUR 6,000 of higher-tier family allowance that she had received for her son. This case was presented by the AOB on the

Bürgeranwalt ("Advocate for the People") television programme. The higher-tier family allowance had been granted mainly because her son had been diagnosed as being on the autism spectrum. In July 2022, a Ministry of Social Affairs Service expert report downgraded the degree of his disability to 30% and stated that he was not permanently incapacitated for work. The woman pointed out that her son's health had deteriorated rather than improved: after finishing his schooling, he had attempted an apprenticeship but had abandoned it after two months; he was not living independently; and he was very withdrawn and unable to manage his affairs on his own, as he suffers from acute social anxiety. The person preparing the expert report stated that he had been unable to specify the degree of disability on the autism spectrum because there were insufficient specialist findings – and yet he had nonetheless declared that the woman's son was not permanently incapacitated for work. In the AOB's opinion, before attempting to reclaim the benefits, the authority should have obtained further findings from a (specialist) expert.

In the complaints it receives, the AOB often finds (as in the case described above) that the authorities assign the task of preparing an expert report to a general practitioner rather than a suitable specialist. In the case described above, it would have been more appropriate to assign the task to a specialist neurologist or psychiatrist. As of the publication date of this Annual Report, the proceedings regarding the mother's appeal were still pending.

There was a positive outcome in the case of a young man who suffered a serious disability following an accident and was receiving a disability pension from the Austrian Pension Agency (*Pensionsversicherungsanstalt*). Initially, the Tax Authority Austria, having received an expert report from the Ministry of Social Affairs Service, decided that although the young man had suffered a 100% decrease in his capacity for gainful employment, this was not permanent; the Tax Authority Austria thereupon rejected the application for higher-tier family allowance. After the AOB intervened, a new expert report was prepared. This report confirmed that the young man was permanently incapacitated for work. Higher-tier family allowance was granted with four years' retroactive effect, and the young man is still receiving it now.

AOB intervened: four years' back payment

There have been positive changes in the area of higher-tier family allowance. Effective in 2023, the benefit will be adjusted each year based on inflation. Another positive change is that higher-tier family allowance will no longer automatically count towards care and nursing allowance. Moreover, party rights have been strengthened: in future, expert reports will be sent to the applicant automatically. Another positive step is that for streamlining purposes and to prevent duplication of effort, processing of higher-tier family allowance cases will in future be coupled with the processing of a disability pass (see Federal Law Gazette I No. 226/2022). Effective 1 March 2023, a disability pass can now be used as proof of significant disability when

Annual adjustment based on inflation; new procedural rules

applying for higher-tier family allowance. This means that all that is needed is the doctor's examination for the disability pass, i.e. the applicant does not have to submit any additional findings. In the AOB's opinion, evidence should be supplied by a suitable specialist with expertise in the specific disorder or disability.

The AOB has in the past recommended that expert reports should be sent by the SMS to the Tax Authority Austria, so that they can be checked to ensure they are conclusive and comprehensible. The AOB's recommendation has not been implemented, however. Despite the new procedural rules, after processing for a disability pass has been carried out, only specific metadata (degree of disability, date of onset of incapacity for work and other metadata) is sent to the Tax Authority Austria.

3.5.3 Reform of Mother-Child Booklet needs to eliminate obstacles to claiming childcare allowance

EUR 1,300 has to be paid back if proof is not submitted

In 2022, the AOB once again received complaints from a number of parents who had had to pay back EUR 1,300 per parent having failed to send proof of the required Mother-Child Booklet medical examinations to the health insurance carrier in a timely manner, despite having had all the Mother-Child Booklet examinations properly carried out.

The AOB has been calling for a legislative amendment for a long time. It is certainly justifiable that parents who fail to have the Mother-Child Booklet examinations properly carried out should have to pay back a significant part of their childcare allowance, as these examinations are an important part of preventive medicine. However, it is not justifiable that the same penalty should apply to parents who have merely forgotten to send proof of examinations in a timely manner. Moreover, parents have often pointed out that they did send proof of examinations but the health insurance carrier could no longer find them. In other cases, although the proof of examinations was sent in a timely manner, there were other shortcomings, e.g. a page of the Mother-Child Booklet was missing, or the paediatrician had failed to sign or date the proof of examinations. The AOB takes the view that it makes no sense that in these cases EUR 1,300 of childcare allowance per parent has to be paid back.

Public health insurance provider usually has proof of examination on file

That is particularly true for the following reason: if the examinations are performed by a physician with a contract with public health insurance offices, and the examinations are charged to the health insurance carrier, the health insurance carrier will in any case already have proof of examinations on file. In other words, under the current legal situation, sanctions apply even

though one is submitting confirmation to an office that has already received such confirmation.

In November 2022, the government passed a resolution concerning reforms to the Mother-Child Booklet, with the goal of expanding it into a digital Parent-Child Booklet and adding additional benefits. The AOB welcomes this plan and urgently recommends that the obstacles to childcare allowance should be eliminated as part of the reforms.

AOB recommends changes

3.5.4 Hardship extension upon death of one parent not applicable to all

The legislator's intention is to encourage parents to share childcare as partners. Childcare allowance in the model with the longest duration can therefore only be fully utilised if both parents share the task of childcare. In 2020, the Austrian Court of Audit ruled that the aforementioned goal is not being achieved, and that the distribution of childcare is still extremely inequitable.

There are also cases where the parents have planned to share childcare, but due to serious unforeseen circumstances this becomes impossible, e.g. because one parent dies. For such situations, the legislator aims to provide support via the hardship extension. Under Section 5c of the Childcare Allowance Act (*Kinderbetreuungsgeldgesetz*), if, due to a death, care facility stay, custodial sentence or domestic violence, one parent cannot provide childcare as planned, the other parent is entitled to receive childcare allowance in a proportionate amount for a longer period, for a maximum of 91 days. This only applies to parents who receive lump-sum childcare allowance. If the parents receive income-based childcare allowance, the hardship extension does not apply.

The young mother of a 10-month-old son contacted the AOB after her partner, the father of their son, died suddenly. Following this very challenging life event, she had discovered that she – unlike families who receive lump-sum childcare allowance – was unable to extend her childcare allowance by the number of months that her deceased husband could no longer utilise.

Father of a young baby died

The woman felt she was being treated unjustly compared with families who receive lump-sum childcare allowance. She was suddenly having to look after her baby every day on her own, and had to immediately go back to work to provide for herself financially and obtain health insurance for herself and her child.

No hardship extension for mother

In the AOB's opinion, there is no reason why parents who receive income-based childcare allowance should be ineligible for the hardship extension. Regardless of which childcare allowance model the parent chooses, if

AOB recommends change in law

their partner dies, enters a care facility, is serving a custodial sentence or perpetrates domestic violence, the parent will find themselves in a challenging and unforeseen situation; in such situations the hardship extension for childcare allowance can provide support. It should therefore be applicable to all parents. For children born in the period up to February 2017, that used to be the case; however, a legislative amendment was made without any reasons being given. The AOB therefore recommended to the responsible Federal Minister for Women, Family, Integration and the Media that the hardship extension should be reintroduced for parents who receive income-based childcare allowance.

However, the Minister rejected the AOB's recommendation. The reasons she gave were that income-based childcare allowance involves larger amounts for high-earning parents, and that a hardship extension is therefore unnecessary. The AOB persisted with its recommendation and brought the matter to the attention of the media. The Minister thereupon stated that she would look into the possibility of a legislative amendment.

3.5.5 Rule of law concerns over rejection of income-based childcare allowance

Rejection with no information about legal recourse

The AOB is frequently contacted by parents after they have received an informal email from their health insurance carrier stating that they are not entitled to income-based childcare allowance and instead should switch over to Special Benefit 1, which is much lower. The informal email does not contain any information about the legal consequences or legal recourse.

These messages from authorities fail to explain that citizens can take legal action to have the authority's legal opinion reassessed in court. These messages also fail to explain that during such legal proceedings, citizens are entitled to receive their childcare allowance in the form of Special Benefit 2. As the individuals affected have frequently pointed out to the AOB, these messages leave families with the impression that they have to sign the form within 14 days and switch to the much lower Special Benefit, otherwise they will receive no benefit at all.

In May 2018, a father – who lives with his family in Austria and works in Germany – submitted an application for income-based childcare allowance. More than two years later, the Austrian Public Health Insurance Office (*Österreichische Gesundheitskasse*) sent an email informing him that he was not entitled to income-based childcare allowance and instructing him to switch over to the Special Benefit within 14 days, otherwise his application would not undergo further processing. The man did not comply with the instruction and contacted the AOB. During the investigative proceedings, it became evident that the rejection of his application for income-based

childcare allowance was incorrect. The man thereupon received the benefit. This would not have been possible if he had complied with the Austrian Public Health Insurance Office's instructions and switched to the Special Benefit.

Another case involved a woman who was living in Austria and working in Germany. Six months after she submitted her application, the Austrian Public Health Insurance Office sent her an email instructing her to switch over to the Special Benefit as she did not fulfil the prerequisites for income-based childcare allowance. The email stated that if she did not comply, an administrative notification rejecting her application would be issued and she would receive no payment at all.

Absence of further options for correcting an authority's mistake

In the AOB's opinion, this administrative practice raises serious concerns with regard to the rule of law. The basic principle of the rule of law in Austria is that when an application is rejected, an administrative notification that states the grounds and is legally contestable must be issued. For that reason, court rulings and legal scholarship have stated that if a childcare allowance application is rejected, in all instances an administrative notification must be issued. If an income-based childcare allowance application is rejected, the parent can contest the administrative notification by taking legal action before the Labour and Social Court or can apply for the Special Benefit (*Bürger-Ehrnhofer, Childcare Allowance Act and Family Time Bonus Law (Kinderbetreuungsgeldgesetz and Familienzeitbonusgesetz)*, p. 266, 292; see also Supreme Court of Justice 20 November 2018, 10 ObS 112/18w).

Administrative practice does not, however, proceed on that basis. The AOB has therefore contacted the responsible Federal Minister for Women, Family, Integration and the Media several times. She stated that if a prerequisite for income-based childcare allowance is not met, the affected parent should first be given the option of applying for the Special Benefit, and that only then – if the parent has stated that they do not want the Special Benefit – should an administrative notification be issued rejecting the application. The parent can then take legal action against the administrative notification. The Minister stated that the parent should in any case already be aware of this, even without receiving concrete information.

The AOB basically welcomes authorities' efforts to act without bureaucracy, but this must not lead to a situation where parents are deprived of their legal options due to lack of information. All parents must have the option of ensuring that a rejection of their income-based childcare allowance application can undergo further assessment and can be corrected (if applicable). The AOB therefore recommends changes. The Federal Minister for Women, Family, Integration and the Media has stated that a possible approach would be to make improvements to the application form.

AOB recommends changes

3.5.6 Various problems with family benefits in cross-border situations

The AOB frequently receives complaints relating to families in cross-border situations where one parent lives or works outside Austria in another EU country and the family encounters problems with family benefits.

In 2020, after years of unsuccessful efforts to bring about improvements, the AOB unanimously declared that long proceedings in many cases and imposing excessive requirements on numerous families constituted cases of maladministration. Several court decisions and a report by the Austrian Court of Audit have concurred with the AOB's criticisms. In most of the cases, the AOB was able to bring about a decision: awarding of the benefit, or an administrative notification rejecting the application, which could then be contested in court by the affected individuals.

Lengthy proceedings and excessive requirements

Nonetheless, in 2022, the AOB once again received over 20 complaints from affected parents concerning excessively long proceedings and excessive requirements imposed by Austrian authorities in childcare allowance cases. In many instances, problems were also encountered when obtaining public health insurance coverage for parents and children. In one case, the authority had still not issued a formal decision eight years after the application was submitted.

Complaints still coming in

The mother whose case was discussed with the responsible Ministry section head on the television programme *Bürgeranwalt* in autumn 2019 still has not received any childcare allowance. Her daughter is now eight. Over six years after submitting an application, in April 2021 she received an administrative notification from the Austrian Public Health Insurance Office rejecting her application, and then took legal action. The Labour and Social Court that has jurisdiction upheld her legal action in summer 2022 and awarded her the full childcare allowance that she had applied for. The decision is not legally binding, however. The Austrian Public Health Insurance Office has brought an appeal against it before the Higher Regional Court.

In her statements of opinion, the Federal Minister has repeatedly emphasised that with the introduction of EU-wide electronic communication between authorities, proceedings are expected to speed up. That is not necessarily the case, however, as is evident for example from a complaint where the Tax Authority Austria did not respond to an enquiry from a German authority concerning family allowance until two years had passed and the AOB had intervened.

Equality of treatment under EU law

Problems often arise with equality of treatment, which is required under EU law. When an assessment is made as to whether there is an entitlement to family benefits, gainful employment in another EU member state should be

treated as equivalent to domestic gainful employment. However, in practice that is not always the case.

For example, a doctor living in Austria and working in Germany applied for income-based childcare allowance; her application was rejected because in Germany she had opted out of statutory pension insurance and chosen a professional pension scheme. However, because insurable employment is still present even in the event of an opt-out, in the AOB's opinion this does not fulfil the EU requirements.

Opting out

Parental leave should be treated as equivalent to gainful employment. In Austria, this equality of treatment is limited to the length of statutory parental leave, namely two years. This raises problems under EU law, as has been pointed out in legal literature ("Sunday, Union law, constitutional law and procedural law problems relating to the 2016 Amendment of the Childcare Allowance Act and the Family Time Bonus Law", ASok 2017, 2). A single mother from Austria had to extend her maternity leave by several months due to lack of childcare options. After the child's second birthday, she received no family benefits, though no grounds were provided for this. The AOB was informed that she should apply for the benefits in Germany, where the father lives. She did so, but without success: the German authorities stated that the matter should be handled by the Austrian authorities.

Extension of maternity leave

Mothers from Austria who before the birth of a child have been in marginal employment or receiving emergency financial aid due to a long period of unemployment do not receive any primary family benefits from Austria. They are merely informed that they should submit their application in the EU country in question. This raises concerns with respect to EU law.

Marginal employment and emergency financial aid

Affected individuals – who are often single mothers from Austria with no contact with the father of their children living abroad, and who do not speak the language of that country and therefore do not know how to submit an application there – may have major problems in supporting themselves if they do not receive childcare allowance.

Concrete problems faced by affected single parents

3.5.7 School transportation on dangerous route

In 2022, the AOB received a number of complaints relating to free transport for schoolchildren who use non-scheduled transportation. A woman stated that her 10-year-old daughter had up until that time been picked up from in front of their house and taken to school. However, now that a scheduled bus was in operation, the school taxi was no longer picking her up, which meant she had to walk 700 metres, including crossing the B69 (*Südsteirische Grenzstrasse*), to reach the bus stop. The mother was concerned for her daughter's safety, as the B69 is a very busy road with numerous bends with

Route to school across very busy road

poor visibility, and it does not have street lighting, pavements or pedestrian crossings.

If no suitable public transport is available in a specific region, the responsible Federal Minister can draw up contracts with transportation companies to transport pupils to school (free non-scheduled transportation). As a matter of principle, public transport is prioritised in free transportation for schoolchildren, and if free non-scheduled transportation is to be set up, the distance to school must be at least two kilometres. If the route to school is dangerous, the minimum distance can fall below this threshold.

Route to school too dangerous

In the aforementioned case, public transport was available, but in the AOB's opinion the route to school was too dangerous. Following an on-site investigation, the Free Transportation team at the Tax Authority Austria declared that the road, with its bends and stretches of poor visibility, is unreasonable for the girl. She is therefore now being picked up and transported to school.

In the case of the son of a farming family in upper Styria, non-scheduled transportation for schoolchildren was already set up in the region. However, the 2.5-kilometre detour to the family farm was not feasible in the mornings due to time constraints and limited capacity. In this case there is basically no legal entitlement to transportation to school. However, since the route to the school bus is over 2 kilometres, the parents are entitled to reimbursement of costs, for which they can apply through school transportation benefits.

3.6 Finances

Introduction

In 2022, the AOB received 891 complaints relating to the Federal Ministry of Finance. That represents a significant increase in the number of complaints received, and is mainly due to the numerous complaints relating to the Energy Costs Credit.

Significant increase in number of complaints

Under the amendment of the 1986 Federal Ministries Act (*Bundesministeriengesetz*) (Federal Law Gazette I No. 98/2022), the Federal Ministry of Finance's sphere of responsibility has been expanded to include digitalisation, including public administration of services for and interaction with citizens and corporations, and regulation of postal and telecommunications services. As a result, complaints were received in those areas, for example concerning requirements regarding GIS fees (radio and TV licence fees), mobile phone signatures, the Citizen Card and its successor ID Austria (currently in development).

Sphere of responsibility broadened

In terms of the existing typical areas of investigation in finances administration, there were no changes. The AOB criticised delays in proceedings at the Tax Authority Austria and the Federal Tax Court, and refusals to recognise extraordinary costs and other deductible amounts and exemption amounts.

Interaction with the Federal Ministry of Finance is always positive, and the complaints received by the AOB were resolved swiftly and comprehensively.

3.6.1 GIS Fee Information Service Ltd.

Resolution of complaints concerning radio and TV licence fees does not lie within the AOB's sphere of responsibility in principle. Given the large number of complaints, the AOB forwards them to the Board of Directors of the GIS Fee Information Service Ltd. (*Gebühren Info Service GmbH*), the agency responsible for administering the fees for the public broadcaster ORF, and asks them to provide a statement of opinion and to contact the licence fee payer directly. As in previous years, the Board of Directors was very thorough in meeting the AOB's requests.

A large number of the complaints were about the basic obligation to pay the licence fees. There were also two significant areas of complaint: communication with GIS field staff and their overall attitude to interaction. This may be attributable to a lack of awareness of the authority that GIS staff hold, and also to linguistic difficulties with comprehension. In the second of these areas, problems related to NOGIS devices and the duty to

Licence fees payable

verify that receiver devices do indeed have no tuner or antenna connection (or no longer do).

3.6.2 Austrian Postal Service

Levying of various charges

In 2022, the AOB received a number of complaints about the Austrian Postal Service (*Österreichische Post AG*) and its levying of various charges on items sent from non-EU countries. Most citizens are unaware of the difference between the levying of import turnover tax, customs duty and import duty by the Austrian Postal Service.

The AOB informed the affected individuals about the legal position, which changed in July 2021. Effective 1 July 2021, the EUR 22 exemption limit no longer applies. This means that for every imported consignment or item of goods sent from a non-EU country, starting with goods valued at 1 cent, 20% import turnover tax must be paid. Customs duty is only payable on amounts over EUR 150. For private gifts, no charges apply below EUR 45. The customs declaration and payment of the import turnover tax are processed by Austrian Post. For costs associated with the gathering and provision of electronic data, Austrian Post charges a fee in the form of import duty (this applies to private gifts as well), which is between EUR 5 and EUR 36, depending on the goods and product.

Reimbursement as gesture of goodwill

Although the AOB does not have investigative powers over the Austrian Postal Service, in some cases the AOB was able to arrange reimbursement of charges as a goodwill gesture, for example in cases where gifts were sent with incorrect declarations.

Unsatisfactory or delayed deliveries

Other complaints related to unsatisfactory or delayed deliveries by the Austrian Postal Service. It admitted that this was due to acute personnel shortages resulting from accumulated sick leave. The Austrian Postal Service responded in a customer-friendly manner to the complaints brought by the AOB, and in many cases offered a solution to the affected persons as a gesture of goodwill.

The Austrian Postal Service faced a challenging situation when in September and October 2022, additional to ballot papers, also the climate bonus (*Klimabonus*) was sent via RSa return receipt letter. This placed a heavy burden on postal service operations overall. In one case, a citizen was sent a return receipt letter by the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, but the letter was not handed over to her, despite the fact that she showed photo ID. Because her post-nominal academic title was not shown in the address on the return receipt letter, but was shown on her photo ID, the post office refused to hand over the letter; its stated reasons were that the address on the letter and the photo ID did not match.

In its letter to the AOB, the Austrian Postal Service correctly acknowledged that a title does not constitute an identifying characteristic, and stated that the branch and sales management team had been duly notified and that employees would receive instructions about correct procedure. The woman informed the AOB that she had duly received the return receipt letter with her climate bonus.

3.6.3 Digitalisation – electronic serving of documents

A man stated that he had been issued penalty orders electronically. He pointed out that since he had been unaware that he was registered for electronic document delivery, he had only found out about the penalties when enforcement proceedings were initiated and his pension became subject to execution.

The AOB was able to verify that before 1 December 2019 the man had been registered with an electronic document delivery service. Since a Citizen Card had to be used to register for this service, that constituted consent to receive documents, and this was demonstrably documented via the Citizen Card and mobile phone signature. The man was therefore reliably stored in the deliverable recipients directory (investigation and delivery service). When electronic document delivery underwent reorganisation, that directory was replaced by the Participants Directory defined in Section 28a of the Service of Documents Act (*Zustellgesetz*). The investigation and delivery service's stored data regarding its customers was electronically migrated to the Participants Directory. Those individuals are therefore deemed participants in the Participants Directory.

The man was migrated to the Participants Directory on 1 December 2019. The AOB explained to him that as of the date of registering for electronic delivery, and also under current law, participants in electronic delivery were and are obligated to immediately report any changes (e.g. email address) to the electronic delivery service and the Participants Directory. Thus, the serving of the documents to the man was not unlawful.

Obligation to report any changes

3.6.4 Energy Cost Credit

The Energy Costs Credit Act (*Energiekostenausgleichsgesetz*) (Federal Law Gazette I 37/2022) entered into force on 9 April 2022. The goal of this legislation was to relieve the burden on households, given the sharp increase in energy costs. In the period following the end of April 2022, vouchers were sent to all addresses at which at least one person is registered as having their main residence, as per the Central Register of Residents.

Prerequisite for entitlement Every natural person in Austria who pays for electricity for a household under an electricity supply agreement, and who was registered as having their main residence in that household between 15 March and 30 June 2022, and whose income does not exceed a specified threshold, is entitled to the credit. Only one voucher may be redeemed per person. Under the Energy Costs Credit Act in its original form, the deadline for applying for a blank voucher was 31 August 2022; the deadline for submitting a completed voucher was 31 October 2022.

Completed vouchers submitted online or by post undergo initial checking of the information concerning the person's main residence and existing electricity supply agreement. Once the initial checking has been performed, the voucher is forwarded to the relevant electricity supplier, who then applies the EUR 150 credit to the next annual bill or end-of-period bill.

Hotline was the only contact method The Ministry published FAQs regarding the Energy Costs Credit, and also set up a telephone hotline. There were no other contact methods (e.g. email or *FinanzOnline*).

Among the population, there was widespread interest in receiving the Energy Costs Credit. However, media ads about the campaign did not contain precise details about the legal prerequisites for receiving the credit.

Legislation caused difficulties From the first wave of complaints, which were received by the AOB in the period following mid-May 2022, various issues were evident. It was clear that there were several groups of persons who, despite bearing electricity costs themselves, were unable to receive vouchers, as they did not have their own electricity supply agreement. In general, these were individuals who live in multi-generational households, which are common in rural areas. In these situations, several generations live as separate households under one roof, and are supplied with electricity jointly under a single electricity supply agreement. Regardless of whether or not a sub-meter has been installed for measuring proportionate usage, only the party who has signed the electricity supply agreement with the electricity supplier can submit a voucher and receive EUR 150. Also affected were households in which relatives had signed the electricity supply agreement, usually on behalf of elderly parents.

The problem also affected assisted living accommodation, student accommodation and allotments. Under such circumstances, electricity usage is usually measured using sub-meters; the operator or administrator often draws up an electricity supply agreement for the entire building or allotment. The residents, despite the fact that they bear electricity costs that are passed on to them, were left empty-handed by the campaign. Also unable to participate were individuals in apartments with agreed flat-rate rent or rent with heating included, despite the fact that they refund electricity costs to landlords.

The AOB recommended to the Ministry that further consideration was needed, particularly regarding the fact that only a small group of persons was entitled to receive the credit. The AOB argued that at least those who have a sub-meter installed by the electricity supplier should also be entitled. The AOB's recommendation was based on the principle of equality, which ought to apply to subsidies.

The Ministry refused. It argued that the campaign was being implemented as rapidly as possible and with as little bureaucracy as possible. It pointed out that in order to relieve the burden of energy costs in a targeted manner, claims had to be linked to an own electricity supply agreement, to prevent unlawful multiple applications or multiple bonuses.

Ministry refused to widen the pool of eligible participants

As a result, a significant proportion of the population did not receive any relief from increased electricity costs. The AOB then consulted the leaders of the parties represented in Parliament, but the legislator took no action to improve the situation via legislative amendment.

The second wave of complaints regarding the Energy Costs Credit, which were received by the AOB in the period following the end of June 2022, were about how the credit was applied. Individuals who had not received a voucher despite being entitled to one expressed criticism. Given that the deadline for submitting a request for a blank voucher was rapidly approaching (31 August 2022), the affected individuals were worried they would be unable to participate in the campaign if they were not in possession of a voucher. As the envelopes containing the vouchers were not addressed to individuals by name, but rather to a given household at a specific address, numerous envelopes did not arrive or were delivered to the wrong recipient.

Poor implementation

The AOB also received complaints that the telephone hotline, which initially was the only way to apply for a blank voucher, was always overstretched, with wait times of over half an hour, or was unreachable altogether. There was also criticism of the fact that contrary to what was stated in the FAQs, it was not possible to apply for a blank voucher via the Energy Costs Credit website.

Hotline overstretched

It was not until the end of July 2022 that the Ministry finally offered the option of applying online. However, mobile phone signature authentication was required for this, and this was too great an obstacle for some elderly people.

No voucher without mobile phone signature

The Ministry also agreed to increase the number of employees working on the telephone hotline. Because training was required for this, this step did not immediately improve the situation, which many affected individuals found unacceptable and annoying. The AOB therefore agreed to supply the Ministry with the names of all individuals who had complained to the AOB about not having received a voucher. The Ministry then granted them the credit.

Initial checking took a long time The third wave of complaints, which were received by the AOB in the period following July 2022, were about the length of time it took to perform the initial checking of vouchers. According to the FAQs, initial checking would take around two weeks after a voucher was received, but in practice it took considerably longer. Initially this was due to technical problems, which in some cases meant vouchers were unjustifiably rejected. There were also delays of up to three weeks in opening and scanning in vouchers sent in by post. However, no changes were made to the FAQs.

The delays in initial checking of vouchers were also due to the number of vouchers being returned. The Ministry was evidently inadequately prepared for this. Another reason was that in many instances the information provided was unverifiable. The reasons for this were: the person submitting the voucher had received and used a voucher not intended for them; or when filling out the voucher they had made mistakes, particularly with the 33-digit meter number.

In some instances, vouchers were rejected because the outcome of initial checking was negative. In other instances, the credit was not duly reflected on the annual electricity bill. The overall result was widespread irritation and uncertainty. The AOB received angry complaints from individuals stating that the matter could not be clarified via the telephone hotline because it was still unreachable. Individuals who sent in the voucher by post were worried their application would not be processed before the deadline.

The AOB agreed to forward to the Ministry the problematic cases it received, to allow clarification of the precise reasons for the rejection of a voucher, correction of incorrectly entered information, or so that a fresh blank voucher could be sent out.

Deadlines extended In view of these difficulties, in Federal Law Gazette I No. 160/2022 (27 October 2022) the deadline for applying for a blank voucher was retroactively extended from 31 August 2022 to 31 October 2022, and the deadline for submitting a completed voucher was extended to 31 March 2023.

AOB voiced criticism Overall, the AOB found the legal basis and implementation of the Energy Costs Credit unsatisfactory. The AOB has seldom received so many complaints of this kind in this area of finances. As of the date of publication of this Annual Report, complaints of this kind are still coming in every day.

3.6.5 Turnover Loss Bonus not payable to German bank account

Application not possible with German account number A man from Graz complained to the AOB that he was unable to apply for Turnover Loss Bonus II for September 2021 because the relevant electronic form would not accept his German bank account number. The error message

stated that the IBAN had to start with the AT country designation. This was a breach of the EU Regulation regarding SEPA (Single Euro Payments Area), the man stated. He also pointed out that neither the Ministry nor the Federal Agency for COVID-19 Financing (*Covid-19-Finanzierungsagentur des Bundes GmbH, COFAG*), a company founded for supporting the Austrian economy in times of the COVID-19 pandemic, had offered him any help with his problem: he had merely been advised to get an Austrian bank account.

The technical specifications and commercial requirements for credit transfers and direct debits in euros are set forth in Regulation (EU) No. 260/2012 of the European Parliament and of the Council of 14 March 2012. Under Art. 9 of the Regulation, "a payer making a credit transfer to a payee holding a payment account located within the Union shall not specify the member state in which that payment account is to be located". The Regulation does not contain any exceptions to this provision for payments by regional authorities, public bodies, etc. The AOB pointed out to the Ministry that the electronic application form for Turnover Loss Bonus II thus contravenes the EU Regulation.

EU SEPA Regulation

In its statement of opinion, the Ministry pointed out that in response to the AOB's enquiry it had investigated the matter. It found that the electronic application form does indeed include a technical functionality that performs checking of IBAN numbers that start with the AT country designation.

In collaboration with *COFAG*, the Ministry found a solution to the problem. As the application deadline for Turnover Loss Bonus II had already passed, the man from Graz was supposed to be sent a specially produced form to allow him to submit a paper application with his German bank account number on it. It is important to note that the Ministry had encountered other similar cases and had promised to send paper forms to the affected persons.

Solution was promised

However, around nine months later, the man from Graz had still not been sent the form. It was not until the AOB initiated further investigative proceedings that he was finally sent the necessary documents.

3.6.6 FinanzOnline – automatic data reconciliation

At regular intervals *FinanzOnline* performs automated data reconciliation with reports from the Central Register of Residents. In two cases that were submitted to the AOB, processing problems arose as a result.

Data reconciliation with Central Register of Residents

A Vienna woman complained that in the *FinanzOnline* database her last name had been changed for no reason and without her knowledge. She only became aware of this because her income tax assessment showed the other name. She contacted the Tax Authority Austria, but made no progress in her efforts to have the correction made.

Incorrect last name The Ministry admitted that her previous last name had inadvertently been stored as her current last name in *FinanzOnline* during the exchange of data with the Central Register of Residents, and promised to correct the error. The AOB found it unsatisfactory that the correction was not made until the AOB intervened.

Address of data twin A woman from Leoben was also affected by processing errors resulting from data reconciliation. In her case, the address of a data twin (a person with the same name and the same date of birth) was erroneously stored under her tax number in *FinanzOnline*.

After she reported the matter to the Tax Authority Austria, her tax number was changed and for security purposes her *FinanzOnline* account was disabled. As she was not informed about this separately, she suddenly discovered she no longer had access to *FinanzOnline*. She was only sent a notification about automatic employee assessment under a new tax number by mail, with no additional explanation.

It was only after the AOB intervened that the Tax Authority Austria phoned the woman to explain the actions taken and to set up new login data for her *FinanzOnline* account.

3.6.7 Expiration of consultation agreement with Germany

Limit on the number of days that cross-border commuters can work from home In July 2022, a man from Salzburg who is a cross-border commuter to and from Germany criticised the fact that the consultation agreement regarding the Austria-Germany double taxation treaty, which was drawn up during the COVID-19 pandemic and relates to the permitted number of working days that can be worked from home, has expired. He stated that there are evidently no plans to extend the agreement. He pointed out that as a result he is no longer able to work more than 45 working days from home without losing his cross-border commuter status. He emphasised that maintaining the agreement would be desirable, for environmental reasons and because it would help reduce commuter traffic.

In June 2022, the Social Committee of the National Council issued a statement about the importance of new basic legal conditions for working from home as a cross-border commuter. It stated that this would make planning easier for cross-border commuters and for companies from a tax, social and employment law standpoint. It pointed out that now that the COVID-19 pandemic has largely ended, an increase in working from home will be desirable. With regard to regulations under the Austria-Germany double taxation treaty at least, there will be tax law complications and complexities in the way the right to tax employment income is apportioned between the two countries.

The Federal Minister of Finance pointed out that experts in his Ministry are already in contact with their German counterparts to come up with regulations that will be acceptable to all parties concerned, and that a range of solutions are currently being worked on. He emphasised that any changes to cross-border commuter regulations under the Austria-Germany double taxation treaty will require the agreement of both countries.

Ministry is working on a solution

3.6.8 Tax Authority Austria: delays in proceedings

During the reporting period, the AOB once again received complaints about delays in issuing initial administrative notifications and appeal decisions. The AOB is well aware that the current personnel situation at the Ministry is difficult and that in recent years and during the pandemic, employees have had to handle an increased workload. Nevertheless, the AOB felt it necessary to emphasise that those problems must not result in delays in tax assessment proceedings, which in some cases are very extensive.

Difficult personnel situation at the Ministry

3.6.9 Delays in proceedings before the Federal Tax Court

Several complaints were received regarding excessively lengthy proceedings before the Federal Tax Court. In particular, there were delays in proceedings in cases where oral proceedings were requested. In a 2021 report (in the series Bund 2021/1), the Austrian Court of Audit drew attention to the large backlog of outstanding appeal cases that had not been closed even after several years.

Backlog of cases

A new President of the Federal Tax Court was appointed in December 2021, and according to media reports the backlog of cases was significantly reduced in the subsequent period. It is hoped that these backlogs will continue to be steadily reduced.

3.7 Interior

Introduction

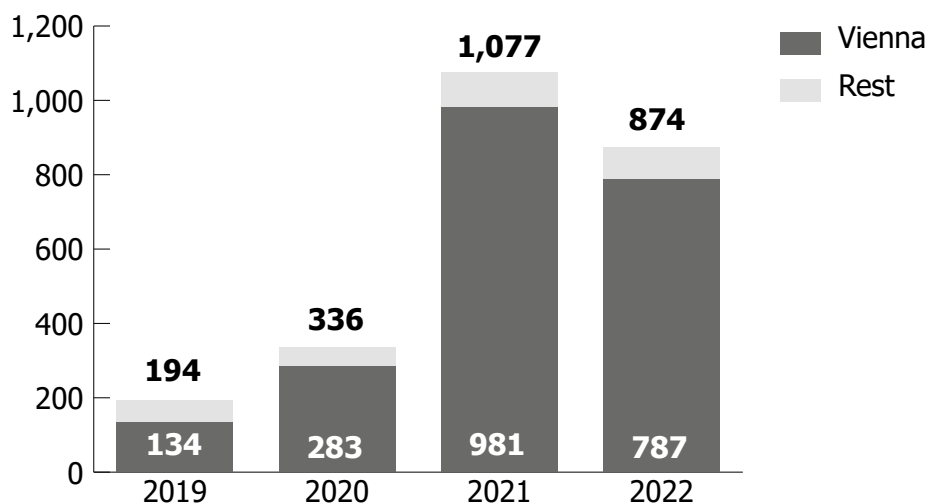
1,811 cases In 2022, the AOB handled 1,811 cases that were within the Federal Ministry of the Interior’s enforcement jurisdiction. 71.3% (1,292 cases) related to asylum law, settlement law and immigration policing law. 16.3% (295 cases) related to the police, 1.8% (33 cases) to residence registration and 1.3% (23 cases) to civil status matters. Other complaints related to services law, gun permits, passports and electoral law (3.5%, 64 cases). There were a few cases regarding the Austrian Pyrotechnic Safety Act (*Pyrotechnikgesetz*) and association law.

The AOB initiated 16 *ex-officio* investigative proceedings that were based, for example, on media reports, observations made by the Commissions of the AOB or information provided by unaffected or anonymous persons. The subject matter of the investigations included Federal support services, periods of detention at police detention centres, allocation of asylum applicants and official acts carried out by the police. The AOB found maladministration in one case; seven investigative proceedings had not yet been concluded as of the date of publication of this Annual Report.

Proceeding for obtaining a residence title

The number of complaints about the length of residence title proceedings fell slightly but remains high. As before, Vienna accounted for most of the complaints. In 2022, 874 people submitted complaints (of which 787 in Vienna), compared with 1,077 in 2021 (of which 981 in Vienna), 336 in 2020 (of which 283 in Vienna) and 194 in 2019 (of which 134 in Vienna).

Complaints about length or residence title proceedings



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. Since then, various measures in the area of residence titles have had a positive impact. Nonetheless, the number of complaints regarding citizenship proceedings, which are also handled by municipal department MA 35, increased significantly (2022: 399; 2021: 223).

In the period following late summer, complaints about the length of first-instance asylum proceedings increased sharply, as a consequence of the increase in the number of asylum applications. A total of 301 complaints related to the Federal Office for Immigration and Asylum (*Bundesamt für Fremdenwesen und Asyl*) as the first-instance authority; 90 complaints related to the Federal Administrative Court as the appeal court (see chapter 3.7.1.).

Despite the fact that Federal Presidential elections were held in 2022, the AOB did not receive many complaints in the area of electoral law (see chapter 3.7.3., individual case). In response to a request from the Constitutional Committee of the National Council at the end of 2022, the AOB issued a statement of opinion regarding Motion 3003/A concerning the 2023 Electoral Law Amendment Act (German Version available at: <https://volksanwaltschaft.gv.at/berichte-und-pruefergebnisse/stellungnahmen>). The AOB has considerable experience with complaints in this area, and therefore welcomed the improvements for polling card voters and persons with disabilities. Nevertheless, the AOB also continues to recommend that the key date be moved forward by law, to ensure that polling cards sent from abroad arrive at the electoral authority in a timely manner.

Electoral law

A total of 295 complaints regarding the police were received (2021: 408). Complaints included failure to take a police report, poorly conducted investigations, inaction, rudeness, conduct during demonstrations and failure to provide information. There were also complaints about arrests, searches, seizures, traffic checks, barring orders and prohibitions to enter (domestic violence), and police surveillance and pursuit; in addition, there were complaints about proceedings under services law and rejections of applications to join the police force.

Complaints about the police

The AOB found maladministration in seven cases; in 82 investigative proceedings it found no maladministration. In 192 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 was provided. In some cases, the investigative proceedings have not yet been concluded.

Domestic violence Some 15 complaints relating to “domestic violence” were submitted; most of them related to 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.

Allegations of mistreatment The AOB received 14 complaints about mistreatment or humiliating treatment. 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	complaints	maladministration found
2022	14	1
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 does not exist In 2015, the AOB issued a recommendation (see volume “Monitoring Public Administration”, pp. 67 et seq.) that an investigative authority independent of the police should be set up to investigate mistreatment allegations made against law enforcement officers. 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 2022, the AOB once

again gathered information about the current status of implementation. According to a statement issued by the Federal Ministry of the Interior, this matter is still undergoing “political discussion”.

3.7.1 Asylum and immigration law

Federal Office for Immigration and Asylum: length of proceedings

After 2,175 complaints relating to the Federal Office for Immigration and Asylum were received by the AOB in 2017, the number of such complaints fell sharply in the period that followed. However, in the period following summer 2022, the number of complaints – mainly about the length of asylum proceedings – rose significantly. A total of 418 individuals contacted the AOB with complaints about the Federal Office for Immigration and Asylum. Of that figure, 301 related to the Asylum Act (*Asylgesetz*). Of the 284 complaints about the length of asylum proceedings, most of which were received in the period following late summer, 195 had been resolved as of the date of publication of this Annual Report. In 95 investigative proceedings, the Federal Office for Immigration and Asylum or the affected individuals reported that asylum proceedings had been concluded.

310 complaints about length of asylum proceedings

The majority of the complaints (202) were submitted by asylum applicants from Syria. A total of 116 complaints related to the Upper Austria Regional Directorate, 51 to the Vienna Regional Directorate, 42 to the Styria Regional Directorate, 21 to the Tyrol Regional Directorate, and a small number to the Regional Directorates of the other *Laender*. By way of example, the concrete situations of various affected individuals are described below:

In September 2021, the Federal Office for Immigration and Asylum opened proceedings regarding a request for entry for four children of a Somali individual eligible for subsidiary protection. In November 2021, the Federal Office for Immigration and Asylum sent the request for an official statement to what was at that time the Federal Office for the Protection of the Constitution and Counterterrorism (*Bundesamt für Verfassungsschutz und Terrorismusbekämpfung*), requesting a statement concerning any possible grounds for preventing entry. The Federal Office for the Protection of the Constitution and Counterterrorism sent its statement to the Federal Office for Immigration and Asylum in November 2021; there were no negative findings regarding the individuals. However, it was not until July 2022 that the Federal Office for Immigration and Asylum informed the Austrian Embassy Nairobi that it was probable that subsidiary protection would be granted to the children. It stated that the reasons for the delay of over six months were the unforeseen Ukraine crisis and the huge increase in asylum applications.

Length of proceedings regarding subsidiary protection

Proceedings at a standstill for a year

In August 2021, a follow-up request for international protection was submitted to the Lower Austria Police Department by an Afghan man. The examination was scheduled for October 2022, but was postponed until a date in November 2022 at the request of the man's legal representative. The intention of the Federal Office for Immigration and Asylum was that the proceedings would be concluded in the fourth quarter of 2022. The complaint was justified, as the Federal Office took no steps in the proceedings for over a year.

Additional monitoring mechanisms at Federal Office for Immigration and Asylum

In June 2021, a man from Yemen submitted an application for international protection. The initial interview and admission to proceedings took place in June 2021. The examination took place according to plan in September 2021 at the Federal Office for Immigration and Asylum. After that, there were delays in processing of the case. In the period between September 2021 and May 2022, the Federal Office took no steps in the proceedings and delayed them. In May 2022, the Federal Office finally granted the man subsidiary protection. The Federal Office has given the AOB its assurance that internal measures and the introduction of additional monitoring mechanisms will help ensure that such situations are avoided in future.

Permitted length of proceedings was exceeded

In April 2021, an application for a Residence Permit plus residence title was sent to the Federal Office for Immigration and Asylum by an Afghan citizen via his legal representative. In November 2021, and then again in December 2021, he submitted further applications for international protection. Following the initial interview in November 2021, the Federal Office sent the man a residence permit card in December 2021. In December 2021, the Federal Office rejected the December 2021 application because the individual was already in possession of the right to reside under the Asylum Act, as he had already applied for international protection. It was not until May 2022 that the Federal Office took a further step in proceedings by sending an invitation for a date at the end of June 2022. In the period to at least July 2022, the Federal Office failed to reach any decision regarding the April 2021 application.

In May 2021, in asylum proceedings for the granting of a residence title under exceptional circumstances, the applicant responded to an improvement instruction. However, in the period to May 2022 the Federal Office for Immigration and Asylum took no further steps in proceedings. The Federal Office gave no reasons for this year-long standstill in proceedings.

In asylum proceedings for granting a "special protection" residence title, the Federal Office for Immigration and Asylum took no steps in proceedings between August 2020 (when the application was submitted) and an invitation to examination in April 2022. The Federal Office gave no reasons for the 19-month standstill in proceedings.

In August 2022, the Federal Office completed proceedings for extension of a residence permit for an individual with subsidiary protection. However, due to an error in processing the administrative act, it did not issue the administrative notification until October 2022, i.e. after a delay of over two months.

Positive decision not delivered

In November 2013, a man submitted an application for international protection. In an administrative notification dated December 2013, the Federal Office for Immigration and Asylum rejected the application and issued a deportation order. An appeal was brought but was rejected by the Federal Administrative Court in March 2017 on the grounds that the matter had already been decided; the proceedings for assessing the permissibility of a return decision were remitted to the Federal Office by the court.

Return decision delayed

In May 2017, the Federal Office informed a man that it was intending to issue a return decision, and asked him to provide a statement of opinion. He sent the statement to the Federal Office in June 2017. He then left Austria. In March 2018, the man was handed over to Austria by the French authorities. After that, the permissibility of a return decision did not undergo assessment by the Federal Office in a timely manner. In December 2021, the Federal Office discontinued proceedings regarding the issue of a return decision.

When processing initial applications under the Asylum Act, the Federal Office sometimes has to perform verification of documents to ensure they are genuine. Verification of documents is performed by the relevant *Land* Police Department. Due to the large number of documents received, verification of documents by the *Land* Police Department is sometimes subject to delays of several months.

Delays in verification of documents

In an asylum case, in September 2021, the Federal Office sent a passport to the *Land* Police Department to undergo technical verification; the *Land* Police Department forwarded the passport to the Federal Office. The passport was finally returned in July 2022. The Federal Ministry of the Interior stated that the delays were due to the growing number of asylum applications, and also to the fact that in the ARGUS information platform a document description has to be generated for use as comparison material.

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*). 75 complaints related to proceedings under the Aliens' Police Act, including issuing convention passports, alien passports and tolerated status cards. In eleven proceedings the AOB found tardiness and shortcomings.

Shortcomings in proceedings under the Aliens' Police Act

In proceedings for issuing a tolerated status card, between June 2021 and January 2022 the Federal Office took no steps in proceedings, which meant the proceedings were delayed by nearly seven months.

Seven-month delay in issuing tolerated-status card

Tardiness in issuing alien passport and convention passport

A woman's application for issuing an alien passport was received by the Federal Office in November 2020. It was not until February 2022 that the Federal Office informed the woman about the outcome of the evidence-gathering process; it thus significantly exceeded the three-month processing deadline stipulated in the Passport Act (Passgesetz).

In September 2020, a man submitted an application to municipal department MA 35 for a Red-White-Red Card plus. He also submitted an alien passport application to the Federal Office in November 2020. Between October 2020 and December 2021, municipal department MA 35 took no steps in proceedings; and between December 2020 and December 2021, the Federal Office took no steps in proceedings. Both authorities thus delayed proceedings.

An alien passport application was received at the Federal Office in March 2021. It was not until October 2021 that the Federal Office informed the applicant about the outcome of the evidence-gathering process. After that, the proceedings were delayed once again, as the authority took until July 2022 to reach a decision. The authority thus exceeded the three-month decision-making deadline stipulated in the Passport Act by a total of twelve months.

Lack of knowledge concerning legal position

In January 2022, the Federal Office took back a Somalian man's asylum entitlement card, but did not issue him a new card because of an incorrect legal opinion. During the investigative proceedings the Federal Office corrected the error. The Federal Ministry of the Interior stated that the Federal Office employees who handle issuing cards have been duly reminded of correct procedure.

Request to view files refused - matter was clarified

In November 2021, an asylum applicant submitted a request to view his proceedings files. Due to an incorrect legal assessment, the Federal Office refused to grant him permission to view the files. Following his complaint, the Federal Office conducted a legal assessment and sent a memorandum to the relevant department to clarify the legal position in mid-November 2021. However, it was not until the end of December 2021 that the Federal Office informed the affected individual that he could now view his files.

According to rulings by the Supreme Administrative Court of Austria, 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.

Change of name request: decision requested

In connection with the issuance of a homeward travel certificate for an Azerbaijani man serving a criminal sentence, the Embassy of the Republic of Azerbaijan in Vienna identified the man with his correct name. In October 2021, the man submitted an application to the Federal Office for Immigration and Asylum requesting the issuance of an administrative notification

regarding a change of name, which is not provided for under the law. The man was informed about the legal position in April 2022 but did not receive an administrative notification. Since he was entitled to be informed about the processing of his request, the Federal Office should have used an administrative notification to reject his request.

The settlement and residence authorities are responsible for conducting residence permit proceedings. The AOB repeatedly finds delays on the part of the Federal Office for Immigration and Asylum when it becomes involved in proceedings and has to carry out immigration police investigations or provide statements of opinion. That is the case for example with residence terminations. Residence termination proceedings should be conducted ex-officio, but in the AOB's opinion ex-officio proceedings should be carried out without delay nonetheless.

Proceedings for obtaining a residence title

In one case, the Federal Office for Immigration and Asylum was unable to explain whether any procedural steps had been taken between October 2021 and December 2022, and if so which ones. 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 stipulates concrete deadlines. Friction arises when multiple authorities are involved, which delays proceedings and affects the individuals who have submitted the application.

In some instances, significant delays are due to inadequate communication between municipal department MA 35 and the Federal Office for Immigration and Asylum. Proceedings are particularly slow if there are also delays in sending reminders.

Lack of communication between authorities

In 2017, a woman submitted a residence title application to municipal department MA 35. The Federal Office for Immigration and Asylum initiated residence termination proceedings. Between July 2019 and October 2021, it took no steps in the proceedings and thereby delayed both proceedings. Furthermore, MA 35 did not contact the Federal Office to enquire about the status of proceedings until October 2021, i.e. after a period of nearly two years. Although MA 35 received an email from the Federal Office in November 2021 stating that residence termination measures were not being taken, it was not until March 2022 that MA 35 asked the Federal Office to return the file. The result was a delay in proceedings, which was attributable to MA 35. Further reasons for the procedural delays were the deadline extension request submitted by the woman's legal representative and the need to obtain a senior physician's expert opinion.

Federal Office and MA 35 took no action for years

In June 2019, a man submitted a residence card application to MA 35. During that month, MA 35 asked the Federal Office for information regarding residence termination proceedings. It was not until March 2020 – up until

Vienna Police Department tardy in sending report

then MA 35 had made no further enquiries – that the Federal Office stated that it had not initiated such proceedings. In May 2020, MA 35 asked the Vienna Police Department to perform an investigation into the applicant's marriage. The Vienna Police Department did so within the deadline but failed to send the report to MA 35. It was not until January 2022 that MA 35 sent a reminder about the report, without having taken any procedural steps or provided any answers to the applicant's enquiries in the intervening period. The Vienna Police Department did not receive the January 2022 reminder. Thus all of the aforementioned authorities were involved in the procedural delays.

In May 2021, an Egyptian citizen submitted a residence card extension request to MA 35. Because the applicant spouse had been legally convicted by the Regional Court of Vienna, proceedings to assess residence termination measures were pending at the Federal Office of Immigration and Asylum. There were delays in those proceedings, and there were also delays in providing a response to an enquiry from MA 35; the Egyptian man's proceedings were affected as a result. In April 2022, MA 35 issued a positive decision regarding his application.

Proceedings before courts can also take a long time. In contrast to the Regional Administrative Courts and the Federal Administrative Court, the Supreme Administrative Court of Austria is not under any obligation to reach a decision within a specific deadline, as there are no legal provisions stipulating that.

No decision in two years

In the return decision proceedings of an Algerian man, an extraordinary appeal was brought before the Supreme Administrative Court of Austria, as an appeal against a March 2020 written decision of the Federal Administrative Court. The proceedings were still pending in May 2022; the Supreme Administrative Court of Austria had taken no discernible steps in the proceedings, aside from initiating preliminary proceedings.

Proceedings lasted one and a half years

In August 2020, on the grounds that there had been a court conviction, the Federal Office of Immigration and Asylum rejected an Iraqi citizen's application to extend his eligibility for subsidiary protection and served the administrative notification to his legal guardian. In August 2021, the man submitted an appeal to the Federal Administrative Court, as an appeal against the deportation decision. In mid-January 2023, the Federal Administrative Court informed the AOB that the proceedings were concluded in December 2022, but was unable to provide any reasons for the length of the proceedings.

Length of appeal proceedings before the Federal Administrative Court

In 2022, 90 people submitted complaints about the length of their asylum appeal proceedings; seven of them submitted complaints not just on behalf of themselves but on behalf of one or more family members. That represents a very significant decrease in the number of complaints as compared with 2021 (189). In 66 cases, the AOB found that the Federal Administrative Court had failed to duly fulfil its decision-making duty and was thus tardy.

90 complaints about lengthy proceedings

Most of the complaints were from asylum seekers from Somalia (19), Afghanistan (17) and Syria (13). Other asylum seekers were from Iran, Iraq, Bangladesh and various other countries. Nine complaints were regarding proceedings from 2022, 21 from 2021, 22 from 2020, 8 from 2019 and 14 were about proceedings still pending since 2018.

Two complaints related to proceedings pending since 2017. In one case, which the AOB had been investigating since 2018, a Libyan man submitted an appeal against the administration's failure to decide. The Federal Administrative Court stated that proceedings would be concluded by the end of 2021, but that was inaccurate and proceedings were still ongoing in March 2022. The Court finally concluded the proceedings in October 2022. In a Somalian man's case, which the AOB had been investigating since 2018, the Federal Administrative Court originally stated that the case would probably be concluded by the end of 2019, but proceedings were still ongoing in 2021 and were eventually concluded in January 2022. The Court did not give any reasons for the lengthy proceedings.

"Oldest" proceedings pending since 2017

In the AOB's opinion, the length of time it takes to process appeals against the administration's failure to decide is particularly problematic. Additional burdens are placed on the affected person because 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 appeal against the administration's failure to decide are supposed to alleviate the situation.

Long appeals against administration's failure to decide

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 complaints and concluded proceedings in recent years.

Proceedings concluded before the Federal Administrative Court		
year	complaints	concluded proceedings
2022	90	45
2021	189	144
2020	224	159
2019	268	235
2018	220	163
2017	265	164
2016	152	99
2015	238	115
2014	974	450
2013	683	368
TOTAL	3.305	1.942

3.7.2 Police

Emergency call handled poorly

Emergency call not taken seriously

In January 2022, a woman made an emergency call to the police when her husband was threatening to attack her with a knife. She stated that the officer handling the emergency call did not take her call for help seriously, responded in a completely inappropriate manner and took no action. She subsequently suffered life-threatening injuries when her husband stabbed her, it was stated.

According to the AOB’s investigative proceedings, the call was taken by the Vienna Police Department emergency call officer. The woman told him she needed help urgently “because he has a knife”. While the officer attempted to ask her to provide the correct address, loud screaming and laughing voices were all that could be heard, it was stated. The emergency call officer’s response was inappropriate. The conversation ended at that point: initially the emergency call officer did not set up a deployment entry, and no deployment entry was shown in the deployment documentation.

Emergency services not deployed until second call

After that, a further call was received from another caller, who was witnessing the incident. This emergency call was taken by a different emergency call officer; contact was maintained for around four minutes, which meant it was possible to obtain the perpetrator’s data. A deployment entry was set up

and sent to the responsible deployment officer during the conversation. As a result, the emergency call officer who was first contacted became aware of the significance of the interrupted call and immediately informed the emergency services.

According to the Federal Ministry of the Interior's report, at the time of the call the potential attacker was waiting for the woman to return to her residential address, following the earlier issue of a prohibition to enter. When she spotted the potential attacker, she managed to make the emergency call.

Services law steps

The AOB criticised the fact that the first emergency call officer categorised the woman's call for help incorrectly, responded in an inappropriate manner and initially did not set up a deployment entry. The AOB recommended that employees responsible for handling emergency calls should undergo targeted further training to raise awareness. The Ministry stated that services law steps had been taken against the first emergency call officer.

Further training

Inadequate deployment in response to intrusive noise

A man submitted a complaint about inadequate police response to his emergency call about intrusive evening-time neighbourhood noise. The man alleged that the telephone call had been conducted "in a rude tone of voice" and that the law enforcement officers had been slow to respond.

The Federal Ministry of the Interior stated that because the emergency call was made at around 8.50 p.m., the law enforcement officers did not understand why it was being made. According to the man, at 8.50 p.m. various individuals were holding a conversation in an apartment and in the front garden of the apartment complex, and one person had urinated in the internal courtyard. The man stated that the officer who answered the telephone call merely pointed out that the house rules of the apartment complex were applicable and said the matter was not within police jurisdiction. The caller was dissatisfied with this answer. The officer gave his service number and ended the call. The man did not specify the deployment location and the officer did not request that information.

When the Vienna Police Department played back the recording of the conversation, it felt that the claim about the "rude tone of voice" was unfounded. Nevertheless, the Federal Ministry of the Interior found that both individuals had conducted the conversation in a way that was not constructive. It also stated that an awareness-raising meeting had been held with the law enforcement officer.

Unconstructive conversation by both parties

It was also stated that a short time later, the man called the Am Schöpfwerk police station to report that several people "were talking super-loudly in the park" and that "one of them was urinating on the benches". He gave his own residential address as the location. According to the records, at 9.04 p.m.

the police station forwarded the call to the Regional Control Centre, which set up a deployment and sent out a sector patrol.

Deployment 60 minutes after phone call

Because the deployment situation "was very busy", the Am Schöpfwerk sector patrol received instructions at 9.29 p.m. and reached the deployment location after approximately 60 minutes had elapsed. The law enforcement officers did not find any excessive noise, and ended the deployment at 10.24 p.m.

The Meidling City Command of the Federal Police spoke to the man for half an hour on the telephone and explained to him the procedure that follows a telephone call. They explained that depending on the situation and urgency, wait times do arise. The Meidling City Command of the Federal Police advised the man that since he was repeatedly encountering difficulties caused by the same neighbour, he should contact the law enforcement officers of the *Gemeinsam.Sicher* (Safer Together) project. The option of a police report was also discussed with the man, to his overall satisfaction.

Awareness-raising meeting with officer

The AOB criticised the fact that both parties conducted the emergency telephone call in a way that was not constructive. The Federal Ministry of the Interior did not give a convincing explanation of why the deployed officers did not arrive until around 60 minutes after the telephone call, and attributed it to the "very busy" situation. The AOB found the man's complaint justified, and welcomed the fact that the authority took action to raise awareness.

Refusal to allow viewing of police report

Woman not named as an "authorised party" in police report

In September 2022, a fire alarm was triggered by a smoke detector in the apartment where a woman was registered as having her main residence along with another person. The fire department and the police were deployed. However, in the police report and in a memorandum from the City of Vienna municipal department MA 68, only the name of the other resident was listed as an "authorised party". When the woman came to Fuhrmannngasse police station in person to view the police report, she was refused permission to do so, and therefore felt discriminated against by the police.

The Federal Ministry of the Interior's report initially cited Section 4 of the City of Vienna Ordinance on Intervention in the Event of Self-triggering of Acoustic Alarm Systems. According to those provisions, the Vienna Police Department has to provide all information to the owners of or other parties with power of disposal over the alarm system or the property that it protects.

Failure to uphold right to view files and have registered residence documentation checked

The woman, along with the other resident of the apartment, is registered as having her main residence at that residential address. Therefore, she was entitled to receive information, even if her data were not shown in the basic registration documentation. When she came to the police station, the woman's registered residence documentation was not checked, and she was

not given access to the files. The AOB found it unsatisfactory that when she came to the police station in person her registered residence documentation was not checked in the Central Register of Residents, and that her right to information was not upheld.

Child had to cross the border without his parents

A man submitted a complaint about the conduct of law enforcement officers at the Brenner border crossing during an entry check. The man lives in Bolzano and is the father of a minor son who is resident in Austria; twice a month the boy is picked up by his father so that he can spend the weekend in Bolzano. The boy is picked up from Austria by his father, and vice versa he is picked up from Bolzano by his mother. Due to the situation during the COVID-19 pandemic, their approach changed: under the circumstances of the pandemic, the father habitually brought the boy back to the border so that his mother would not have to enter Italy. Their meeting point was the filling station at the Brenner motorway exit. In May 2021, a law enforcement officer at the Brenner border refused the man permission to enter Austria, despite the fact that the man presented a negative COVID-19 test and a digital pre-travel clearance. As a result, the 10-year-old boy had to cross the border on his own.

10-year-old boy had to cross border alone

During its investigation, the AOB found that on the day of the man's attempted entry into Austria in May 2021, he had been unable to present a negative COVID-19 test result or digital pre-travel clearance and had been unable to credibly demonstrate that he was exempt from entry requirements. In that respect, the AOB found that the law enforcement officer did not act unlawfully. Nevertheless, the official action ultimately meant the child had to cross the border alone (albeit a distance of only approximately 30 metres) and therefore showed a lack of sensitivity concerning the child's needs. The AOB therefore criticised the way the official action was handled and drew attention to the importance of upholding children's rights.

Lack of sensitivity to child's needs

Bias during investigation

A man alleged that a law enforcement officer had filed several police reports on the grounds of suspicion of administrative offences (including slander directed at the officer himself) solely for the purpose of obtaining the man's (supposedly inaccessible) registered address during police investigations.

According to the Federal Ministry of the Interior report, the man's allegations did not make sense, as his address was already available via a simple internet search before the police report was filed. Ultimately, the AOB was unable to conclusively verify the allegation that the officer had filed police reports solely for the purpose of obtaining the man's address.

Investigations in officer's own interest

However, the fact that the officer filed police reports on suspicion of multiple administrative offences, including slander directed at him, and also arranged the investigations himself, suggested the presence of bias. The AOB therefore criticised the officer's conduct.

Inadequate investigation following a burglary

A woman complained that following a burglary at her home, the investigation conducted by law enforcement officers was inadequate because they did not take evidence from her daughter or husband.

According to the Federal Ministry of the Interior report, on 31 August 2021 at around 6.15 a.m. the woman informed the Regional Control Centre of the Lower Austria Police Department about the burglary at her home. The Regional Control Centre then assigned the investigation to Laa an der Thaya police station. Two officers then immediately went to the scene of the crime and inspected it along with the woman and her daughter.

Evidence not taken from daughter or husband

On 21 September 2021, the woman underwent questioning as a witness at Laa an der Thaya police station. Due to the COVID-19 pandemic and associated precautionary measures in the workplace, it was agreed with her and her husband that only one person would be present in the interrogation room during questioning. According to the information provided by the authority, neither she nor her husband considered this a problem. During the questioning of the woman as a witness, her husband waited in the police station waiting room. The authority emphasised that it would have complied with the woman's wishes if she had wanted her husband to be present.

The Federal Ministry of the Interior also pointed out that the woman provided the public prosecutors' office with a full account of the details of the case. The public prosecutors' office assigned Laa an der Thaya police station the task of further investigating the burglary and determining the value of the stolen items, in particular by taking evidence from the husband and the daughter and, if necessary, by taking additional evidence from the woman herself. Enforcement officers from Laa an der Thaya police station subsequently did so.

Further investigation conducted later

The AOB found it unsatisfactory that the law enforcement officers had failed to comprehensively question the husband and the daughter and only did so when instructed to do so by the public prosecutors' office. The complaint was therefore justified, in the AOB's opinion. Since the further investigation had been conducted in the meantime, the complaint was settled.

Police fails to take report concerning theft

Suspected theft during hospital stay

A man explained to the AOB that he receives care from a legal guardian and a social worker. Following a hospital stay, the man noticed that his apartment

had been cleaned and broken items had been replaced. He also discovered that some of his cash was missing. He contacted the AOB because he suspected his legal guardian and his social worker of having stolen the cash. In his opinion, the police had failed to take appropriate action.

According to the Federal Ministry of the Interior, the police officers did not know that the man suspected his legal guardian and his social worker of having stolen the cash. It was stated that it was evident from a conversation between the police officers and the legal guardian that the latter was aware of the accusations, and that for the police officers this was sufficient reason to refrain from reporting the matter to the public prosecutors' office.

Police officers discussed matter with legal guardian

In the AOB's opinion, the police officers should have reported the matter to the public prosecutors' office in any case, regardless of whether or not they knew that the man suspected his legal guardian and his social worker of having stolen cash from his apartment while cleaning it. In the AOB's view, merely conducting a conversation with the legal guardian was not sufficient action on the police officers' part.

Unauthorised forwarding of internal day report

A woman stated that for years she had been involved in a legal dispute with a co-owner of an apartment building over parking rights in the inner courtyard. In early 2020, the police had to mediate in a dispute between them. Police officers noted in an internal day report that during the entire official action the woman "was very uncooperative and argumentative" and that she was "already known to the authorities".

Evidently the lawyer of the opponent in the dispute became aware of the internal day report, because a short time later he filed several reports to the police about the woman, submitted a petition for appointment of a legal guardian, and submitted a disciplinary report to the board of which the woman was a member. The police informed the woman that she was not allowed to view the files in the day report because it was an internal report.

Police internal day report became known

The Federal Ministry of the Interior denied several times that the internal day report had been forwarded to unauthorised parties, but ultimately had to admit that the content of the day report had been disclosed, though it was unable to find out who had forwarded it. The Ministry also informed the AOB that measures had been taken to raise awareness among officers at the Goethegasse police station. The AOB criticised the fact that the content of the internal day report had been forwarded, but welcomed the fact that awareness-raising measures had been taken.

Awareness-raising measures

Applications for payment of penalties in instalments – Vienna Police Department

The AOB received complaints that the Vienna Police Department (Simmering Police) was using informal letters to issue refusals of requests for payment of administrative penalties in instalments.

Parties are entitled to administrative notification

Under Section 73 (1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*), an authority must issue an administrative notification regarding a party's request without unnecessary delay and at the latest six months after receiving it, unless stipulated otherwise in the administrative provisions. In a 15 December 1977 ruling (Slg. N.F. No. 9458/A), the Supreme Administrative Court of Austria ruled that every party is entitled to an administrative notification if a request (or an appeal) is pending. This also applies if the prerequisites for rejecting the request are met.

The AOB criticised the fact that the Vienna Police Department was not using administrative notifications when processing requests to pay penalties in instalments. It advised the Federal Ministry of the Interior to remind police department employees about Section 73 of the General Administrative Procedure Act.

Police Department not service-oriented

In connection with one complaint, the AOB also criticised the fact that due to a technical error, the official penalty payment notice referred to the contested charge sheet instead of the penal order. The AOB also pointed out that the Vienna Police Department had not responded to the affected individual's request for an update on the status of proceedings, which had in fact been legally concluded four months earlier. In the AOB's opinion, the Police Department was not acting in the spirit of service-oriented public administration.

Man refused permission to use toilet at police station

Right to use a toilet

A man complained that at Günselsdorf police station he had been refused permission to use the toilet, and as a result had had to relieve himself outdoors, which was very unpleasant for him. The Federal Ministry of the Interior stated that the man had not urgently needed to use the toilet and that his questioning had been about to end, and that due to COVID-19 restrictions it had been agreed that there would not be a toilet break.

The AOB emphasised that any person who enters a police station should be entitled to use the toilet, even in instances where the person's statements about needing to use the toilet are contradictory. Moreover, the AOB emphasised that the COVID-19 pandemic did not constitute an excuse for refusing permission to use the toilet.

Elderly man serving an administrative penalty was not given regular medical examinations

The son of an 80-year-old man with dementia complained that his father had been arrested and detained at Roßauer Lände police detention centre, so that he could undergo administrative detention to substitute for failing to pay EUR 4,700 in penalties. It was inferable from the Federal Ministry of the Interior's statement of opinion that the admission medical examination showed the elderly man did indeed have dementia but that from a medical standpoint he was fit to undergo detention.

The Ministry conceded that after the admission medical examination, 31 days elapsed without any further medical examination at 14-day intervals, and that this was a breach of the provisions in a Ministry decree. The AOB considered it a case of maladministration but deemed that it had been resolved, because the Ministry had at the same time stated that an electronic appointment management system at the police detention centre had been set up, which would automatically generate medical examination appointments at two-week intervals.

No follow-up medical examinations

The AOB cannot refute the findings of the admission medical examination. However, there are justifiable doubts as to whether an 80-year-old with dementia who clearly no longer has a grip on his own affairs should undergo administrative detention in a police detention centre.

Was detention really necessary?

Determining identity during a demonstration was excessive

A woman complained that law enforcement officers unlawfully determined her identity during a demonstration.

According to the AOB's investigative proceedings, on 18 September 2021 at 9.30 a.m. a total of 18 people participated in a demonstration outside the entrance of the Schloss Orth an der Donau national park centre, as part of a demonstration that was not properly reported in advance in the manner stipulated in the Assembly Act (*Versammlungsgesetz*). The day before, a Diet member had used Facebook to call for the demonstration. The officers did not become aware that the demonstration had been called until they investigated it while it was in progress at the aforementioned location. Evidently, the Diet member was the voice of the demonstration.

Because Orth an der Donau police station was only manned with one officer, two further patrols from the district were present to provide support. Gänserndorf municipal police station was not manned and had no knowledge of the demonstration. The Head of Gänserndorf District Authority instructed the law enforcement officers to determine the identity of the demonstrators and submit a report about this to the District Authority. Most of the demonstrators acted in a cooperative manner. The report was submitted to Gänserndorf District Authority on that day.

Head of District Authority instructed officers to determine identity of demonstrators

Grounds to suspect administrative offence

According to the statement of opinion issued by the Head of Gänserndorf District Authority, the demonstration was not properly reported in advance as stipulated in the Assembly Act, and therefore there were grounds to suspect that an administrative offence under the Assembly Act might occur. Because of those suspicions, the Head of the District Authority gave the instruction to establish the situation and to obtain the details of the individuals present.

Under Section 34b of the Administrative Penal Act, law enforcement officers have the authority to determine the identity of a person if the person is caught in the act or immediately afterwards is credibly accused of the act or is found with objects that indicate their involvement in the act.

According to the Federal Ministry of the Interior, those provisions apply to individuals of whom it may be assumed that they intend to commit an administrative offence or that they have done so in the period immediately prior. Since the Diet member called the demonstration via Facebook and was present at the location, there were grounds to suspect that he was the organiser. Because he failed to properly report the demonstration in advance in the manner stipulated in the Assembly Act, there were grounds to suspect that he might commit an administrative offence.

Authority admitted that its actions were excessive

In the Ministry's opinion, it was only lawful to determine the identity of the Diet member, unless he would have been known by virtue of his political mandate anyhow. The Ministry emphasised that because participating in a demonstration that has not been properly reported in advance is not an offence, determining the identity of the other demonstrators was unlawful. The Ministry reminded the Head of Gänserndorf District Authority of that fact.

The AOB concurs with the Ministry that determining the demonstrators' identities was unlawful and excessive, notwithstanding the fact that the Head of Gänserndorf District Authority issued the instructions to do so.

Penalty despite mask exemption

A woman participated in a demonstration against COVID-19 measures. Despite being exempt from wearing a mask, she received a penalty because law enforcement officers were unable to verify the exemption certificate she presented to them.

Doubts over certificate unjustified

As the AOB stated in earlier cases, that argument would only make sense if the medical certificate were obviously forged, counterfeit or not issued by a physician. In this instance there was nothing to suggest that, and the officers were therefore not justified in reporting the woman, in the AOB's opinion. The fact that the officers were unable to verify the woman's mask exemption certificate that she presented to them was not a justification for reporting her.

Criticism of police conduct during COVID-19 demonstration

Several participants in a demonstration complained about unprofessional police conduct during the release of demonstrators after they had been encircled by the police at a demonstration against COVID-19 measures on Bellariastrasse in Vienna in March 2021. The criticism focused in particular on the fact that for a period of time there was no way to exit the encirclement, which meant the demonstrators were unable to comply with police orders. Ombudsman Walter Rosenkranz, who was a participant in the demonstration, confirmed the accuracy of these observations.

No way to exit police encirclement

The AOB determined conclusively that for a five-minute period after the police gave orders for demonstrators to exit the encirclement, a barrier section estimated at only two metres in length was opened to allow corralled demonstrators to exit. Since there were law enforcement officers to the left and right of the open barrier section and the opening was only two metres wide, crowding occurred, which made it impossible to comply with the two-metre social distancing rule.

Opening in barrier was not wide enough

Unhygienic storing of non-recyclable waste at police station

During a visit to the Brenner Border Facility, which is a satellite facility of Steinach-Wipptal police station, the commission of the AOB noticed rubbish piled up in a corner of a passageway. The commission encountered this unpleasant sight immediately upon entering the building. The commission expressed concern that storing waste in this way at the border facility, which is not always manned, could lead to vermin infestations.

Unhygienic conditions at facility

The Federal Ministry of the Interior explained that the law enforcement officers separate the waste: glass, paper, metal and plastic are taken to the recycling centre every week, while the non-recyclable waste is left behind. Rather than being taken away independently, the non-recyclable waste is taken away at specified intervals, which are stipulated by the municipality rather than by the facility. The Ministry stated that once the promised new building has been completed, talks will be held with the owner about a uniform approach to waste management.

The AOB welcomed the fact that the investigative proceedings raised awareness of the problem. Notwithstanding the fact that the officers at present have to comply with the specified intervals for removal of the non-recyclable waste, they should store it in an appropriate manner. The AOB criticised the unhygienic method for storing the non-recyclable waste at the border facility and recommended that containers be provided until the move to the new building.

Containers would help

3.7.3 Electoral law

Federal Presidential elections 2022 – man refused a ballot paper

A man contacted the AOB after the 2022 Federal Presidential elections. He stated that the returning officer had refused to allow him to vote, because before entering the polling booth he had demanded that his driving licence, which he had surrendered, be handed back to him.

Identifying document must not be retained

The Federal Ministry of the Interior explained that usually the electoral authority enters the data of the person eligible to vote in the electoral records while they are casting their vote, based on the identifying document that is presented. The purpose of this is to ensure that voting takes place swiftly. However, there is no statutory obligation to surrender the identifying document to the representatives of the electoral authority while casting a vote. The Ministry pointed out that the electoral authority records showed that the returning officer had told the man he would not be given a ballot paper unless he surrendered his driving licence. The Ministry admitted this was incorrect procedure.

Voters must prove their identity

Sections 67 and 68 (1) and (2) of the 1992 Federal Law on National Council Elections (*Nationalrats-Wahlordnung*) contain provisions about checking entitlement to vote when a vote is being cast. Under those provisions, the person entitled to vote has to appear before the electoral authority, state their name and residential address and present a document or official credentials that clearly prove their identity. The wording of the provisions states that the person entitled to vote must first identify themselves. If the person entitled to vote is on the electoral register of the local electoral authority, the representatives of the returning officer must give the person an empty ballot paper envelope and official ballot paper.

The AOB concurs that there is no statutory obligation to surrender the identifying document to the representatives of the electoral authority while casting a vote. The representatives of the returning officer thus unlawfully infringed the man's right to vote when they refused to give him a ballot paper and ballot paper envelope.

3.7.4 Residence registration

Residence Registration Act amended for intersex persons

The biological sex of an intersex person is not unambiguously "male" or "female". An affected person from Vienna complained that the proof of residency they were sent did not have the necessary sex designation box, and that the residence registration authority had refused to correct this in the requested manner. The person also stated that the Federal Ministry of the Interior had not responded to the corresponding requests.

In a 15 June 2018 ruling (VfSlg 20258), the Constitutional Court of Austria ruled that intersex persons are entitled to an appropriate designation in the civil registry pursuant to Civil Status Law (*Personenstandsgesetz*). The general term "sex" used in Civil Status Law includes alternative identities, based on an interpretation that conforms with the Federal Constitution.

On the residence registration certificate (as an Annex to the Civil Status Law), the only options for designating sex were "male" and "female". This precluded the possibility of an interpretation in conformity with the Federal Constitution, and therefore a clear designation such as "diverse", "undefined" or "inter" in Civil Status Law was needed.

Only two options for designated sex on certificate

The Federal Ministry of the Interior apologised for the fact that initially the questions concerning residence registration law had gone unanswered. Under the prevailing legal position at the time, the requested correction to the residence registration form was not possible. The AOB asked the Ministry to describe what steps had been taken since summer 2021 in the review proceedings regarding an amendment to the 1991 Residence Registration Act (*Meldegesetz*). As part of that amendment, additional options for designating sex were to be provided, as was the case with Civil Status Law.

In May 2022, the Ministry stated that the ministerial draft and the impact assessment had undergone revision, and that technical work had been carried out in preparation for adapting around 50 IT interfaces. The Ministry did not give any reasons why a government bill had not been introduced.

The AOB recommended that in the interests of providing appropriate options for designating intersex persons in residence registration documentation, the Ministry should make further efforts to bring about a legislative amendment. That recommended legislative amendment was implemented and took effect as of 31 October 2022. As a result, the Annexes to the Residence Registration Act were redesigned, and further options for alternative designations of sex were added.

Legislative amendment implemented

Foreign citizen's name in the Central Register for Residents

A woman complained that the residence registration authority had refused to correct her name on her proof of residency. On her residence registration certificate, her full name was shown as both her first name and her family name, even though she had submitted an Indonesian embassy verification of her family name.

During the investigative proceedings, the residence registration authority stated that the manner in which a foreign citizen's name is written in their travel document affects how their name is entered in the Central Register of Residents. If their passport only has one name box, the prevailing practice in Vienna is to enter the full name in the first name box as well as in the

family name box. The authority emphasised that this practice is in line with a recommendation issued by the Federal Ministry of the Interior in 2002. It pointed out that there are plans for a legislative amendment, though the plans are still in the review phase at present. Under those plans, in future a document that indicates the elements of the person's first name and last name will suffice for an entry in the Central Register of Residents.

Ministry has changed its legal opinion

The comments made by the City of Vienna are accurate. However, the Ministry's current view is that the governing principle should be that the person's name should be entered in a manner oriented to foreign legislation. Hence in the case of the Indonesian woman, her names should have been shown in the Central Register of Residents in a manner that precisely reflected the elements in the Indonesian embassy verification. The Ministry stated that it would inform the residence registration authority accordingly and would send all residence registration authorities a set of instructions for comparable situations.

Recent legislative amendment

It would have been inappropriate to accuse the residence registration authority of maladministration, as it was implementing a Ministry decree that was still valid. The AOB welcomed the fact that shortly before the investigative proceedings were concluded, the desired change was made in the Central Register of Residents. Under a legislative amendment that took effect on 31 October 2022, foreign legislation regarding distinctive features of names can now be duly reflected in the Annexes to the Residence Registration Act and in the Central Register of Residents.

Registration and de-registration of mother and child not carried out simultaneously

A mother contacted the AOB to complain that in December 2020 the residence registration authority had carried out registration and de-registration for her but not for her son, who at that time was three months old. She stated that the absence of one of the residence registration certificates had initially escaped her notice, and that she was having difficulties with disbursement of family allowance and childcare allowance.

According to residence registration law, the residence registration authority carries out residence registration and de-registration as soon as it receives a fully completed residence registration certificate. Predating or backdating of residence registration processes is not provided for under the law.

Authority did not receive application for the child

The Federal Ministry of the Interior stated that in December 2020 the woman had sent the authority residence registration certificates for her son as well as for herself. Evidently, the request for her son had got lost in transit to the competent case worker at the 21st District residence registration service. The Federal Ministry of the Interior corrected the residence registration

date and promised that a confirmation would be sent via email. The AOB therefore deemed the complaint resolved.

Two cases of delay in providing information

A woman from Salzburg and a Viennese complained that the respective residence registration authorities were tardy in providing information.

The woman from Salzburg alerted the City of Salzburg Residents and Civil Registry Office to a residence registration offence. The authority pointed out the informant's lack of party status in the official de-registration process and refused to issue information.

Lack of party status regarding registration-related offence?

The Federal Ministry of the Interior, as the supreme authority, took the view that under residence registration law, a whistleblower should generally be informed of the status of an official de-registration process upon request. The City of Salzburg Residents and Civil Registry Office was duly reminded of this and was asked to take implementing steps. The AOB welcomed the fact that the residence registration authority had followed up on the information provided by the whistleblower and had initiated an investigation.

The Viennese, who had temporarily housed three Ukrainian citizens in her home, expressed doubt as to whether they had been properly de-registered. She stated that they had moved to Lower Austria in June 2022, and that she had not received any information about their residence registration status, despite having promptly notified the residence registration authority in Vienna.

No information received about registration status

The residence registration authority admitted that it had failed to inform the woman about the de-registration and re-registration of the three Ukrainian citizens in June 2022, and that it had not done so until investigative proceedings were initiated in August 2022. It stated that the residence registration authority in Lower Austria had carried out de-registration of the Ukrainians from the Vienna address at the same time as registering them as resident in Lower Austria, and that it had mistakenly assumed that this meant the matter had been fully dealt with.

According to Section 18 (1) of the Residence Registration Act, upon request and provided that proof of identity is furnished, the residence registration authority must provide information from the Central Register of Residents about whether and (if applicable) where within Austria an unambiguously definable person is or was registered as resident. The AOB proceeded on the assumption that the investigative proceedings had helped raise awareness, and welcomed the fact that the information was duly provided.

3.7.5 Passport law

Passport issued contained error

A Styrian woman complained that the passport authority had issued her a passport with the wrong last name and had not reimbursed the fee.

New passport issued with previous name

The Federal Ministry of the Interior stated that the application had been submitted to the municipality of Anger, which was responsible for checking the woman's identity, and that Weiz District Authority was responsible for completing the remaining processing of the application. Both authorities stated that the woman had merely submitted her old passport containing her name before she married, had not alerted them to the fact that her last name had changed and had signed a written statement in which her maiden name appeared twice. Weiz District Authority stated that it had been unable to use her signature to determine her current last name.

During the AOB's investigative proceedings, it became evident that the municipality of Anger had conducted a search in the Central Register of Residents, but had not used the woman's last name as shown there – which was her correct last name – when processing her application. Furthermore, Weiz District Authority had failed to check the data. The Ministry took the opportunity to instruct both authorities on how to correctly process passport applications.

Fee reimbursed

Neither authority proceeded correctly when processing the woman's passport application, and the complaint was therefore justified. The fact that awareness of this matter was raised and the fee was reimbursed was seen as positive by the AOB.

Delay in issuing passport

In June 2022, a father complained to the AOB that passport proceedings for his minor son had been pending since June 2021 and had still not been concluded.

The Austrian Embassy London confirmed that the father had attended a June 2021 in-person meeting during which he submitted the initial application for verification of citizenship and for issuance of a passport to his son. Because his son was not listed in the Central Register of Residents, it had not been possible to issue the desired documents, it was stated. The Austrian Embassy London forwarded the child's documents to the competent municipal department MA 35, so that the child could be entered in the Central Register of Residents.

It was evident from the investigative proceedings that the applicant had swiftly fulfilled the authorities' requests for documentation, but the Austrian Embassy London had been tardy in sending an important document to

municipal department MA 35. At the end of June 2022, it was clarified that the boy derives both his British and his Austrian citizenship from his father. In mid-July 2022, the boy finally received his passport.

Pursuant to Section 17 of the 1992 Passport Act (*Passgesetz*), authorities are subject to a three-month deadline for decisions on passport applications. According to Section 38 of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*), unless the law states otherwise, an authority is entitled to reach a decision itself on initial questions that arise during preliminary proceedings and that 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 defer the proceedings until a legally binding decision has been reached on the initial question.

**Passport application:
three-month
deadline for decision**

The Federal Ministry of the Interior took the view that the Austrian Embassy London should have deferred the passport proceedings until the question of citizenship had been clarified. The AOB concurred with this view, as citizenship is a prerequisite for issuing an Austrian passport. The Austrian Embassy London did not defer the passport proceedings and was tardy in forwarding an important document to municipal department MA 35. As a result, it missed the deadline for a decision by more than ten months.

**Proceedings should
have been deferred**

The AOB welcomed the fact that during the investigative proceedings the passport was finally issued, and that the Ministry promised to make improvements to the training documents for passport authorities.

3.7.6 Civil status matters

Refusal to issue civil status documents

A woman and her wife complained to the AOB that in September 2021 an official at the Klagenfurt am Wörthersee Registry Office had refused to issue a birth certificate, proof of residency and proof of citizenship for the couple's son.

In the opinion of the Federal Ministry of the Interior, the official incorrectly assumed that the woman was not a parent and therefore asked for the mother to be present. The official failed to check the entry in the Central Register of Residents, which shows that an acknowledgement of parentage of the unborn child was recorded in May 2021. In September 2021, after the parents had submitted a written request for issuance of the desired documents, the authority sent them by post immediately. The official apologised to the parents for the unpleasant situation.

**Doubt over status as
parent**

The AOB criticised the fact that issuance of the documents had been refused. As the registry office had taken immediate action and apologised, the AOB deemed the complaint resolved.

Problems in obtaining documentation to prove no impediment

In August 2022, an expatriate Austrian complained to the AOB that since April 2022 the Brixlegg Registry Office had been refusing to issue documentation to prove no impediment, so that he and his fiancé, who is from Malaysia, could marry.

Documentation proving no impediment: prerequisite for marrying

The Federal Ministry of the Interior stated that at the beginning of April 2022 the engaged couple received information from the registry office concerning the documentation required to prove no impediment. As the man and his fiancé have both been married before, the authority placed special emphasis on the need to prove that their respective marriages had been dissolved. At the in-person meetings in April and August 2022, they were unable to furnish proof of their completed divorces, and they did not provide documents confirming that their respective main residences were abroad. Moreover, the registry office wrongly assumed that the Malaysian civil registry declaration had a validity of only six months. It was not until August 2022 that Rattenberg district court sent documentation to the registry office as evidence of the respective divorces.

According to Section 6 (1) of the Regulation on the Implementation of Civil Status Law, engaged adults with Austrian nationality who have previously been married must provide the following documentation: proof of birth registration, proof of citizenship, proof of previous marriages, proof of dissolution of the most recent marriage and proof of main residence if the main residence is abroad.

Pursuant to Section 15 (2) of Civil Status Law, the only circumstances under which it is not necessary to provide the aforementioned documents is if the engaged persons can credibly demonstrate that they cannot obtain the documents or can only obtain them with considerable difficulty.

Authority assumed incorrectly that civil status declaration was invalid

In compliance with current law, the civil registry authority refused to issue documentation proving no impediment until the court verification of the respective divorce decrees had been received. However, the AOB criticised the fact that Brixlegg Registry Office had assumed that the foreign civil status documentation was only valid for a limited period. During the investigative proceedings, the Ministry alerted the registry office to the error in its legal opinion. The AOB therefore deemed that the complaint had been resolved.

Correction request was not forwarded

A man complained that after an entire year, the civil status authority had still not reached a decision regarding his petition for a correction to his birth certificate. During the investigative proceedings, it became evident that in April 2021 the man had sent his correction petition to the Salzburg Civil Registry Association, which did not have geographic jurisdiction for his case. As part of judicial assistance, the Salzburg Civil Registry Association requested the man's naturalisation files and prepared written documentation, but instead of swiftly forwarding the files to Wien-Zentrum Registry Office, it took no further steps.

Request was sent to the wrong authority

In December 2021, the man contacted Wien-Zentrum Registry Office, which immediately initiated investigative proceedings and provided the AOB with a clear account of how proceedings had been handled up to that point.

If a petition is sent to the wrong authority, that authority has two options according to Section 6 (1) of the General Administrative Procedure Act: it can either forward the petition to the competent authority, or it can instruct the person to contact the competent authority.

The authority without jurisdiction must not arbitrarily delay the forwarding of the petition. Insofar as the authority without jurisdiction that received the petition does not forward it to the competent authority, it itself becomes subject to a statutory decision-making obligation. Because the Salzburg Civil Registry Association did not forward the petition to Wien-Zentrum Registry Office, the AOB deemed that the Salzburg authority had failed to take action for a period of seven months.

Forwarding must take place swiftly

Employee at Ottakring Registry Office: inappropriate choice of words

A woman stated that she had felt that a comment made over the telephone by a registry office employee was discriminatory. She alleged that the employee had addressed her in an unfriendly tone and had advised her to instruct her relatives in Serbia to obtain the necessary documentation for proving no impediment to marriage and to quickly "send them to Vienna by long-distance coach".

During the investigative proceedings, the Ottakring Registry Office conceded that the well-meaning advice to quickly obtain the originals of the documents might, under the specific circumstances, have seemed insulting to the applicant, and issued an apology.

Registry office apologised for poorly chosen formulation

Provided an appropriate tone of voice is used, practical tips offered by authorities are citizen-friendly. In this specific case, the woman gave a credible account of having found the choice of words inappropriate. The AOB

assumes that the investigative proceedings will lead to awareness-raising measures for employees at the registry office.

Fee was charged to delete woman from list of citizens eligible for lay assessor duty

A man contacted the AOB on behalf of his wife. He stated that due to poor health she had submitted a request to be deleted from the list of citizens eligible for jury and lay assessor duty, and that the authority had fulfilled his request. However, he and his wife were both disgruntled that she had had to bear the costs of the deletion.

Deletion on grounds of ineligibility is cost-free

Pursuant to Section 2 (1) of the 1990 Jurors and Lay Assessors Act (*Geschworenen- und Schöffengesetz*), persons are deemed ineligible for jury and lay assessor duty if they are unable to fulfil those duties due to poor physical or mental health. Unlike requests for release from jury duty, where private interests are a key factor, requests that are based on ineligibility are in the public interest and therefore cost-free.

Woman was reimbursed

During the investigative proceedings, the Federal Ministry of the Interior conceded that the woman had credibly demonstrated that due to her age and poor health she was unable to fulfil the duties of a juror or lay assessor. It agreed that she was ineligible for this duty, which is a duty generally incumbent upon citizens. The Ministry therefore reminded Gänserndorf District Authority of the legal situation. The unlawful fee was reimbursed to the woman while the investigative proceedings were in progress.

3.8 Justice

Introduction

1,305 complaints were received concerning the Federal Ministry of Justice. Out of these, 871 alone concerned facilities of the penitentiary system and forensic institutions, 102 concerned the protection of adults and 47 concerned the data protection authority. The overall total does not cover all of the complaints that related to proceedings and decisions made by courts or public prosecutors. With regard to courts of ordinary jurisdiction, the AOB only has competence to review the duration of proceedings, which was also raised in complaints – albeit not on a significant scale during the year under review.

3.8.1 Protection of adults

Once again, the AOB established that since the entry into force of the Second Adult Protection Act (*2. Erwachsenenschutz-Gesetz*) on 1 July 2018, the number of complaints concerning the issue of adult guardianship has fallen significantly. During the period under review, 2022, 102 written complaints were received by the AOB, in addition to a large number of telephone enquiries concerning problems relating to the protection of adults.

As in previous years, those affected complained about court rulings on the appointment of adult guardians by the courts, which are ineligible for review by the AOB, or regarding the fact that the competent Guardianship Court was not monitoring the activities of adult guardians. Specifically, the insurmountable hurdles that arise where attempts are made to cancel judicial adult guardianship measures or to change the adult guardian are also being increasingly mentioned.

In many cases, it was criticised that those represented are pressured into giving up familiar living arrangements and forced to move in to care institutions and facilities. As previously, the AOB has received critical reports from the relatives of those affected concerning a lack of information, although also problems relating to cooperation with court-appointed adult guardians from the legal professions, who for instance refuse to speak to relatives or to reimburse expenses incurred, or only do so after a delay.

The AOB participated in a project group set up by the Federal Ministry of Justice to carry out an assessment of the Second Adult Protection Act and will also continue to submit its observations to the committee of experts established for this purpose.

3.8.2 Data Protection Authority

During the year under review, 47 complaints were received by the AOB concerning the issue of data protection. Some of these concerned the activities of the Data Protection Authority, such as improvement requests, legal advice and issues relating to the collection and assessment of evidence. Concerns focused overwhelmingly on the duration of proceedings before the Data Protection Authority.

**Pandemic increases
number of
complaints**

It came to the attention of the AOB that – having already experienced an extraordinarily high workload in 2020 and 2021 – the Data Protection Authority had received an unprecedented level of complaints due to the personally addressed information letters concerning vaccination against COVID-19 that had been sent out by the umbrella association of public social insurance carriers, the offices of regional governments and the Austrian Public Health Insurance Office (*Österreichische Gesundheitskasse*) since December 2021. For instance, the Data Protection Authority had received more than 4,000 submissions by as early as the second calendar week of 2022.

This figure was already higher than the average annual number of complaints received by the Data Protection Authority, which, according to data protection status reports, amounted to 1,036 cases in 2018, 2,102 cases in 2019, and 1,603 cases in 2020. By December 2022, the number of so-called “vaccination complaints” had reached 4,890.

Logistical cost

Simply opening envelopes, reading incoming emails and logging communications in the computer system took up an enormous amount of time. The Data Protection Authority was able to inform the AOB in detail of the actions it had taken in order to deal with this extraordinary level of work. It was able to conclude almost all proceedings by processing vaccination complaints within an internally established working group and by engaging with all legal officers.

The Data Protection Authority informed the AOB that the “wave of complaints” had shown that the instruments put in place to streamline proceedings (including in particular combining cases for a joint decision) were insufficient for such a “large-scale event”. The Data Protection Authority takes the view that the law should be changed in order to enable it to respond better to a large number of cases.

3.8.3 Public prosecutors

During the year under review, numerous enquiries and concerns were submitted to the AOB concerning the activities of prosecutors. The AOB was able to refer to the possibility of submitting an application for continuation (Section 195 of the Austrian Code of Criminal Procedure). However, in

a case concerning the discontinuation of investigating proceedings for decisions taken pursuant to Section 35c of the Austrian Nationality Act (*Staatsangehörigkeitsgesetz*), the AOB was only able to refer to the possibility of monitoring by technical supervision (aside from the launch of investigating proceedings). The related gaps in protection under the law are also objected to in specialist literature (Fellner/Nogratnig, *Richter- und Staatsanwaltschaftsdienstgesetz, Gerichtsorganisationsgesetz und Staatsanwaltschaftsgesetz § 35c StAG no. 3*) and should be closed.

3.8.4 Facilities of the penitentiary system and forensic institutions

Introduction

In the year under review, the AOB received 871 complaints from inmates at facilities of the penitentiary system and forensic institutions. A total of 18 consultation days were held at correctional institutions and forensic wards in public hospitals over the course of the year. These were also used as an opportunity to exchange views with managers at the respective institutions.

Complaints and
consultation days

Officers are able to refer their concerns individually to the AOB. In order to determine their needs in a more targeted manner, during the year under review the AOB issued invitations to group discussions at selected correctional institutions. In these invitations, the AOB also stated its thanks for the previous support, whether in relation to the holding of consultation days or for visits by the commissions of the Austrian National Preventive Mechanism (NPM).

"Talking to the AOB"

Management of the facilities contributed to the success of these consultations. They not only provided suitable rooms but also ensured through careful shift planning that anybody with an interest could join in. They did not participate themselves. This made it easier for officers to voice their concerns and desires more openly and freely.

These additional meetings organised for staff were regarded as a sign of appreciation. The dialogue helped to increase mutual understanding. The positive feedback received has encouraged the AOB to offer similar consultations at other correctional institutions. It will also be helpful for the further development of the NPM.

3.8.4.1 Suicide and attempted suicide

Development and reaction

For a number of years, the Federal Ministry of Justice has informed the AOB promptly concerning any suicides or attempted suicides involving persons detained in facilities of the penitentiary system and forensic institutions.

2021 stood out in this regard. The number of reports more than tripled compared to 2020. Hopes that figures would return to or fall below the level from previous years were not fulfilled. More reports had been received by the end of November 2022 than in the whole of the previous year.

Working group in the Ministry of Justice

Although the number of cases that ended in suicide fell, the Ministry had to deal with a dramatic increase in relevant incidents and set up a working group on "Safety and Care in Crisis Situations". Alongside representatives of the Ministry and correctional institutions, the former long-standing head of Vienna Mittersteig correctional institution and co-developer of the internationally recognised cell assignment programme VISCI, Patrick Frottier, also participated in the working group as an external expert. The AOB was also involved, and had a sufficient opportunity to provide input.

VISCI (the 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: red 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.

Concluding report urgently needed

Issues relating to care, cell design and safety as well as specific staff and organisational requirements were discussed at a total of five meetings. A concluding report for the Federal Minister of Justice has still to be finalised. The fact that reports are not declining highlights the need for further preventive measures to be implemented swiftly.

Suicide attempt by an inmate – Innsbruck correctional institution

As in previous years, (attempted) suicides were more frequent in regional court prisons than in ordinary prisons. Once again in 2022, Vienna-Josefstadt correctional institution was particularly affected. 14 relevant incidents occurred in this facility.

Suicidal woman left on her own

The increasing number of reports from suicidal juveniles and women also gives cause for concern. At the end of August 2022, the AOB received a report concerning an incident at Innsbruck correctional institution. The report stated as follows: "The inmate held a razor blade to her throat in the presence of a task force under the leadership of [...]. At this point the inmate cell door was closed in order to ensure the safety of officers". The inmate subsequently inflicted a deep cutting injury to her forearm. The AOB could not understand why the inmate cell door was closed, especially as the task force was called in order to prevent the inmate from injuring herself.

The Ministry stated in this regard that the task force attended the scene and, after assessing the overall situation, the officer with operational command decided on the deployment-related course of action. On account of the

significant risk – caused by the inmate – the members of the task force were equipped with anti-stab vests, visor helmets, protective shields and tasers.

Arrangements had been made prior to deployment to ensure the safety of the prison guards. Specifically, where an inmate is brandishing a dangerous item such as a razor blade and threatening to use it, the staff intervening must be equipped with suitable personal protective equipment (PPE).

No dialogue conducted

The argument relating to self-protection is understandable. However, it is not clear why the task force moved in without protective shields. It is also unclear why no attempts were made to stay in contact with the inmate through the food hatch, and thus to convince the woman not to cause injury to herself, until the inmate cell was opened up again after equipping the task force.

3.8.4.2 State of repair and equipment

Specially secured inmate cells

The AOB consultation days provided an opportunity to gain an impression of the structural condition of correctional institutions. Last year's focus was on "specially secured cells". These cells are only allowed to house people who cannot be accommodated in another inmate cell on account of the danger they represent for themselves or for others. These inmate cells must therefore be specially designed to prevent escapes and self-harm. Any defect or any source of danger is a greater concern here than it is in other inmate cells.

The Federal Commission also examined the situation and equipping of specially secured cells. The NPM welcomes the development of standards by the Federal Ministry of Justice, which will need to be complied with in future in relation to new buildings or in the event of an overall renovation of existing buildings.

Standards established

Specially secured inmate cells – Innsbruck correctional institution

The specially secured inmate cells at Innsbruck correctional institution were visited in March 2022. These left a sad impression. It was particularly striking that the individuals housed there did not have any access to daylight. As a result, throughout the entire period during which they were held in the bunker-style structure, which has neon lighting, they were unable to distinguish between day and night. The only way in which they can compare their own sense of time with reality is to listen to the radio via the emergency call button and wait for the time to be announced (during the hourly news bulletins).

Torture-like conditions

Detention in these inmate cells raises human rights concerns. The condition of the cells is at odds with every understanding of modern facilities of the penitentiary system. Accordingly, these inmate cells must be adapted as soon as possible.

Specially secured inmate cells – Floridsdorf correctional institution

Multiple hazards In April 2022, the AOB once again assessed the two specially secured inmate cells at the satellite facility of Vienna-Mittersteig correctional institution. The condition of the cells has not changed. Both inmate cells were in a proper hygienic condition. No changes had been made to its weak point, a ceramic toilet sunk into the floor, which is tiled into the wall in this area.

In order for the emergency call button installed in the entrance area to be reached, the internal bars have to remain open. This means that detainees have access to a ceramic washbasin in the anteroom, where it is possible for them to injure themselves (as well as in other places). On the other hand, if the intermediate bars are closed, the inmate cannot use the emergency call button. This means that prison guards are particularly reliable on video monitoring when monitoring the specially secured inmate cells.

Inmate cells in the basement The condition of both inmate cells is still unsatisfactory. They are situated in the basement and are (too) small. In addition, owing to its mirroring effect, the black floor makes video monitoring more difficult. Even if the rooms are only used occasionally, they need to be thoroughly refurbished.

Specially secured inmate cells – Feldkirch correctional institution

Acute hazard During a routine visit to the specially secured inmate cells, the AOB pointed out an acute hazard posing a risk of injury. The inmate cell window is covered with a Perspex panel fixed within a metal frame, which has been screwed to the window frame. The screws create sharp edges against the metal bar. Since the room contains a sofa bed as well as a cube seat, a person detained inside it can easily reach the sharp screw heads and cause injury to their limbs or head. The way the window is sheeted over has a provisional appearance and should be replaced by a secure covering.

It was also noted that the opening for reaching the emergency call button is too small. In addition, detainees housed in this inmate cell receive plastic cutlery, which can easily be broken. The AOB once again recommends that plastic cutlery be replaced with cardboard cutlery.

Specially secured inmate cells – Korneuburg correctional institution

Toilet bowl on a plinth Korneuburg correctional institution has a specially secured inmate cell on each floor. They are all fitted out in an identical manner. In May 2021, one

of these inmate cells was visited on the first floor. The room was in a proper hygienic condition at the time of the visit. The emergency call button can be accessed by reaching through the bars. There is no independent access to drinking water. A washable mattress is situated inside a walled extension. The window is made from shatter-proof frosted glass, cannot be opened and is fixed to the masonry. The room is video monitored. The camera records what is happening throughout the entire cell. According to the display on the video monitor, the toilet area is pixelated. This ensures sufficient privacy when using the toilet.

As has previously been objected to on several occasions for comparable inmate cells, the toilet bowl made from stainless steel has not been mounted flush with the floor, but has rather been placed on a concrete plinth around 15 cm high. During construction of the building, care was not taken to place the outflow pipe in this room lower down. In order to ensure proper drainage of waste into the drainpipes, the toilet had to be raised on a plinth. The problem is that the approximately 15 cm height difference creates a risk of injury for inmates.

The actual inmate cell is separated from the separately accessible anteroom by a massive steel grille. This constitutes an additional hazard, as an inmate could hang themselves from the frame using tear-proof clothing.

Multiple iron beams

The fact that the room is in the direct vicinity of the control station for the wing does not reduce the risk, as the duty office is only manned during day shifts. From Friday noon until early on Monday morning, as well as on public holidays, the screen is monitored exclusively from the guardroom, which is situated on the ground floor at the entrance to the building. It is located at quite some distance from the individual floors. In the event of attempted suicide, death may have occurred by the time the inmate cell is opened.

It was suggested that the beams be covered with Perspex, while installing holes to ensure that the air conditioning unit installed in the anteroom supplies sufficient fresh air to the inmate cell.

Major need for renovation – Linz correctional institution

A tour of the building at the end of a consultation day in the middle of November 2022 left a significantly below-average impression. The staircase was unnecessarily bare. The few pictures on the walls have faded due to the sunlight and reinforce the impression of neglect and indifference.

There are steps not only in the entrance area but also on individual floors. The smoke coming out of inmate cells is noticeable in the hallway of the women's wing. This not only harms the health of officers, but also the (non-smoker) female prisoners, who include a pregnant woman.

Stale smoke

Cold rooms The juvenile wing is also worn out and bleak. Aside from furniture, inmate cells only contain a television. It is also excessively cold. Although thermostats were in operation, the radiators were cold despite the winter temperature on this day. When questioned, the juveniles complained that it was cold, especially at night. They went to bed fully clothed. The radiators had apparently not been vented. Other than that, there is no explanation for why the cells should be cold, despite the thermostats in the hallway being set to a warm temperature.

The sports room in the basement is well equipped with exercise machines. However, there is no mention of the fact that machines must be disinfected after use. The washbasin in front of the window appears not to have been cleaned for years and needs to be replaced.

This sad impression continued when accessing the outdoor area. Almost half of the gravel surface is covered with a layer of moss and cannot be walked on or used for sporting purposes without risk of injury. As this part of the yard remains in shadow for the entire day and is only cleaned once each year during the spring, the yard cannot be used until then.

Major need for renovation Overall, Linz correctional institution requires significant renovation, which should take place in the near future. The AOB discovered during the consultation day that the communication and security system is set to be replaced. Also, the two specially secured cells are due to be adapted. Furthermore, a priority for the management of the facility is to create two inmate cells that are suitable for persons with disabilities. It is also planned to renovate the visitor area. There is not even a toilet there. Visitors have to use the facilities in an adjacent building (school). Finally, the guard room area is also set to be renovated.

Despite the cramped conditions, the Federal Real Estate and Property Corporation (*Bundesimmobiliengesellschaft*) is committed to the location. It is anticipated that the offer of training and education will be expanded following the improvements. There should also be access to ELIS programmes in inmate cells in future. Televisions, radios and telephones should also be available as standard. Overall, 50 inmate cells will be adapted during ongoing operations. The building will also be extended during the course of the renovation.

Structural deficits – Innsbruck correctional institution

Tiny inmate cells Innsbruck correctional institution is a building from the 1970s. The main building houses inmate cells with bunk beds. Since the area available to stand in is restricted by the installation of the toilet and the positioning of the beds, prisoners are unable to walk up and down.

To save space, the bunk bed ladder is positioned at the foot of the bed, so that the occupant of the upper bunk has to crawl forward along the bed until

it is possible to lie down. Inmate cells are so small that, in addition to a small table, they only have one stool situated beneath it that can be pulled out when required. Additional chairs would impede access to the window. On a positive note, inmate cells have a television and a fridge.

The prison doctor's surgery was also in a sorry state; it was completely worn out and in no way consistent with the expectations of either patients or medical staff.

Medical surgery requires urgent renovation

The modular structure in which mentally ill offenders, women and juveniles are housed left a significantly better impression in structural terms. The rooms there are bright and are not outdated. Some drawbacks include the bathrooms, which do not have barrier-free access, but are rather installed in inmate cells as cabins at a height of around 15 cm. They include a toilet and a shower, although the showerhead is so inappropriately positioned that the whole bathroom floor gets wet whenever it is used.

Bad planning of bathrooms

Lack of space – St. Pölten correctional institution

At a consultation day in April 2022, the AOB was able to gain an impression of operations at St. Pölten correctional institution. The visit covered the company providing occupational opportunities, the carpentry workshop, the metalworking shop, and the decorating unit, which is also responsible for in-house electrical work, the laundry as well as the spaces that are operated by the prison business.

The building left a significantly better impression, having been fully renovated in 2021. The roof structure and covering were renewed, new windows were installed, the facade was painted, the plinth area was renewed and metalwork and drain pipes were replaced. The final part of the external work was being carried out at the time of the visit. Seven or eight structural building projects have been completed on the building within the space of one year.

Renovation of the main building

These significant improvements were not able to make up for the fact that the building still has to make do with 30 six-person cells and one eight-person cell. As regards the two-person cells, these are particularly small. It would be desirable for an annexe to be built, which would enable the management to ensure strict separation between detainees in pre-trial detention and prisoners serving a custodial sentence, to house juveniles appropriately, to offer individual cells to detainees in prison for the first time and to provide special services with suitable spaces. At present, the psychological service and the social service can only use the duty office for discussions with prisoners. Unfortunately, construction of the annexe would encroach upon the open areas that are used by the prison business as a garden.

Cramped conditions

Shabby inmate cells Two inmate cells chosen at random in the building were visited, and their condition was not found to be significantly below average. Inmates complained about furniture with sharp-edged screws protruding. This was the case for chairs as well as box-like seats, resulting in risk of injury or damage to clothing from the furniture. The AOB pointed out that these defects would have to be rectified.

Failure to mark steps – Graz-Karlau correctional institution

The AOB previously objected to the failure to mark steps at the foot and top of stairways at St. Pölten correctional institution in 2016 and Suben correctional institution in 2018. After receiving a complaint, during the year under review the AOB discovered that steps were also not marked at Graz-Karlau correctional institution.

Large number of tripping hazards The Austrian standard *ÖNORM B 1600* only requires markings within buildings accessible to the general public. However, areas that are not generally accessible to the public should also be brought up to standard, because it makes no difference whether an accident, which occurs due to the failure to see a top or bottom step, happens within a part of the building that is accessible to the general public or elsewhere.. Due to frequent user turnover in terms of both detainees and guards, the AOB considers that the locked zone should be treated as an area in which markings should be applied.

Fortunately, the Federal Ministry of Justice accepted this view. Steps at the foot and top of all stairways at Graz-Karlau correctional institution had been properly marked in accordance with the *ÖNORM B 1600* standard by the end of February 2022.

Mould in showers – Feldkirch correctional institution, Dornbirn satellite facility

Damage caused by damp for years During a consultation day in the middle of March 2022 at the Dornbirn satellite facility, inmates complained about mouldy showers. During the next visit the AOB also identified damage caused by damp. Since it is constantly damp throughout the entire shower room, simple airing and occasional cleaning is not sufficient to remove the mould. Since the problem has been known for years, the AOB suggested that the Ministry renovate the shower rooms as a matter of priority.

The Ministry confirmed the persistent mould. A thorough renovation had not been possible due to budgetary constraints. It stated that the satellite facility was affected by significant structural deficits. Major, long-term investments would no longer be sufficient and the building would be closed. Until then, the mould should at least be cleaned off surfaces.

Exercise yard for the women's wing – Eisenstadt correctional institution

The design of the exercise yards at the Eisenstadt correctional institution represents a problem. They are not properly configured, in terms of both architecture and their layout. The outdoor area available to women is particularly unsatisfactory. It is a yard surrounded by a high wire mesh fence. The whole area is paved, and due to its size of 10 by 5 metres it is unsuitable for moving around or passing the time. There is a green area outside the yard that is unused. Unfortunately, no consideration has been given to the possibility of setting it up as a garden.

Depressing cage

Lack of opportunities for sport – Vienna-Mittersteig correctional institution

In April 2022, detainees complained that there was no opportunity to engage in sport. The large internal yard had been closed for almost two years due to building work. There is no specific area for sport. Training with dumbbells and weights is prohibited. Although there is an exercise bike on each floor, there is no other sporting equipment. There is a table tennis table on the ground floor.

The AOB discovered that building work had come to an end in the summer of 2022. Since then, it has been possible to expand the options for sports once again. As a result, it will be possible to play ball games such as basketball or badminton in future on the hard surface in the internal yard. In addition, gym mats will be installed in the multi-purpose room on the second floor, so that at least gymnastics can be available during bad weather. The room is not (really) suitable as a sports room, although it can be readily ventilated (for brief periods). The management of the facility also plans to set up sports groups again.

Future options

Following the AOB's proposal, the Ministry announced that the possibility of setting up a specific sports room was being considered. In addition, provision has been made in the 2023 budget for the purchase of various exercise machines such as a rowing machine and a treadmill.

Acoustic nuisance from ventilation system – Pavillon 23/2, Penzing Hospital

A patient complained that he was unable to sleep at night because the ventilation system was permanently in operation. It had been installed in the bathroom adjacent to the patient's room, which for security reasons did not have a door. The hum of the fan was clearly audible and it could not be switched off.

Permanent noise

When queried concerning the matter, the head of nursing staff stated that he was aware of it. The patient had been moved in the meantime from the acute care room, with the result that he was no longer affected by the acoustic nuisance. Nobody had previously complained about a humming noise emitted by the ventilation system. However, there was an understanding that people accommodated in the acute care room are particularly sensitive.

Switching off during the night

There was a willingness to remedy the situation, provided that this could be done without any technical cost, especially as the Municipality of Vienna was no longer planning any major investments in view of the impending relocation of pavilion 23/2. Attempts would be made to clarify with the building technician whether a time switch could be installed in order to turn off the fan during the night.

Significant improvements – Wiener Neustadt correctional institution

In the middle of February 2022, the AOB was able to identify significant improvements at Wiener Neustadt correctional institution. New window bars had been installed in the old building as well as an internal fence within the exercise yards. A dry riser was installed in the staircase in order to improve fire safety and the Federal Real Estate and Property Corporation (*Bundesimmobiliengesellschaft*) upgraded the sewer.

A lot of work carried out in-house

All hallways and most inmate cells were painted. Overall, 450 kg of putty and 1,500 litres of paint were applied to a surface totalling 6,500 m². 75 inmate cells were repainted, locks to inmate cells were changed, radiator maintenance was carried out, bunk beds were equipped with climbing devices, mattresses were replaced and the old wooden cabinets were changed for lockable cabinets made from plastic. Although a random check established that no individual cell was entirely free from faults, overall significant progress has been made, which has had a positive effect on the prison atmosphere.

The management of the facility conducted employee appraisals with all officials, improved job satisfaction and held return-to-work discussions with officials on long-term sick leave before they resumed work in order to clarify in which part of the building the officer concerned would be most at ease in future.

Women's wing exemplary

The prison atmosphere in the women's wing was particularly positive, and the head of the wing came across as being particularly enthusiastic. She endeavours to provide the women with a daily structure – despite the continuing low general employment rate – by offering housekeeping courses. This enables them to learn in small groups about hygiene, ironing, using washing machines, baking, cooking and make plans for after release from prison, etc. On the day of the visit, the women's wing was particularly clean

and hygienic. All of those present appeared to be satisfied and confirmed that this was the case when asked.

3.8.4.3 Living conditions

Dramatic overcrowding – Eisenstadt correctional institution

For a number of weeks during the autumn of 2022, the Eisenstadt correctional institution had an occupancy rate of 120%. According to media reports, which read "Eisenstadt correctional institution bursting at the seams" ("*Justizanstalt Eisenstadt platzt aus allen Nähten*", Kronen Zeitung of 25 September 2022), the facility no longer had enough bunk beds and detainees were forced to sleep on the floor. The reason for this was, and still is, the daily influx of smugglers being apprehended. 83% are foreigners. In addition to overcrowding, the range of languages spoken among detainees was causing problems.

Consequences
of illegal border
crossings

By contrast, during the same period, other correctional institutions had an occupancy rate of only 80%. The issue for the AOB was thus what action the Ministry was taking in order to reduce occupancy spikes at Eisenstadt correctional institution. Occupancy figures are recorded on a daily basis by the Ministry. In addition to daily reports, an online application of the Integrated Prison Administration can be used to obtain current figures. Between January and July 2022, detainee numbers for the whole of Austria increased from 7,573 to 7,847.

The prison administration has various options for evening out disparities between the capacity and occupancy of individual facilities. Once overcrowding has been identified, changes of classification and transfers between prisons are treated as a matter of priority. However, all relocations are dependent upon the duration of the sentence, security code and type of prison regime. Linguistic challenges are dealt with using a video interpreting system, which is being used at all correctional institutions. It is also possible to use the "*Sprache Direkt*" program.

Compensatory
measures

It was established that the competent department within the general directorate had decided on two changes of classification and six transfers between prisons, but that this had not resulted in prompt transfer. The Ministry was unable to provide a detailed list of transfers between prisons and changes of classification.

Decisions acted on
late

The Federal Commission of the Austrian NPM also expressed concerns regarding the situation. It visited Eisenstadt correctional institution in the middle of October 2022 in order to document the circumstances of detainees and staff. On this occasion, the Commission established that people convicted at first instance whose respective judgments had not yet become final were being temporarily housed in St. Pölten, Krems/Donau

Ad hoc visit by the
Commission

and Graz-Jakomini correctional institutions, which had somewhat reduced the occupancy pressure. However, the full cost of transportation was being borne by Eisenstadt correctional institution. For officers this meant a large number of additional journeys involving long distances. The minor easing of pressure on everyday prison life was entirely offset by this additional work.

Short cell opening times – Graz-Karlau correctional institution

No time for basic needs

A number of prisoners complained that cell opening times in two wings were too short at weekends. One prisoner stated that four of them were being held in an inmate cell and that the cell was only opened for 15 minutes in order to shower and use the telephone. Some officers were a little more generous, leaving cells open for around five minutes longer. However, during this period it was not possible to attend to bodily hygiene or to telephone relatives or friends.

The management of the facility stated that there had been frequent attacks in these two wings. There were constant fights and incidents, and so cell opening times had to be kept short as a result. A remedy could only be envisaged following the completion of alteration work, which should increase the number of single cells. Each single cell should also have its own bathroom, enabling inmates to shower at any time so that cell opening times would not have to be used for bodily hygiene.

The AOB recommended that the alteration work also be used as an opportunity to install cabling so that sufficient telephones would be available in future.

Lack of indoor sports options – Korneuburg correctional institution

Too little equipment

A number of inmates complained that they only had very limited opportunities to practise sports. Although the sports room in the south wing had a treadmill and fitness equipment, the north wing only had an exercise bike and pull-up bars. The AOB took this as a reason to review the issue.

Multi-purpose room

The sports room on the first floor of the north wing is situated at the end of the hallway opposite the kitchen. It is a large L-shaped room with a PVC floor. The long side has a continuous window overlooking the internal courtyard that lets in daylight.

There is a table tennis table in the middle. Bats are available. Balls can be borrowed from staff. There is a dartboard on the wall, with darts placed on the windowsill. There is also an exercise bike and a fitness machine with a pulley mechanism, which is clearly broken. Until it is repaired, it can only be used to do pull-ups.

The management of the facility correctly states that there is not enough space for additional devices in the room. They are aware of the defective

equipment, but are still waiting for spare parts due to supply problems. Until then, inmates are allowed to train with home-made weights.

Washing of hand, bath and tea towels – Sonnberg correctional institution

As was pointed out by a prisoner, detainees at Sonnberg correctional institution have two hand towels, two tea towels and two bath towels, which are changed every 14 days. They have to decide between not washing for 24 hours, or using one towel for too long and only one towel of each type in order to avoid running out.

Sonnberg correctional institution confirmed that hand, bath and tea towels are changed every 14 days. Not all prisoners hand in their sets every second week.

Fixed wash day

It is permitted to place towels in the laundry bag along with underwear for weekly cleaning. As long as the laundry bag is not too full, thereby enabling proper cleaning, this is not a problem.

The AOB recognises the efforts made by Sonnberg correctional institution to cater to the wishes of individuals. However, in order to avoid (smear) infections and taking account of an understandable need for hygiene, a default usage period of two weeks appears to be too long. It should also be considered that, based on experience, smokers are more prevalent within the penal system and even unused towels absorb smoke.

Interval too long

No food option to suit religious requirements – Asten correctional institution

A detainee at Asten correctional institution complained that he had not received kosher food during the first three weeks of his detention at Asten correctional institution. He had received kosher food at Vienna-Josefstadt correctional institution, at which he was previously housed. A note to this effect had been recorded in his electronic file prior to transfer.

No kosher food

The Federal Ministry of Justice conceded that, despite being aware of the file, Asten correctional institution had failed to discuss the detainee's religious dietary requirements with him and to organise meals through the Jewish Community. However, it was also noted that the individual in question had not himself reported his special dietary requirements at the time he was received at Asten correctional institution.

On a positive note, it should be pointed out that as soon as Asten correctional institution became aware of the matter, it took action promptly and organised kosher food, which was delivered deep-frozen from Vienna.

Unequal treatment at prison kiosk – Innsbruck correctional institution

Special offers not available for everyone

An inmate complained that detainees not performing work at Innsbruck correctional institution were always taken last to the prison kiosk and that stock of special offers, e.g. cheap butter or milk rolls, had often run out.

It is understandable that cheaper products are not kept in stock in unlimited quantities. However, detainees not performing work through no fault of their own should not miss out on such special offers.

Rotation ensures equality

The AOB was able to ensure that the strict plan specifying when inmates from each wing could go to the prison kiosk was set aside and a rotation system was introduced. As a result of the rotating times, those inmates that had previously been left empty handed would have the opportunity to take advantage of special offers.

Payment of allowance – Federal Ministry of Justice

A day release prisoner complained that he was only paid the food allowance monthly in arrears. As he was required to feed himself, he had had to pay for the costs of food up front.

Difficult to reclaim payments

The Ministry confirmed the correctional practice. Reports from Graz-Karlau correctional institution have apparently shown that meal allowances paid out in advance are in most cases spent immediately by day release prisoners at the Maria Lankowitz satellite facility. If a day release prisoner is required to return to the main facility due to misconduct, the money has often been spent entirely at the start of the month. In such cases, it is no longer possible to reclaim it.

The AOB notes in this regard that prisoners must contribute to the costs of the penitentiary system, which is done by applying a deduction to their wages. Wages are credited monthly in arrears. On the other hand, correctional institutions must ensure the sustenance of prisoners, who must receive sufficient nourishment in the form of simple prison meals. If a correctional institution is unable to comply with this obligation, for instance due to the fact that the detainee is not physically inside the correctional institution, in the view of the AOB the detainee has a legal entitlement to a substitute payment in cash.

Practice unlawful

Although it is possible to make up for any previous (excessive) spending by paying out the food allowance in arrears in the event of return to the main facility, this would mean that detainees would have to advance the costs of their own meals. There is no basis for this in the Penitentiary System Act (Strafvollzugsgesetz). In addition, the Ministry appears to have left decisions concerning offsetting arrangements to individual correctional institutions.

Decisions that do not require any differentiation should be taken centrally. In order to ensure equal enforcement, the AOB suggested that an instruction be issued at federal level requiring food allowances to be paid in advance in future. The Ministry implemented this suggestion. Meal allowances must now be paid out at all correctional institutions each month at least weekly in advance.

New solution

Failure to comply with requirements set out in decrees – Mittersteig correctional institution

In April 2022, a detainee at the Floridsdorf satellite facility of Vienna-Mittersteig correctional institution complained that his computer had still not been returned to him. The device had been taken away from him in 2019. Following an investigation, no criminal conduct had been identified. Nonetheless, his laptop had still not been returned to him.

The issue had previously been discussed with the general directorate at the start of July 2021. It was assured that the necessary IT parameters would be put in place by the end of 2021. The individual case discussed should be expedited, especially as the PC was taken away from the prisoner without having established any misuse on his part.

Promise not kept

During the discussion, the general directorate agreed with the AOB that the waiting time had been disproportionately long. The AOB also stressed once again in the discussion that working on a PC throughout the period of detention should be regarded as a significant aspect of re-socialisation.

Last year, the AOB discovered that the Floridsdorf satellite facility is unaware of any change to the Enforcement Handbook (*Vollzugshandbuch*). This year it was informed that the general directorate has noted that PCs were not being returned by Mittersteig correctional institution and its satellite facility.

Various excuses

The AOB cannot accept that decrees applicable to all correctional institutions in Austria are not being implemented and complied with in Vienna-Mittersteig. The issue of finding a further case of maladministration and a recommendation concerning this issue was considered.

The Ministry stated that the Head of Vienna-Mittersteig correctional institution was reminded concerning the applicable legal provisions contained in the Penitentiary System Act, as well as the rules contained in decrees, and was instructed to comply with the Act and decrees. An implementation period lasting until 1 September 2022 at the latest was agreed upon. Following the expiry of this period, the general directorate issued a written instruction to the management of Vienna-Mittersteig correctional institution, which should be complied with by the start of February 2023.

Years of struggle

Call for equal treatment The AOB does not deny that technical developments in the IT sector represent a challenge for the prison administration. However, as this affects all correctional institutions, it is not apparent why detainees in one particular facility should be treated less favourably than those at another. It thus objected to the difference in treatment.

Privileges in the event of transfer – Federal Ministry of Justice

It is beyond doubt that a change in the place of incarceration should not have any effect on privileges previously granted. Withdrawal should only be ordered if privileges are abused by the detainees or if the circumstances under which they are granted no longer apply for any other reason. It is not sufficient simply to assert that practice at the new correctional institution is different. In the view of the AOB, greater attention should be focused on the conditions under which a privilege was granted. These circumstances should be documented to make sure that they are known at the next facility. Not every change is relevant in this regard. The relevant circumstance must be one that would preclude the grant of the privilege.

No over-hasty withdrawal Since detainees are initially held in “arrival cells” in the event of transfer, which are not similar to ordinary inmate cells, it is possible that the conditions of the new, albeit temporary, inmate cell could be regarded as a reason for the subsequent failure to apply the conditions under which the privilege was granted.

Assessment only after access phase Unless and until it has been definitively clarified in which inmate cell the detainee should be accommodated on a long-term basis, any technical devices that have been allowed as a privilege should not be issued. The correctional institution should only review whether the conditions under which the privilege was granted are still met once this inmate cell has been allocated. The Ministry committed to considering these suggestions when next reviewing the Enforcement Handbook.

Damage to property during transfer – Garsten correctional institution

The private property and food belonging to one prisoner were mislaid during his transfer from Garsten to Stein. His television was also damaged in transit.

The Ministry declared that not all private property is logged in the Integrated Prison Administration (i.e. an IT application of the judiciary) in the event of transfer. The administrative cost associated with doing so is too high. Only specific items such as valuables and documents are recorded and logged.

Damage conceded In this case, it was conceded that the television had been damaged. Some food had to be disposed of, in part for hygienic reasons. Based on the

purchases made during the previous three months, the prisoner was offered compensation of around EUR 290.

It is clear that not every item is recorded individually. However, particular care is required when handling third party property. No further action by the AOB was necessary following the offer of compensation.

Missing items – Innsbruck correctional institution

One inmate complained that upon returning to prison to serve his sentence (following an escape) some of his private property was missing, including clothing and everyday items.

All items belonging to the inmate had been packed away in a box by a prison guard, which was handed over to the prisoner upon his return. The actual contents of the box were not specifically recorded. In addition, some of the missing items were prison property, which should not be returned.

No record

The Ministry, however, took this case as an opportunity to require Innsbruck correctional institution in future to keep an inventory of items, to record all items taken into custody and to obtain confirmation that they have been taken from the inmate concerned and from the officer doing so in order to ensure better traceability.

The AOB is not unaware of the administrative cost involved in recording each item individually. However, any third party property must be treated with care and the prison administration should also not be placed in a position in which evidence is lacking. The AOB therefore welcomes the measures taken. In order to avoid similar complaints, the Ministry requirement should apply to all correctional institutions.

Discharge of burden on proof

Retention of operating instructions – Krems correctional institution

One inmate at Krems correctional institution complained that he had been refused permission to buy a pocket calculator. In addition, operating instructions had been taken away from him and not subsequently returned.

The Ministry confirmed that a request to purchase a particular pocket calculator had been made in the middle of June 2022. Due to initial security concerns, the purchase request was rejected. Following a further request in the middle of August 2022, research was carried out to establish whether the device was internet capable. The operating instructions referred to by the inmate were required for this purpose. The security concerns were ultimately resolved, and the request was approved.

Multiple requests

The pocket calculator was purchased and provided to the inmate in September 2022. The inmate was also given the operating instructions at this time. The reason given for the delay was an acute staff shortage at

Krems correctional institution, as well as the fact that the pocket calculator could not initially be sourced.

Instructions withheld for unnecessarily long time

It is noted that the inmate ultimately received the device requested. However, it does not make sense why he was only provided with the operating instructions at the time the device was handed over, especially as they can be downloaded from the internet and Krems correctional institution thus did not require this documentation from the inmate at all.

3.8.4.4 Right to family life and contact to the outside

Restrictions on visiting rights imposed by decree – Federal Ministry of Justice

The First judiciary law accompanying the COVID-19 Law (*1. COVID-19-Justizbegleit-Gesetz*) (Federal Law Gazette I 2020/16 as applicable pursuant to Federal Law Gazette I 2022/224) authorises the Ministry to adopt regulations imposing restrictions on visits and other contact to the outside.

Decree rather than regulation

Until the respective regulations were issued, the Ministry directed the correctional institutions in writing on various occasions not to allow visits. When asked concerning the lack of legal cover, the Ministry countered that during a “lockdown” it was in any case not permitted to leave one’s place of residence for the purpose of making a visit. As such, there were no adverse consequences for visitors or prisoners.

This interpretation of the law is not accurate: even during the period of strict lockdowns, contact was permitted several times each week with a partner not living in the same household, immediate family members (parents, children and siblings) and certain important people with whom there was either physical or non-physical contact as a general rule. The restrictions imposed by the Ministry thus had clear effects on existing social contacts and amounted to an interference with the fundamental right to privacy and family life on both sides (Article 8 ECHR, Article 7 of the Charter of Fundamental Rights of the European Union).

Infringement of fundamental rights

The fundamental right was also infringed. The First judiciary law accompanying the COVID-19 Law prescribes the legal form by which restrictions may be imposed. These do not include directives, which do not have any external effect. It was objectionable that, when imposing restrictions on visits, the Ministry did not use the prescribed legal form.

Different opportunities for extended visits – Federal Ministry of Justice

Essential for re-socialisation

The AOB identified those correctional institutions throughout the country at which extended visits were possible. The AOB regards the opportunity

to receive such visits as an important instrument for maintaining personal ties. This facilitates the maintenance of a positive "space for reception" after incarceration, which helps to prevent re-offending.

In order for an extended visit to take place, there must be "suitable rooms" in the correctional institution. Detainees do not have any specific individual right to the creation of such rooms. There is also no right to temporary relocation to another correctional institution in order to receive such an extended visit.

Out of the 28 correctional institutions, six facilities (Garsten, Graz-Karlau, Hirtenberg, Korneuburg, Salzburg and Stein) have two suitable rooms, and eight facilities (Asten, Eisenstadt, Klagenfurt, Leoben, Schwarzau, Suben, Wels and Vienna-Simmering) have one room, while Klagenfurt correctional institution has to rely on its satellite facility. Demand can be catered for at all correctional institutions that have at least one room. Detainees requiring enhanced security at Klagenfurt correctional institution cannot be taken to the satellite facility as it is designed both structurally and in terms of staffing for relaxed detention; no transfer to another correctional institution has occurred to date. Out of those correctional institutions that do not have any "suitable rooms", Linz, Ried and Vienna-Mittersteig correctional institutions stated that detainees would not as a general rule be transferred to other correctional institutions.

Major differences

There is no objective reason for this difference in treatment. The AOB therefore asked the Ministry to ensure that detainees at all correctional institutions have the opportunity to receive extended visits in principle.

Unjustified less favourable treatment

It is also striking that five of the correctional institutions that do not have "suitable rooms" reported a lower demand for extended visits. The AOB thus also suggested that detainees be informed that it is nonetheless possible to request an extended visit at a correctional institution in which there are no suitable rooms.

Duty to provide information as a proactive obligation

The Ministry implemented this suggestion. If an extended visit cannot be arranged on site, the possibility of having one at another correctional institution in the vicinity should be considered. Appropriate visiting spaces should also be created in the main building of the newly built Klagenfurt correctional institution. Due to a lack of financial resources or suitable spaces, the only places where there will still be no opportunity for extended visits in the future are Gerasdorf, Linz and Vienna-Josefstadt correctional institutions.

Children in detention – Federal Ministry of Justice

The issue as to how long a small child should be allowed to remain with their mother in prison is a matter for the management of the respective

Extensive decision

correctional institution. It must strike a complex balance, which also incorporates assessments of child psychological and socio-pedagogical aspects. Following complaints concerning the holding of children in custody or the separation of children from their mothers (on the grounds that it was not permitted to keep them in custody), the procedure for making decisions regarding such matters was reviewed.

As the Ministry stresses, according to long-standing practice, decisions are not taken by the management of the facility alone. There is close cooperation between special services at the correctional institutions and external organisations, such as the youth welfare facility and/or child and youth welfare services. The specialist views of these bodies are taken into account. There is no legal obligation to obtain these specialist views, even on an advisory basis; moreover, they are not considered to be essential by the Ministry.

Statutory basis called for

The AOB does not doubt that, in practice, most decisions are taken after receiving input from experts. However, the reworking of the legislation in order to establish an obligation to involve advisors would provide certainty, and is thus recommended.

Long wait for relaxation of prison rules – Federal Ministry of Justice

Only dealt with after a year

Acting on its own initiative, the AOB questioned the time taken to process a request for a relaxation of prison rules for a detainee at Stein correctional institution. His carer filed a submission request concerning the relaxation of prison rules on his behalf at the start of May 2021. Following a supplementary request at the end of September 2021, the submission request was clarified by a letter sent in November 2021 and once again referred to the general directorate for a decision. Six months later, a decision had still not been taken.

The Ministry conceded that the supplementary report received in December 2021 had been placed on file without informing the competent case officer. This meant that it was only conclusively dealt with in the middle of June 2022.

In terms of its content, the plan to allow periods of release for social purposes was acknowledged. Periods of release for social purposes should be used in order to enable gradual reintegration into society. The detainee's willingness to participate in this programme should be confirmed. In addition, coping strategies acquired by the detainee during therapy, such as how to deal with frustration, women and the detainee's own addictive behaviour, and also ultimately their ability to negotiate with others, should be tested.)

3.8.4.5 Torture, abuse and degrading treatment

Delayed investigation of abuse – Stein correctional institution

Acting on its own initiative, the AOB launched investigative proceedings concerning an injury caused to an inmate by a prison guard: the incident took place in February 2022 in Stein correctional institution. The food hatches to inmate cells were opened shortly before 5 p.m. Evening meals are normally passed through them without opening the cell doors.

The inmate in question stuck his head out of the food hatch in order to speak to the porter. Apparently, it is commonplace on the wing for inmates to stick their heads out, and this was also done by other prisoners that evening.

For some unknown reason, a guard grabbed the prisoner's head with two hands and hit it repeatedly (between four and six times) against the inmate cell door, which could have resulted in a broken neck or severe injury to the throat. The inmate unsuccessfully attempted to avoid further abuse and to pull his head back through the food hatch. Using both hands, the guard violently pushed the head back through the food hatch. Two lacerations (on the left side of the forehead and on the right ear) can be seen in several videos placed online by the injured person.

Guard lashes out

The inmate then pressed the emergency call button. He stated through the intercom that he had been injured by a guard, pointed out that he was bleeding and asked for a doctor. No inspection took place in the inmate cell, and a prompt medical examination was not carried out.

Emergency call

He stated that his concerns were disregarded and he was taunted. He was told that he was "a man" and would "get over it". He was also informed that "a complaint would not solve anything". In the view of the inmate, they were only waiting for him to say something that could be used as a pretext for accusing him of an administrative or criminal offence. On the same evening, two nurses looked through the food hatch into the inmate cell independently of each other.

At his wish, the prisoner was taken to the doctor several days later due to a persistent headache. This was the first time that a doctor had seen him after the incident. The doctor did not measure the wounds or take any photographs. On the same day, the inmate was informed that he would be transferred to Suben correctional institution, which then occurred.

Upon his arrival there, he stated during the admission examination that he had been struck on the head by a guard at Stein correctional institution. In view of the injuries identified by him (laceration of the right auricle, abrasion to the left temple around 5 cm long), the doctor considered these allegations to be credible.

Credible pattern of injury

The Ministry stated that the incident was reported to the Office of the Attorney General in Vienna. However, the competent public prosecutors' office in Krems did not conclude that there was any initial suspicion of a criminal act. In view of this fact, it was not considered that there was any need to question witnesses.

The AOB took the view that the public prosecutor's decision – that there was not even any initial suspicion of a criminal act pursuant to Section 88 of the Austrian Criminal Code (*Strafgesetzbuch*) – could (only) be explained by the extremely brief report from Stein correctional institution, which did not contain any details whatsoever concerning any injury. On the other hand, nurses noted injuries on the evening of the incident. This discrepancy could be clarified by questioning witnesses.

Inaccurate report As a matter of fact, transcripts were subsequently taken of statements made by the two nurses, another prison guard and the porter. These show that the two nurses had identified the injuries, after which they had discussed them with the guard who made the report, who had also seen the bleeding wounds. However, in his subsequent report to the management of the facility and to the Office of the Attorney General in Vienna, the guard later stated that the two nurses in service had looked at the prisoner through the food hatch and had been unable to identify any injuries.

Incriminating witness statement The statement made by the porter fully confirms the account provided by the injured person. He stated as follows: "I was two inmate cell doors away from the inmate's cell door [...] and saw him stick his head out through the food hatch. I then noticed the inmate involved in an altercation with the guard. The guard then closed the food hatch and pressed it against the inmate's head. The inmate tried to defend himself. The guard then attempted, first with his hands and then with his knee, to push the inmate's head back through the food hatch. The inmate again sought to defend himself. He was unable to close the food hatch completely because the inmate's head was stuck in the food hatch. The inmate cried out and told the guard to stop. I came up to the inmate cell door with the food trolley and asked the guard what was happening and what he was doing and said that the inmate was already bleeding and he should stop. The guard made a dismissive gesture with his hand and indicated to me that I should give some food to the inmate. I saw the injured [...] through the open food hatch. I gave him his evening meal and saw a heavy wound to the ear as well as heavy bleeding to the side of his head."

Distressing picture The following part of the statement is particularly telling: "I found out that other guards came along as well. I found out that guards had come from the 'task force' and that one of them had said to him: 'Hey, what are you doing, man? Are you crazy?' I then went back with my trolley and was locked back inside my inmate cell. I could hear the prisoner shouting out, saying he needed help".

As a result of these assertions, Stein correctional institution submitted a supplementary statement of facts to the Office of the Attorney General in Vienna. The AOB objects to the fact that closer investigation was only carried out due to its own insistence: while the statement by the prison doctor in Suben correctional institution was made, as the Ministry asserts, exclusively in response to the enquiry by the AOB, the assessment provided by the doctor nonetheless contains new information in addition to the victim's allegation that he was injured. Moreover it is not – as the general directorate asserts – a subjective appraisal but rather a reconstruction of the pattern of injury by a specialist expert, and should have been taken by the authorities as a reason for a follow-up complaint.

Not much interest in clarifying the facts

By a letter of November 2022, the Ministry announced that the public prosecutors' office in Krems had withdrawn a criminal complaint filed against the guard in September 2022, resulting in the discontinuation of criminal proceedings. A disciplinary complaint against the guard has apparently been submitted to the federal disciplinary authority.

Intimidation by a service dog – Stein correctional institution

An inmate in the high-security wing complained that he had been held for a considerable period of time in a specially secured inmate cell at Stein correctional institution. He had been forced to sleep with manacles and shackles in order to prevent self-injury. Although it was cold and he had asked for one, he was not given a blanket. The individual affected also complained that a dog had been set loose on him and that he had been threatened with a taser.

Escalation on the secure wing

In its answer, the Ministry confirmed that the usage of a taser had been threatened on several occasions during deployment, and that the taser had also been activated during the deployment. It was no longer possible to establish whether the prisoner had asked for a blanket. Tear-resistant blankets were available in Stein correctional institution if required.

Taser activated

In general terms it was possible to establish that specially secured inmate cells at Stein correctional institution also have a thermostat in the room. Heating is provided automatically, taking account of the internal and external temperature. Specially secured inmate cells are equipped with underfloor heating and radiators within a single heating circuit. The pre-set temperature is 24°C, and this setting naturally cannot be changed by officers on their own initiative. During this period the external temperature in the Krems area had daily peaks of 25°C.

Of course, it is naturally also possible that it was particularly chilly during the night. It is also not disputed that the person affected was fitted with an abdominal belt including manacles and shackles.

Police dog in front of cell bars As regards the threat of unleashing a dog, the Ministry stated that police dog handlers and sniffer dogs were also present in the correctional institution on that day in order to carry out searches of inmate cells. This official action was headed by a member of the task force, which had been deployed at short notice due to the escalation on the secure wing.

At this time, the police dog handler had been waiting with his dog in the hallway. The inmate was able to see the dog through the intermediate bars of the specially secured inmate cell. According to the Ministry, the distance between them had been four metres. The dog was wearing a muzzle, was on a leash and was calm and inactive. No threat was made to unleash the dog.

Unnecessary scenario Even though this episode essentially amounts to a case of one person's word against another's it is not clear for the AOB why the dog handler was present at all in the high-security wing and did not wait outside until the member of the task force continued to pursue the official acts for which he had been called out. If it would not have been appropriate to wait outside the wing, the police officer should have waited with the dog in the wing's guard room until the deployment could continue.

Brawl in the shower – Linz correctional institution

Animosities known During the November 2022 consultation day, several prisoners reported that a fight had taken place in the communal shower at the end of October. Two antagonists had met there. They had previously threatened each other with violence in such an eventuality. The guards were aware of this. The brawl could only be ended with the involvement of the task force.

The management of Linz correctional institution confirmed that inmates from several inmate cells were taken to the showers during the morning. After the doors had been closed the guard heard shouting. After immediately looking inside, he saw both of the adversaries lying on the floor. They were holding each other's throats. The alarm was sounded over the radio. The incoming reinforcements broke up and separated the two inmates. A subsequent examination established that they had not suffered any injury during the incident. A third prisoner who had witnessed the incident reported that one of the antagonists had attacked the other as soon as he came into the shower.

Duty of care breached? Although the outbreak of disputes amongst prisoners can never be prevented entirely, if, as is alleged by those who heard, the reciprocal threats were known about, then the guards committed a breach of their duties of care. This is suggested by the fact that (at least) one of the two rivals had evidently only been waiting to attack the other. There is no other explanation as to why the two started fighting immediately after the doors were closed.

Overly “provocative clothing” of a female inmate – Klagenfurt correctional institution

A 36-year-old woman held in pre-trial detention at Klagenfurt correctional received a warning. When she was collected for a visit with her parents, a prison guard informed her that her clothing was too provocative. She was wearing a summer dress with compression stockings. She was forced to change before the visit and to wear trousers instead of a dress.

Changing before visit

The Ministry referred to the obligation to follow any instructions issued by staff. It was not explained why a strapless dress that was 68 cm long could be worn on the wing by a woman who was 169 cm tall, but not during a visit (with parents).

Klagenfurt correctional institution stated that the inmate would have to walk through several men’s wings on the way to the visiting spaces. There had been some isolated instances of inappropriate behaviour among the male prisoners, who shouted obscenities about female inmates during the night.

The Ministry made it clear on its own initiative that female inmates should not be held responsible for the behaviour of male inmates, and proposed a variety of measures. The correctional institution will be recommended to appoint a confidant for female inmates. In addition, workshops should be offered to male detainees during which they can reconsider their image of women. The issue will be addressed at the next meeting of the management of the facility.

The AOB welcomes the fact that the Ministry has proposed various measures. Female inmates must not be held responsible for obscene behaviour or sexual assaults by men on account of their clothing. The problem should be seen as one of the behaviour of male inmates and their image of women and not the style of female inmates’ clothing.

No inversion of offender and victim

Ambiguous message – Eisenstadt correctional institution

The AOB received an excellent impression during its tour of Eisenstadt correctional institution. Rooms are bright, modern and well-lit, the prison atmosphere is excellent, and both inmates and guards feel evidently at ease.

This stands in stark contrast with a sign affixed to the wall of a meeting room in the women’s wing. The room is exclusively available to the social and psychological service for discussions with female inmates. The only sign in an otherwise undecorated room states: “I love listening to somebody lying when I know the truth.” The word “lying” is printed in large type, and a cartoon with a Pinocchio nose has been drawn above.

Blanket submission

The message could evoke an impression of bias for an inmate. For this reason alone, it was recommended that the sign be taken down, which promptly occurred.

3.8.4.6 Health care

Disastrous medical care – Floridsdorf correctional institution

Months without a doctor

During the consultation day held in the middle of April 2022, several inmates complained about the entirely inadequate medical care. The last time the prison doctor had been present on site was three months before. Since then, the medical superintendent from the general directorate had helped out on a couple of occasions. There was still no sustained medical care.

Nurse overwhelmed

During the week, a nurse is on duty in the medical surgery. From time to time, she receives support from a nurse, who helps to sort medication. Otherwise, the nurse is left to her own devices. She has to contact doctors, arrange appointments in medical surgeries, out-patient clinics and hospitals and take decisions that should be left to a doctor.

Since the medical surgery is not staffed at the weekend, all decisions have to be made by the prison guards on duty. They decide in particular when to call an emergency doctor or if a person has to be taken to hospital.

The AOB took the entirely inadequate circumstances as a reason to ask the Ministry to make every effort to ensure that the prison doctor vacancy was soon filled.

The Ministry confirmed the inadequate level of medical care, and took the involvement of the AOB as an opportunity to request the recruitment agency for justice supporting staff to look for a replacement, who started work in May 2022. Additional resources were also found to ease the burden on the nurse.

General practitioner completely overwhelmed – Innsbruck correctional institution

In March 2022, the AOB held a consultation day at Innsbruck correctional institution. It discovered that, for some time, only one general practitioner had been present on site for four days a week. There was no substitute. This inevitably resulted in the doctor being extremely overworked. Time for the patients is extremely limited, and lengthy examinations and discussing results are practically impossible. In addition, on the consultation day, only one single nurse was working, and the other positions were unoccupied. Psychiatric treatment occurs on three days each week.

Acute risk of burnout

As a result of the staff shortage, the prison doctor and nursing staff are under extreme pressure. They object to having to work considerable overtime and point out that there is no replacement if they are unwell or on holiday.

Substandard infrastructure

The environment and fittings in the surgery leave a sad impression. Everything has to take place in one single room. According to patients,

the examination and treatment area does not meet the expected hygienic requirements, and the staff working there are unmotivated.

There is no space offering privacy, either for patients if they have to take off their clothes in order to be examined, or for the doctor and his assistant, if diagnoses need to be dictated and further treatment discussed. There is a desk in the middle of the room, which the doctor and the nurse share. Medication is stored behind it.

The current shortages of medical staff have resulted in inadequate care for inmates and the overloading of existing staff. It is therefore urgently necessary to devise a new approach at federal level.

Nationwide shortages

What is missing above all is a financial incentive to attract medical experts to work in prisons and detention centres. Vacancies remain unoccupied for a long time because no doctors apply due to the low remuneration. Financial incentives and workplace attractiveness should therefore be improved in order to ensure medical care also over the medium to long term.

Excessively late examinations upon arrival – Feldkirch correctional institution

Newly arrived prisoners must undergo a medical examination (health examination upon arrival) within 24 hours of their arrival or transfer. This is one of the health care recommendations.

The reality is different: if a detainee arrives at Feldkirch correctional institution on a Friday, they are only seen by a doctor a week later. The reason for this is that the general practitioner only holds a surgery at the correctional institution on a Thursday.

Examination by a doctor only after a week

At present, this inadequacy can only be made up for by having the inmate examined by a police doctor prior to handover in order to identify any potential signs of injury or abuse, allowing prison guards to decide at the weekend whether it is appropriate to take the inmate to hospital, and having an initial anamnesis carried out on Monday by a nurse who, while being experienced, does not have the same knowledge as a trained physician, before the prisoner is finally seen by the prison doctor on Thursday.

Feldkirch correctional institution is far below the standard that the AOB demands for all correctional institutions in Austria.

Untenable decision-making practice for HCV treatment – Federal Ministry of Justice

In the middle of June 2022, medical staff at Klagenfurt correctional institution complained that no decision had yet been taken in response to two requests for the provision of HCV treatment. Both cases involved women who had

been examined at the hepatitis C out-patient clinic. After a letter was written by a doctor supporting HCV treatment, the medical superintendent at the Ministry was requested to approve the medication in March 2022 and April 2022. However, no reaction was received.

Nationwide examination

In response to these two cases, the AOB asked for a list indicating how many patients at correctional institutions were waiting for HCV treatment. After disparate information had been provided concerning treatment capacity as well as sequencing and planning lists (which however were not furnished), the AOB was able to consult the medical superintendent's official mailbox. This established that most of the requests, which were submitted to the medical superintendent in 2022 and supported by medical findings, had remained unanswered.

Following enquiries with the respective correctional institutions, it was established that patients were still waiting for medication to be approved, despite having considerable viral loads and serving lengthy custodial sentences, and it was not foreseeable when they would be able to start treatment. Officers working in the infirmary described the administrative effort of having to follow up on multiple occasions with the Ministry, without ever receiving an answer, as tiring and tough.

Alarming case of maladministration

In its criticism to the Ministry, the AOB underlined that the recording and processing of requests for the approval of HCV therapy constituted a case of maladministration. Before issuing a joint recommendation, it called on the Ministry to ensure that these requests were recorded quickly in a table and dealt with swiftly in order to ensure the transparent sequencing and approval of medication.

Severe health consequences

It should be noted that, in many cases, patients only remained without medication for three months, barely suffering any side effects, with more than 90% of cases resulting in a full recovery. However, if hepatitis C remains untreated, after a number of years this may result in serious liver disease such as liver cirrhosis or liver cancer.

By late summer, the viral load of one patient had fallen so much that she no longer required therapy. The other patient has been duly receiving the medication since September 2022. She should have recovered by the end of 2022.

Failure to maintain a date for an operation – Garsten correctional institution

An operation was scheduled for August 2022 for a prisoner at Garsten correctional institution in order to deal with his bilateral calcaneal spur. Shortly before the date, he was told that the operation had been postponed until February 2023. The patient subsequently found out that the delay had not been requested by the hospital.

The Ministry confirmed that the appointment had to be postponed due to a lack of prison guard staff resources (due to vacation and sick leave). Transfer to a hospital and guarding at that location was associated with additional costs. The postponement of the operation had been justifiable on medical grounds.

The AOB notes that appropriate medical care must be given to detainees. A date for an operation should be agreed upon if it is medically necessary. The question as to whether treatment should be carried out must be answered according to the rules of medical science and must not be dismissed due to shortages of law enforcement staff.

Prolonged pain

Long waiting times for psychiatric treatment – Stein correctional institution

At the consultation day held in March 2022, various inmates at Stein correctional institution complained about long waiting times for securing an appointment with the psychiatrist. The management of the facility also complained about the situation. At present, only one psychiatric consultant is present at Stein correctional institution for eight hours each week (four hours on Monday and four hours on Friday). These hours are not sufficient to provide adequate care to all inmates who need it. Only acute cases can be treated, either before or after the weekend.

Only emergency care

Efforts made by the correctional institution to recruit new staff in consultation with the Ministry and the recruitment agency for justice supporting staff have been unsuccessful. Cooperation with the university has also failed to bear fruit. It is suspected that this is due to the unattractive working conditions.

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. Detainees are entitled to receive this care. Due to the months-long waiting times for treatment, the statutory requirements are not being complied with.

Statutory requirement unequivocal

Inconsistent approach to blood samples – Federal Ministry of Justice

An inmate complained that, in contrast to the practice in Vienna-Mittersteig, Asten and Garsten, there were no appointments to discuss the results of blood samples at Graz-Karlau correctional institution. On the contrary, it is only possible to receive a copy upon payment of a cost contribution.

The AOB established that appointments to discuss results are not held in all instances nationwide. However, detainees do have the opportunity to ask for any pathological findings to be discussed.

Practice not consistent

The difference in practice is unsatisfactory and should be harmonised. This should involve a consideration of the following aspects: the period of time that passes between the blood sample and the provision of the results creates uncertainty for the patient – as is the case after any examination; the intervening period of time should be kept as short as possible. Every inmate should find out as soon as possible after the results are available. This is because it is only at this point that they can decide – if follow-up is not necessary due to any pathological findings – whether they wish to discuss the results. The failure to provide information would lead the inmate to ask for a discussion of the results too early (or repeatedly), or it would unnecessarily lengthen the period of uncertainty for the inmate. Since the notification of any pathological findings is a medical declaration, this information may only be shared after the report on the findings has been confirmed by the prison doctor.

Ministry approves change

The Ministry agreed with the AOB regarding the fact that the practice of informing detainees concerning the outcome of any pathological findings (from blood tests) also needs to be standardised. There are plans to change the Enforcement Handbook, although a time frame has not been indicated. This should ensure consistent enforcement.

Stocking support for prosthetic leg – Graz-Jakomini correctional institution

Unstable prosthesis

During the consultation day held at the end of October 2022 in Graz-Jakomini, one prisoner complained that he urgently needed a stocking support for his prosthetic leg. Based on past experience, he will consume three stocking supports each year. If the stocking support wears out, the prosthesis starts to rub on the location of amputation, resulting in inflammation of the scar tissue.

He had been held in custody since the start of April 2022 and was still using the first support for that year. He had spoken about it with the doctor a number of times. He stated that the costs for the last stocking support of EUR 900 had not yet been settled. The orthopaedic technician had also enquired several times within the institution. He was also unable to explain the delay.

Replacement finally ordered

In the follow-up discussion, the management of the facility assured that it would look into the allegation concerning the delay. The AOB was able to obtain the scheduling of another treatment appointment at the end of October. A new, specially adjusted stocking support was ordered, delivered in the second week of November and provided to the inmate.

EUR 70 for an x-ray – Stein correctional institution

An inmate at Stein correctional institution requested an *ex-post* deferral of detention. The court apprised of the matter instructed an expert in the field

of internal medicine and pneumology and asked the correctional institution to arrange for the examinations necessary for the report to be carried out.

As the inmate is unable to stand due to the previous amputation of a leg, he was taken to an external doctor who was able to take a lung x-ray even when the patient was sitting. The inmate argued that an amount of EUR 70 was charged to his account for this examination. It subsequently transpired that the amount had been charged in error. A reimbursement was arranged.

Additional charge reimbursed

Data privacy breach – Stein correctional institution

A detainee complained that notices to individual inmates are given through the intercom, including when a person has to see a doctor. This was claimed to constitute a data privacy breach. At other institutions, officers would come to the inmate cell and provide the message to the detainee in person, thereby guaranteeing confidentiality.

Personal notices

The management of the facility conceded that, where inmates are housed in shared accommodation, notices given through the intercom can be heard not only inside the inmate cell by its occupants but may also be audible in the hallway if the inmate cell door is open. Although it may be possible to go to the inmate cell in each individual case at other institutions, this is not practicable at Stein correctional institution due to the difficult staffing situation.

The AOB proposed that prisoners be called if there are any personal notices and asked to come to the charge office where they can be informed without the risk of any third parties listening in. The proposal was accepted.

Confidentiality must be maintained

3.8.4.7 Personnel

Enormous strain on quarantine wings – Stein correctional institution

During the consultation day held at the end of March 2022, guards on the quarantine wing complained about the working conditions there. They have to put on an overall, an FFP3 mask, a face visor and disposable gloves each time they enter the wing. Wearing and changing protective clothing multiple times was stated to be physically challenging and exhausting. Some staff apparently refused to wear protective clothing during shifts, which made the staff situation even more difficult.

Exhausting work

Inmates on the quarantine wing also suffered as a result of the living conditions. They were only allowed to leave the inmate cell twice a week in order to shower and to make brief telephone calls, rather than every other day. There was no outdoor exercise, so they were locked up for 24 hours a day.

An hour outside the cells

By opening up the wing for an hour, section by section, inmates could be relieved of some of the pressure of being locked up and allowed a little freedom of movement. This would also provide relief to the guards on duty, as during this time prisoners could shower on their own and would not have to be accompanied individually from the inmate cells to the bathroom and then back to the inmate cells (while wearing protective clothing).

Despite initial reservations, the management of the facility took account of the suggestion for a structurally closed wing. This was not feasible on the second quarantine wing, which is situated in the main building. As the individual floors are not structurally separated there, there were fears that aerosols could be spread in the cell block or that contaminated objects could be thrown from one wing to another. However, in view of the declining rate of infection, a commitment was made to close down this wing and to subsequently move prisoners to free spaces in the closed wing, so that they could also benefit from eased restrictions.

Training and continuing education in forensic institutions – Asten correctional institution, Federal Ministry of Justice

Daily challenges when on duty

During a consultation day at Asten correctional institution in November 2022, staff from special services pointed out that it was occasionally difficult for colleagues from law enforcement to deal appropriately with behaviour of detainees caused by their illnesses. Some of them felt personally attacked when patients verbally molested them. Conversely, some prison guards also displayed admirable patience when dealing with persons with mental illnesses. Sometimes, there was simply a lack of reciprocal understanding between prison guards and special services.

The management of the institution also considers that there is a need for continuing education and support for officers when dealing with persons with mental illnesses. It therefore drew up guidelines on what to do in the event of specific incidents (threats, intimidation, hate speech, sexual assaults, verbal or physical assaults on staff or clients). They also state what immediate action should be taken with reference to a checklist. Supervised case discussions must take place promptly after any incident. A professional discussion of the incident must be offered to all staff involved, which must also include a collective discussion and clarification of the work situation going forward.

Further training as assistance and support

Training and continuing education in relation to the detention of mentally ill offenders may be offered within the institution or at the Correctional Services Academy (Strafvollzugsakademie), where there is a common concept for executive and non-executive staff. This not only promotes reciprocal understanding among professional groups, but also focuses on the clinical picture and needs of people accommodated in these facilities. The Ministry

indicated that it was considering the provision of this type of collective training.

In addition to reducing the number of professional groups, it is also essential to provide training in how to act appropriately in order to ensure de-escalation. Specialist guidelines should be incorporated into quality standards. This would also help all institutions that are set to be managed as forensic therapeutic centres in future when preparing their mission statements.

3.8.4.8 Detention in forensic institutions

Delay in classification and transfer – St. Pölten correctional institution, Federal Ministry of Justice

According to the Penitentiary System Act (*Strafvollzugsgesetz*), the Ministry must decide within no more than six weeks of a final judgment at which correctional institution and according to which principles the sentence is to be enforced. The decision is referred to as "classification".

An inmate at St. Pölten correctional institution approached the AOB for help, as he had already been held for three months without having been classified. He had received a custodial sentence and was also the object of a precautionary measure that deprives liberty, and wished to start treatment as quickly as possible. This was apparently not being offered to him at St. Pölten correctional institution.

Waiting for transfer

The AOB noted that the decision had been taken by the Ministry too late. The inmate was convicted at the start of July 2022, but was only classified almost twelve weeks later. In addition, there was a delay in transferring him to the correctional institution designated for enforcement, Vienna-Mittersteig, until the end of October 2022 due to a lack of capacity.

In a second case the judgment was issued in November 2021. Classification occurred at the start of March 2022. Transfer to the target institution of Vienna-Mittersteig occurred in the middle of March 2022.

The AOB does not deny that it may take time to lay the groundwork for the decision on classification. It is nonetheless important to stress the need for a quick decision concerning the location of subsequent enforcement as well as swift transfer, as the start of structured care is dependent on this.

Statutory period exceeded

No therapy for detention in forensic institutions – Vienna-Josefstadt correctional institution

A detainee at Vienna-Josefstadt correctional institution complained that he had been classified a month before for the Vienna-Mittersteig special medical facility. However, he was forced to wait until a space became free. It was

On waiting list for months

not foreseeable when he would be moved to the target institution, and what therapy he would receive until then.

The Ministry conceded that the judgment became final in May 2022. He had been classified for Vienna-Mittersteig correctional institution in the middle of August 2022. He was transferred there at the end of September 2022. Inmates cannot be offered any therapy specific to their disorders at Vienna-Josefstadt correctional institution.

Unlawful in several respects

The AOB objected that the six-week deadline for classification provided for by law had not been complied with and that the detainee was not offered any therapy once the judgment became final. This constituted a breach of the intensification requirement, which provides that “a comprehensive treatment examination that is consistent with modern, scientific standards” followed by the offer of therapy must occur “without undue delay”, at the latest at the start of the detention in a forensic institution (Austrian Constitutional Court, judgment of 4 May 2011, 2 BvR 2365/09 = EuGRZ 2011, pp. 297 et seq).

Violation of the separation rule – Graz-Karlau correctional institution

An inmate at the Graz-Karlau correctional institution complained that he was locked up for up to 19.5 hours per day. In addition, mentally ill offenders and prison inmates were mixed together with one another on the wing.

The Ministry accepted that, due to the high occupancy rate, at the end of November 2021 an additional wing had to be created for the detention of mentally ill offenders. The wing contains 20 single cells. They were subsequently occupied by new arrivals. These also included the complainant.

Mixed occupancy

It is conceded that, due to organisational reasons, there have been difficulties in complying with the separation rule. During the transition phase, inmates held in regular detention were mixed up with mentally ill offenders. However, at the end of December 2021 only one inmate in regular detention was still being held on this wing. That prisoner was in the pre-release programme and due to leave the wing in the near future. It was possible to transfer all other prison inmates as soon as a suitable inmate cell became available.

The AOB does not deny that difficulties may arise in separating mentally ill offenders and prison inmates from one another while a new wing is created for the detention of mentally ill offenders. Since the breach of the separation rule was conceded, the complaint was justified.

Inadequate medical care foreseeable – Göllersdorf correctional institution

At its consultation day held at the start of April 2022, the AOB discovered that the post of the deputy to the medical director had been abolished. As the special medical facility has 13 trainee places for doctors, and is hence larger than the General Hospital, this action did not make sense.

Impending bottleneck

The AOB discovered that the Ministry has given notice of a permanent position to the Federal Ministry for Arts, Culture, the Civil Service and Sport. However, the tasks of the deputy to the medical director at Göllersdorf correctional institution also include working at Vienna-Josefstadt correctional institution (the satellite facility of Göllersdorf correctional institution). Since the deputy must be present at Göllersdorf correctional institution if the medical director is absent, this does not appear to be feasible.

The Ministry stated that Göllersdorf correctional institution was responsible for ensuring a deputy to the medical director (to act as a replacement during absences). The 2022 personnel plan included the position of "Deputy to the Medical Director". An evaluation request has already been submitted to the Federal Ministry for Arts, Culture, the Civil Service and Sport, although a response has not yet been received. The appointment review procedure will be launched promptly after the outcome of the evaluation procedure is known. It is correct that the duties associated with this position will include management of the Göllersdorf satellite facility of Vienna-Josefstadt correctional institution as well as deputising for the medical director of Göllersdorf correctional institution. It is considered to be "self-evident" that the holder of the position will be present at Göllersdorf correctional institution for the duration of any substitution period.

Double duties

The concerns of the AOB have not been dispelled by this report, especially as the grant of management responsibility for the satellite facility may conflict with the person's presence from time to time at the special medical facility. The two roles should be separated. This issue was previously discussed at a meeting in late autumn 2022. The General Director expressed his surprise. He had not previously been aware of the issue.

Saving in the wrong place

No day release due to contact restrictions – Mauer-Öhling Regional Hospital

During the consultation day held at the start of March 2022, one patient reported that she would shortly be eligible for an easing of restrictive measures. She had been on the ward since December 2021 and complained that her contact restrictions had been extended and that she would thus not be allowed to go on any trial day release, which she would require for the easing of restrictive measures. Discussions had already been conducted about the follow-up care facility she should attend.

As a solution the AOB suggested that she wear an FFP2 mask for a couple of days after returning from day release and that she could take a PCR test. Should this not be possible, it should nonetheless be permitted to complete the interview without having been on any day release.

No exception In the follow-up discussion, it was stressed that the forensic ward was bound by decisions taken by the hospital in view of the current COVID-19 situation. Clusters of cases should be avoided in all circumstances.

The AOB found that the acute ward includes single rooms in which patients may be placed if they have recently arrived or upon their return from a period outside the facility. When they come into the main building, they take a PCR test, followed by a further PCR test after the third day spent in the single room.

Equal treatment with new arrivals It was suggested that – insofar as compatible with spatial capacity – those people who are shortly due to qualify for the easing of restrictive measures also be temporarily accommodated in a single room so that they can experience periods of day release and are not held any longer than is necessary. Three people were in this position on the consultation day. The management undertook to consider at the next team meeting whether the proposal was feasible.

Expansion of Göllersdorf correctional institution

Modern annexe The AOB discovered at the end of March 2022 that a design for the construction of an annexe to Göllersdorf correctional institution had been drawn up. 104 additional spaces would be created. Although planning submission documents do not yet appear to have been drawn up, the funds for the annexe (EUR 15 million) have been set aside. The main building is set to be thoroughly renovated. The aim is to return to an occupancy rate of one or at most two patients per room. In addition, a specific area is to be fitted out as a long-term unit and another section for low-intelligence patients. Following its full expansion, Göllersdorf correctional institution should become as large as Asten correctional institution.

Employees involved Employees have been involved in the planning process. The important consideration is that rooms should be sufficiently large and have a needs-oriented wet area. There is also a desire to create isolation rooms in order to ease pressure on the current acute and sub-acute ward.

Göllersdorf correctional institution aims to focus on one issue and in the first instance establish the need for care, and how it could be covered. It is also planned to take in persons from other correctional institutions and to offer acute psychiatric care for the neighbouring correctional institutions. Furthermore, there should be an admission section in order to ease pressure on the acute ward. All of this will naturally require a corresponding increase in staffing.

Expansion of forensic medicine – Graz II Süd Regional Hospital

The high occupancy pressure in relation to the detention of mentally ill offenders means that it will soon be necessary to expand the forensic wards at the Graz II Süd Regional Hospital. The aim is to accommodate all forensic patients admitted to the hospital in one single building. A currently empty building would be particularly suited to this. However, significant investments would have to be made before it is purchased.

Urgent need for beds

The aim is to practically gut the building and to fit it with new windows during subsequent structural adaptation. In this regard, it was recommended that the bars be removed and that Perspex struts be fitted instead of secondary glazing, as these currently make it impossible to provide cross ventilation to rooms on the PSF1 ward, resulting in heat accumulation in patient rooms, especially during the summer.

The incorporation of Perspex fixtures into window frames was regarded as best practice at the forensic ward in Marburg. They do not provide the sensation of being locked in, and enable rooms to be thoroughly aired. The proposal to also incorporate these security measures into the expansion of the Graz II Süd Regional Hospital has been submitted to the medical director. She has undertaken to pass on the suggestion to the owners and operators of the institution.

No window bars necessary

Since the further development of admissions to forensic institutions also depends on potential changes in the law, such as higher penalties for inducement offences, and the Styrian Hospital Cooperation is required to operate the hospital according to commercial considerations, it is planned to set up the two new wards in such a manner that they will only be managed as closed wards where necessary.

The wide range of therapy offered is already impressive. Alongside a sports pavilion containing a gym and space for strength and endurance training, there is a wide range of options for manual pastimes, whether in the garden area, training in domestic work (sewing, washing, working with felt, crocheting), in a bookbindery working with cardboard and paper, or in a company providing occupational opportunities working with wood, glass and metal. In this regard the persons accommodated in the forensic ward benefit from a broad range of therapy options, which also benefits other patients at Graz II Süd Regional Hospital.

Broad range of therapy options

The spacious configuration of individual pavilions on a side area full of green spaces encourages people to use them and to move around outside, which is conducive to the recovery process.

Plenty of green areas

Needs-oriented adaptation of pavillons – Mauer Regional Hospital

The AOB was left with an excellent impression after visiting the new forensic medicine building at the Mauer Regional Hospital in April 2019. This

Successful conversion

impression was strengthened in March 2022. The consultation day offered the opportunity to visit building 6, which accommodates chronically ill patients. Although the pavilion is part of an older building, the construction of a ramp and installation of a lift has ensured barrier-free access to floors and hence all rooms. The hallway and rooms are comfortably designed, so that patients can be given the feeling of being at home.

Good practice A key consideration in feeling safe is the empathy of nurses and the senior physician who does the rounds, and it was also on their initiative that an animal husbandry space was set up in the enclosed area. Contact with cats and rabbits helps patients to come out of their shell and to bond with the animals. Alongside the therapeutic effect, the animals also help to mitigate the women's pain at being separated from their families. From a human rights perspective, this practice can only be endorsed.

Saving of a best practice model – Rankweil Regional Hospital, forensic medicine

During the consultation day at the forensic adult psychiatry ward, the AOB discovered that the residential building would be closed for capacity reasons from the end of March 2022. The reason was that medical staff were urgently needed in the main building, and could hence not be allocated to work shifts at the residential building.

Enforced vacancy The living area is situated in a separate structure, down a slope, around 250 metres from the main building. This building includes a total of six residential units (two two-bedroom units and four one-bedroom units) for relaxed detention. Forensic patients are not locked up there. They can come and go as they wish. Curfew is at 11 p.m., and the door is then locked from the outside. There is an alarm, which is installed on the inside of the entry door to the building. Therapy is provided on an out-patient basis in the main building. Food is delivered from the hospital. A joint cooking session is held once each week. Meals can be eaten together. Otherwise, there is a wide range of recreational activities, although also space for each individual to be alone.

Uncertain future The closure of the living area came as a great shock to all affected. Guards and medical staff have had to redeploy to the main building, and to set up a sub-acute ward there in the closed wing. This entails a clear fall in quality of life also for patients, especially as the easing of restrictive measures could be tried out in the residential building, and being housed there provided a motivational boost to patients, making it easier for them to move towards the end of their placement and towards conditional release.

Future plans are completely uncertain. Medical staff voiced concerns that the building might be allocated to the child and adolescent psychiatry wing, thus being permanently lost to forensic medicine.

3.9 Climate action, environment, energy, mobility, innovation and technology

Introduction

In the year under review, the AOB dealt with 1,038 cases falling within the jurisdiction of the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology. Most complaints relating to transport concerned driving licences, as well as the implementation of the Motor Vehicle Act (*Kraftfahrgesetz*) and the Federal Road Tolls Act (*Bundesstraßenmautgesetz*). However, a large number of complaints related to energy. More than 500 people complained that they had not received the climate bonus (including the inflation adjustment).

1,038 cases

3.9.1 Driving licences

Costs of driving licence examinations

The AOB has reported repeatedly on complaints made by persons with chronic illnesses concerning the high costs they incur when extending temporary driving licences. Calls to lower costs were in part acted upon by lawmakers in amending the Driving Licence Act (*Führerscheinggesetz*) (Federal Law Gazette I no. 121/2022).

Cost reduction approved

Accordingly, since 1 August 2022, persons who have received a temporary driving licence due to a health impairment have been exempt from stamp duty and administrative fees when renewing it. This means a saving of EUR 49.50 upon each renewal.

However, the vast majority of the financial burden relates to the cost of specialist medical assessments that persons with a chronic illness must regularly undergo in order to maintain their driving licence. Under current law, these costs, which often amount to several hundred euros, must still be borne solely by those affected.

High costs remain

Driving licences with a fixed validity period for persons with diabetes

The AOB regularly receives complaints questioning the justification of imposing restrictions on driving licences (fixed validity period, special requirements) for people with diabetes. According to Section 11 (2) of the Driving Licence Act Health Regulation (*Führerscheinggesetz-Gesundheitsverordnung*), persons with diabetes who are treated with insulin or particular pills may as a general rule be issued with or granted a category 1 driving licence. However, the driving licence has a maximum validity

period of five years, subject to the requirement of medical check-ups and examinations by a public medical officer.

Current relevance of fixed validity periods questioned

Those affected objected that this rule, which requires considerable effort and high costs, is now outdated. This is due to the fact that, in the meantime, there have been extremely effective developments in the field of blood glucose measurement and the administration of insulin. It is thus asserted that there is no reason why fixed validity periods and special requirements should play any role in increasing road safety. As a result of these submissions, the AOB asked the Ministry to state whether the current status of medical science has been taken into account within the applicable rules.

Checks indispensable from an official perspective

The Ministry obtained a statement of opinion from the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, which indicated that, due to the wide range of possible symptoms, case-by-case decisions were required in cases involving diabetes. The Federal Ministry of Social Affairs, Health, Care and Consumer Protection declined to recommend the abolition of mandatory follow-ups for driving licences with a fixed validity period. Specifically, measures such as training in identifying hypoglycaemia should be required in cases involving severe hypoglycaemia in order to ensure fitness to drive. Follow-ups are still necessary, among other things in order to review compliance with measures. In addition, carrying out checks is the only way of establishing whether any long-term consequences of the illness are impairing fitness to drive or road safety. This conclusion was also endorsed by the Austrian Diabetes Society (*Österreichische Diabetes Gesellschaft*).

The Ministry therefore took the view that the current legal position under the Driving Licence Act Health Regulation should be maintained. Based on the arguments presented, this position made sense to the AOB.

Problems converting foreign driving licences

In some cases, people criticised the procedures relating to the conversion of their driving licences issued abroad. Driving licences issued by EU or EEA member states are also valid in Austria, but may be converted voluntarily into an Austrian driving licence.

Validity lapses 6 months after changing residence

However, if the holder of a non-EU or non-EEA driving licence relocates to Austria, they are – as a general rule – only allowed to drive a motor vehicle for six months. After this time, the driving licence is no longer valid in Austria and must be converted.

Incorrect information when converting foreign driving license

Serbian driving licence

A woman complained that the Neusiedl am See District Authority provided her with incorrect information concerning the conversion of her Serbian driving licence, thereby causing her to suffer financial loss. At an appointment

in April 2022, a staff member at the District Authority had informed her that a practical driving test would be required in order to convert her driving licence. As a result, she registered with a driving school and paid EUR 295 for driving lessons and a test. At the start of May 2022, the District Authority staff member informed her that she was not required to take a practical driving test. The driving school refunded her EUR 120, but retained the remaining EUR 175 as an administrative fee.

As a general rule, a practical driving test is required when converting a non-EU or non-EEA driving licence. However, exceptions apply for particular countries such as Serbia. A practical driving test is not required when converting a Serbian driving licence. This applies for all driving licence classes. The Neusiedl am See District Authority has stated that it will reimburse the EUR 175 cost. The AOB welcomes this measure.

No driving test necessary

Demand for a foreign criminal record extract

An Austrian citizen who returned to Austria in April 2022 following an extended stay abroad wished to obtain the conversion of her driving licence issued in Egypt into an Austrian driving licence. The Styria Police Department demanded an Egyptian criminal record extract, alongside other documents. The woman complained that it would take a very long time to obtain an Egyptian criminal record extract through the Egyptian Embassy. This meant that it would not be possible to comply with the six-month deadline for converting the driving licence.

Egyptian criminal record extract demanded

In response to the AOB, the Styria Police Department referred to Section 23 (3) (3) of the Driving Licence Act (*Führerscheinggesetz*). According to this provision, the holder of a driving licence issued in a non-EEA country must be issued upon request with a driving licence with the same entitlement, provided that "there are no concerns regarding the person's fitness to drive". The Styria Police Department stated that it "generally" proceeded on the assumption that no such concerns exist in relation to the conversion of a driving licence, if the person who has only been residing in Austria for a few months can present a clean foreign criminal records extract that is dated no longer than six months ago.

Examination of fitness to drive

The AOB pointed out that this general approach may lead to significant complications and delays. The AOB therefore asked the Ministry to state whether the Styria Police Department's view was shared by the highest transport authority, or whether the transport authority had issued any general requirements for subordinated driving licence authorities.

The Ministry reported on "consultation" between the Styria Police Department and "Police Departments in other *Laender*". This established that there is no equivalent requirement in other *Laender*. The Styria Police Department took this as an opportunity to change its administrative practice. Accordingly, with

Styria Police Department changes administrative practice

immediate effect, a criminal record extract will no longer be demanded by the driver licensing authority in a blanket fashion for non-EEA countries.

The AOB informed the Ministry that uniform application of the rules is welcomed. However, uniform application should not be limited to individual Police Departments; on the contrary, provision should be made – for instance in the form of clarification within the Driving Licence Act General Implementing Decree (*Führerscheingesez-Gesamtdurchführungserlass*) – to ensure that all driver licensing authorities are covered.

Failure to process an application

Applicant at fault according to the authority

A man complained that his application made in October 2021 for the conversion of a driving licence issued in Switzerland was only processed by the Traffic Department of the Vienna Police Department in May 2022. The Traffic Department justified the lengthy period required for the procedure essentially on the grounds that it was waiting for the applicant to submit a medical certificate.

However, according to the procedural documentation presented to the AOB, at the end of March 2022 the Traffic Department requested that the applicant supplement the documentation he had previously submitted. This request was based on an examination by the public medical officer, which was only available for him to undergo in the middle of March 2022 – that is, around five months after submitting his application. The official request at the end of March 2022 came a few days later.

Authority slow to act

Therefore, the applicant was not responsible for the long duration of the procedure and in particular the breach of the maximum deadline for a decision of six months specified in Section 73 (1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*). The AOB criticised the delays, which were attributable to the Traffic Department.

Insufficient information provided

In February 2021, a woman applied to the Traffic Department of the Vienna Police Department seeking to convert her driving licence issued in Germany. Around one week later, the German driving licence authority informed the Traffic Department that the driving licence had been revoked in Germany since February 2015 due to the failure to submit a medical certificate.

Requirement for examination by a public medical officer

In May 2021, the Traffic Department invited the woman to undergo an examination with a public medical officer with a view to obtaining an Austrian driving licence. During this examination with a public medical officer, she was referred to a specialist doctor in order to obtain a supporting statement of opinion. She submitted the specialist doctor's statement of opinion to the authority in October 2021.

Although she enquired which documentation was (still) required in her case, the Traffic Department only informed the driving licence applicant in December 2021 that she would also have to take a practical driving test as the driving licence had been revoked more than 18 months ago.

Information about driving test after nine months

The woman stated that she would not have pursued obtaining an Austrian driving licence on cost grounds had she been told about this requirement by the Traffic Department at an earlier stage (in February 2021). The objection to this late provision of information was justified from a citizen-friendly and user-friendly standpoint.

Revocation of driving licence without legal grounds

A woman complained that the Carinthia Police Department had withheld her driving licence during a traffic check in March 2022. The police had falsely noted in the report that her driving licence had been revoked by administrative notification at the time of the traffic check. Her driving licence had therefore been withheld unlawfully.

According to Section 39 (1) of the Driving Licence Act, a public supervisory authority is only allowed to withhold a driving licence in situations such as if the authority has revoked the driving licence by an enforceable administrative notification or has imposed a driving ban on a person by administrative notification. The provision also stipulates the prerequisite that the person must have failed to comply with the obligation to submit documents.

The Ministry stated that the Klagenfurt-Land District Authority had issued the woman with a driving licence expiring in February 2022, with the result that she had been driving without a valid licence since March 2022. The AOB objected that the legal prerequisites for a provisional withholding of the driving licence had not been met, since no notice had been issued revoking the driving licence or imposing a driving ban.

Payment of fines

A court-appointed adult guardian contacted the AOB, stating that the Oberwart District Authority had issued a total of 25 administrative fine notices against the woman under his guardianship since 2011. In these, it was alleged that the woman had failed to hand in her driving licence to the authorities, despite it having been revoked. The administrative notifications were filed at the post office and were never collected. Numerous wage garnishments were subsequently enforced in order to collect the fines.

25 administrative fines

After taking over adult guardianship responsibility, in May 2019 the adult guardian consulted the case file and filed a request seeking the reconsideration of all of the administrative fine proceedings. The Oberwart District Authority failed to act on this request in an administrative notification issued in June 2020.

The Oberwart District Court appointed a lawyer who – for reasons incomprehensible to the adult guardian – when appealing against this decision only referred to seven administrative fine proceedings from the previous three years.

Delivery of administrative notification invalid according to court

The Regional Administrative Court of Burgenland dismissed the appeal, upheld the decision of the Oberwart District Authority and rejected the request seeking the reconsideration of the seven proceedings as inadmissible. It held that the penal orders had not been validly served, with the result that there were no concluded proceedings that could be reconsidered. When making its ruling, the Regional Administrative Court relied on expert psychiatric opinions obtained by the courts, most recently in February 2020, which established that the woman had not been capable of fault and had not had procedural capacity since March 2009.

Authority refuses full reimbursement

In response to this decision, the Oberwart District Authority repaid the fines collected through compulsory enforcement within the seven proceedings, plus costs. On the other hand, the District Authority refused to reimburse the other 18 fines and enforcement costs totalling around EUR 30,000 as they were not covered by the Regional Administrative Court's ruling.

The AOB could not understand the refusal to reimburse the woman in full, especially as the findings contained in the expert psychiatric opinions obtained by the courts were relevant for all administrative penalty proceedings. It is beyond doubt that the defective service identified by the Regional Administrative Court thus affected all penalty notifications issued since March 2009.

AOB obtains compensation

In the view of the AOB, there was no legal or objective reason not to reimburse all administrative fines as well as the enforcement costs arising in relation to penalty notifications since March 2009. The office of the regional government of Burgenland ultimately accepted this view and arranged for the reimbursement of the fines imposed in the other 18 proceedings along with the enforcement costs that had arisen.

3.9.2 Motor vehicles

Refusal of taxi driver's licence due to insufficiently good character

In its Annual Report 2021 the AOB reported on the strict interpretation of the term "good character" in accordance with Section 6 (1) (3) of the Operating Regulations for the Non-Linear Carriage of Passengers (*Betriebsordnung für den nichtlinienmäßigen Personenverkehr*) by the Traffic Department of the Vienna Police Department in a specific case before it.

According to this provision, a taxi driver's licence must be issued or extended 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".

Taxi drivers must be of good character

Following the discussion of the case in the ORF TV programme *Bürgeranwalt* ("Advocate for the People"), around 40 other affected persons contacted the AOB. The AOB took this as a reason to launch ex-officio investigative proceedings concerning enforcement practice by the Vienna Traffic Department.

As a result, the AOB established that the Traffic Department had displayed a "strikingly careless attitude" to road traffic rules and assumed a person not to be of good character in the event of only two fines for (relatively minor) breaches during the five-year observation period. For instance, the requirement of good character was deemed not to have been met in cases involving exceeding the permitted maximum speed limit in a residential area of 50 km/h by 18 km/h, and the failure to stop at a stop line notwithstanding a non-flashing yellow traffic light.

Two penalties already too much

The Vienna Regional Administrative Court confirmed this decision, and also assessed the identified breaches as "serious road traffic offences" under the Operating Regulations for the Non-Linear Carriage of Passengers. In other cases referred to the AOB, three or four similar administrative breaches over a five-year period resulted in a refusal of a taxi driver's licence. Since the AOB does not have any investigative powers over the administrative courts, it could only take note of this standard and inform those affected.

However, affected persons also raised concerns regarding the fact that taxi driver's licences will need to be replaced by plastic card licences within the coming five years and fixed validity periods will expire. If the strict enforcement practice is maintained, the need to exchange or renew taxi driver's licences may result in a considerable number of licences being revoked and hence a (time-limited) "prohibition on the practice of the profession" for a large number of taxi drivers.

Impending professional ban

The AOB doubts that the strict interpretation by the Traffic Department and the Vienna Regional Administrative Court of the concept of "good character" incorporated by the Ministry into the Operating Regulations for the Non-Linear Carriage of Passengers as of 1 January 2021, as well as the resulting consequences, reflect the intention of lawmakers and the highest transport authority.

Ministry sees no need for action If this is not the case, Section 13 of the Occasional Transportation Act (*Gelegenheitsverkehrsgesetz*) and the Operating Regulations for the Non-Linear Carriage of Passengers should be amended or enforcement guidelines should be issued by the Ministry to subordinated authorities. However, the Ministry did not consider there to be any need for action, and rather referred in general to the examination of each individual case that must be carried out by the authority and the possibility of appealing against any decision refusing an application.

Nuisance caused by parking area for buses

A woman from Lower Austria contacted the AOB, stating that a private bus operator was operating a bus parking area for up to 30 buses on a neighbouring property, from which regional scheduled bus services were operated. The buses left the parking area every day at around 4.30 a.m. and were parked there again until 12.30 a.m. The woman's sleep was unreasonably disturbed by manoeuvring and preparatory actions relating to the departure of the buses. The authorities she contacted (including the office of the regional government of Lower Austria, the Mödling District Authority and the municipality) were unable to offer any remedy, referring to the lack of a legal basis under public law.

No scope for imposing requirements The AOB established that there was no scope for taking action against the nuisance under trade and industrial law, since according to Section 2 (1) (15) the Austrian Industrial Code (*Gewerbeordnung*) these provisions are not applicable to the operation of bus services. The Bus Services Act (*Kraftfahrliniengesetz*) only provides for an approval procedure for bus stops. Bus parking areas are not covered by concession procedures. As the bus parking area only has a gravel surface and is situated in building land on an industrial estate, the mayor was also unable, as the planning authority, to prescribe any noise-reduction measures.

No approval procedure envisaged As a result, the lady has been confronted with the unsatisfactory outcome whereby no procedure has been or will be conducted by the authorities to take due account of her interests in avoiding unreasonable nuisance that could arise through the usage of the neighbouring property as a parking area for buses operating scheduled services.

On the contrary, the only available remedy was a right to obtain an injunction or compensation, which could be enforced through court action according to Section 364 (2) and Section 364a of the Austrian Civil Code. However, this would be conditional upon the prerequisite of proving (which is difficult) that the noise or exhaust emissions exceed the ordinary level taking account of the location and significantly impair the typical usage of the property.

Ex ante review would make sense In the view of the AOB, it is thus conceivable that a statutory rule could be adopted, providing for an *ex ante* review of the effects of an installation such

as the one at issue in this case on the rights of neighbouring properties. However, the Federal Ministry for Digital and Economic Affairs, which has competence over the Austrian Industrial Code, did not accept that there was a gap in the law, as bus services are entirely exempt from the Austrian Industrial Code. The Ministry referred the matter to the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, which has competence over the implementation of the Bus Services Act. As regards the scope of the Bus Services Act, the Ministry raised concerns regarding the freedom to provide services of passenger transport undertakings, which must be guaranteed under European law, as well as aspects of public procurement law. This meant that, from the perspective of the AOB, the neighbour – as well as other persons affected by similar problems – was effectively left in the lurch.

Digital road toll sticker

As stated in previous years under review, once again in 2022 the holders of digital annual road toll stickers voiced their inability to understand the limited opportunities to transfer the road toll sticker to a new numberplate, as provided for under the Federal Road Tolls Act (*Bundesstraßen-Mautgesetz*) and the ASFINAG Tolling Regulation. In a statement of opinion concerning the Annual Report 2021, the Ministry referred to the previous expansion of the scenarios in which transfer is possible.

Criticism at lack of flexibility

However, the AOB considers that there is by all means scope for more customer-friendly rules. This applies in particular to the fact that transfer is still limited to the same registered owner. This means that, in the event that a vehicle is sold during the year, the digital annual road toll sticker cannot continue to be used even though the purchase price was paid for an entire year.

Further scope for improvement

3.9.3 Aviation law

Delays of years in the investigation of air accidents

In the Annual Report 2020 (volume "Monitoring Public Administration", p. 143) and the Annual Report 2021 (volume "Monitoring Public Administration", p. 168), the AOB previously noted cases of maladministration of the Federal Safety Investigation Office regarding the excessively long duration of air accident investigations.

In 2022, following a complaint, the AOB established that the concluding report concerning an air accident on 20 September 2007 had still not been presented – more than 15 years after the fact. This excessively long duration of proceedings is even more perplexing as the draft report was sent in December 2017 for a statement of opinion, and statements of opinion

Investigation not concluded after 15 years

had already been received in February 2018. It is incomprehensible for the AOB why the Safety Investigation Office, which according to its own assertions has been swiftly working through old cases since 2018 following a reorganisation, has for almost five years been unable to incorporate the statements of opinion submitted into the concluding report that must be issued according to law.

Every complaint justified

The fact that every single complaint submitted to the AOB to date concerning the duration of air accident investigations has resulted in a finding of maladministration due to the excessive duration of proceedings should be given particular emphasis.

Ex-officio investigation

The AOB took this as a reason to launch *ex-officio* investigative proceedings in November 2022. It asked the Ministry to submit a table listing all air accidents between 2006 and 2020 inclusive, along with precise information concerning the date of the accident, the date on which the investigation was launched, the date on which the draft report was completed and the date on which the concluding report was completed.

Based on the documents transmitted by the Ministry, the AOB established at the end of 2022 that it is by no means uncommon for proceedings before the Federal Safety Investigation Office for the investigation of air accidents to be extremely long. Thus, at the end of 2022, six out of ten proceedings launched in 2008, nine out of 13 launched in 2007 and twelve out of 15 launched in 2006 had still not been concluded.

It is incomprehensible for the AOB that it has still not been possible to conclude these proceedings five years after the reorganisation. The fact that, out of 28 proceedings launched in 2006 and 2007, 21 – i.e. 75% – have still not been concluded, illustrates the complete inefficacy of the office. The AOB therefore decided to expand its *ex-officio* investigation to cover the years 2000 to 2005.

Aim of the legislation missed

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. This is because, due to technical progress, the presentation of investigation results after so many years can hardly increase safety.

Unnecessary costly instruction of a lawyer

Lawyer instructed to represent Ministry

During the course of investigative proceedings, a citizen submitted a letter from a lawyer to the AOB, which stated that the Ministry had instructed him as its legal representative.

The lawyer essentially stated in his letter that a person involved in a comments procedure does not have the status of a party. The AOB took the letter as a reason to launch *ex-officio* investigative proceedings, which

concluded that a case of maladministration had occurred on the following grounds:

According to the settled case law of the Constitutional Court of Austria (see e.g. Collection of decisions of the Austrian Constitutional Court 12929, 18.266, 19.750), the review criteria regulated under Article 126b (5) of Federal Constitutional Law (*Bundes-Verfassungsgesetz*) set out directly applicable requirements in relation to implementation. The entire administrative apparatus of the Federal Government is thus obliged to ensure “value for money”, and it follows from this *inter alia* that counsel may only be instructed for the performance of tasks vested in the administration by law if this is indispensable in order to perform those tasks provided for by law, if the required specialist legal expertise is not available in-house within the administration.

Constitutional law obliges authorities to ensure value for money

Under the terms of the Accident Investigation Act (*Unfalluntersuchungsgesetz*) 2005 and the relevant EU law, the Federal Safety Investigation Office is required to carry out safety investigations into accidents and disruption, including in the field of aviation.

The AOB does not deny that the statutory design of the Federal Safety Investigation Office raises various highly complex legal issues, which were not however relevant within this regard. The investigation only concerned specifically the fact that, pursuant to Section 14 (1) of the Act, during the course of an investigation into an air accident every person involved in the accident must be given the opportunity to gain access to the preliminary investigation report and to comment on it in writing.

The explanatory notes concerning the original version of the Act expressly state that the persons or institutions mentioned in the legislation should only be involved in the comments procedure in order to ensure the objectivity of investigation results. It is expressly stressed that the comments procedure should “not result in the person concerned having the status of a party within the proceedings”; this also appears to be consistent in terms of the systematic structure of the Act, since neither the provisional investigation report nor the concluding report may be qualified as an administrative notification within the meaning of the Act.

Comments procedure clearly regulated by law

No provision of either EU or constitutional law requires that a person involved in the comments procedure should have the status of a party. Moreover, the legislative materials clearly state that the legislator did not intend those persons who were involved in the accident to have the status of parties within the comments procedure. Accordingly, the unequivocal provision laid down by Section 14 (1) of the Accident Investigation Act can evidently only be interpreted to the effect that persons involved do not have the status of parties within this procedure. As far as the AOB is aware, the Federal Safety Investigation Office has also consistently embraced this interpretation of the

Legal position and administrative practice are unequivocal

law since the Act came into force in 2005. Consequently, none of the persons involved in the respective accidents have been granted status as a party within any of the numerous comments procedures conducted in accordance with Section 14 of the Act.

AOB criticises the instruction of lawyer

Against this backdrop, it is simply incomprehensible for the AOB why it was considered to be necessary to instruct a lawyer in order to answer an enquiry submitted by a representative of a person involved in an air accident investigation procedure. This is because, in view of the legal position unequivocally stated by the comments discussed above concerning Section 14 (1) of the Accident Investigation Act 2005 as contained in the original version of that Act, which is also reflected by the long-standing enforcement practice of the Federal Safety Investigation Office, a person involved in the comments procedure does not have status as a party within the meaning of the General Administrative Procedure Act.

Amount of fee implausible

It was also not apparent for the AOB how the lawyer could have taken 28 hours to write his letter extending to two and a half pages, as this time was not itemised any further in the respective fee note. According to the AOB, the Ministry should at least have insisted on further itemisation before settling the fee note so that it could examine whether the time spent on the work was plausible.

AOB identifies cases of maladministration and issues recommendation

The instruction of a lawyer by the Ministry as well as the subsequent payment of more than EUR 10,000 without any examination of the plausibility of the actual time indicated in it, both constitute cases of maladministration. In order to avoid similar cases of maladministration, the AOB recommended to the competent Federal Minister that external lawyers not be used to answer queries falling within the purview of the Ministry. The Federal Minister informed the AOB in January 2023 that the recommendation was being implemented.

3.9.4 Railway law

Call for overhaul of framework plan for the expansion of barrier-free accessibility

Old trams still in use

Each year, the AOB deals with a large number of complaints concerning barrier-free accessibility on Austrian Federal Railways (*ÖBB*). The AOB considers action to be necessary in particular on rail series 4020 developed in the mid-1970s (!), which despite not having barrier-free accessibility is still being used within the Vienna metropolitan area. According to the information available to the AOB, this series will remain in service in large numbers until at least 2025. For persons with reduced mobility, it is de facto impossible to use them due to the high entry steps.

The AOB also criticised the fact that the Austrian Federal Railways "2020–2025+ implementation plan for rolling stock and infrastructure" is now more than two years old and has in part been superseded.

The AOB therefore suggested publishing an updated framework plan. Austrian Federal Railways informed the AOB that this suggestion would be implemented and that an updated framework plan would be published in March 2023. The AOB welcomes this step and will analyse the new framework plan in detail.

New framework plan being drawn up

Problems purchasing the Climate Ticket

A man complained to the AOB that, as a person with a disability, he was unable to purchase the Climate Ticket (*KlimaTicket*) as he did not have a computer or a smartphone.

The competent Federal Minister informed the AOB that intensive work was ongoing in conjunction with the Austrian Disability Council (*Österreichischer Behindertenrat*) to ensure barrier-free accessibility for the Climate Ticket Austria, when both purchasing and using it.

Commitment to expansion of barrier-free accessibility

Retrospective demand for ticket payment by Ukrainian refugees

As a result of the war in Ukraine, the internal service regulations for train attendants stated that an emergency ticket should be issued to a war refugee simply upon presentation of a Ukrainian identity document. However, the AOB received complaints regarding the issue of retrospective demands for ticket payment in some cases, even though the passengers had complied with this requirement by presenting their passport or a refugee identity card. In these cases, the AOB was able to obtain the prompt cancellation of the retrospective demand for ticket payment along with an apology from Austrian Federal Railways.

Prompt cancellation and apology by ÖBB

Uncooperative approach of Zillertal transport services

A man contacted the AOB due to the fact that, following the renovation of a railway station on the Zillertal Railway, he was experiencing railway noise inside his home. Despite two requests, the Zillertal transport services (*Zillertaler Verkehrsbetriebe AG*) was not willing to state its opinion. The AOB regrets this uncooperative approach, which contrasts with the approach taken by all other railway companies that have previously been asked by the AOB for a statement of opinion.

Letter from AOB unanswered

3.9.5 Energy and environment

Introduction

More than 500 complaints concerning the climate bonus

In 2022, a large number of complaints related to energy. More than 500 people complained in 2022 that they had not received the climate bonus (along with the inflation adjustment). Dealing with this large number of complaints, which arrived after the end of October within the space of a few weeks, represented a major challenge for the AOB.

Photovoltaics and electricity price brake

However, just under 50 complaints were received concerning the processing of photovoltaic grants by the competent authority for green power (*Abwicklungsstelle für Ökostrom AG*). Those affected had applied for a grant and found that grants were awarded according to a type of "lottery system" under which the key factors were good PC skills, advance information from various internet forums and speed. This award system is provided for under the Renewable Energy Expansion Act (*Erneuerbaren-Ausbau-Gesetz*), and is thus not a problem caused by any defective implementation of this Act. Various concerns related to the so-called "electricity price brake" provided for under the Electricity Price Subsidies Act (*Stromkostenzuschussgesetz*). Criticism concerned in particular the fact that, where there is more than one household in a building, only the person in whose name the electricity meter is registered can obtain the subsidy. The AOB also received repeated enquiries concerning smart meters. The AOB has dealt with this issue comprehensively over the last few years (see most recently the Annual Report 2020, volume "Monitoring Public Administration", p. 146).

Problems relating to payment of the climate bonus

In order to compensate for additional burdens resulting from prices based on greenhouse gas emissions along with the price increases occurring during the year under review, the Climate Bonus Act (*Klimabonusgesetz*) provided for the payment of a climate bonus along with an anti-inflation allowance for the year 2022. The two bonuses totalling EUR 500 were supposed to be received by all natural persons living in the country for at least 183 days at a registered place of residence. The Ministry announced in October 2022 that the payment of benefits by bank transfer or the dispatch of vouchers as an alternative had been completed.

By the end of the year under review, more than 500 people had complained to the AOB that they had not received the bonus. The "flood of complaints" continued after this, with more than 750 complaints having arrived up to the time of compiling this report.

Large number of EU citizens not receiving climate bonus

Many of those affected were EU citizens or citizens of third countries holding a valid residence permit for Austria under the Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*) or the Federal Act Concerning the

Granting of Asylum (*Asylgesetz*). These people complained that, according to information received from the Ministry or from the "Climate Bonus Service Line", they were not registered in its computer system. This was apparently due to problems in the automated review of entitlement by the Federal Ministry of the Interior, which, under the terms of the Climate Bonus Act, must transmit the personal and registration data of entitled persons to the Ministry.

Other people had not received a bank transfer, despite having up-to-date account information, or a voucher by post. Numerous submissions also concerned the handling of enquiries and complaints by the "Climate Bonus Service Line". In some cases, advisors could not be contacted for days at a time or were unable to provide a coherent explanation for the failure to make the payment.

In response to many complaints the AOB launched investigative proceedings, most of which had not been concluded by the time of compiling this report. The AOB took the problems described as a reason to launch an *ex-officio* investigation in relation to the organisation of bonus payments as well as the handling of complaints by the "Climate Bonus Service Line" and the conciliation body provided for under the Climate Bonus Act.

**Ex-officio
investigation**

These *ex-officio* investigative proceedings were still ongoing at the time of compiling this report as, due to the initial statement of opinion by the Ministry, numerous aspects under investigation still needed to be clarified. However, the AOB has already been able to establish that the Ministry had not been prepared for the large number of complaints.

The Ministry created bureaucratic hurdles within the AOB's investigative proceedings. For instance, it informed the AOB in relation to numerous enquiries that the persons referred to by the AOB indicating their first names, surnames and addresses were "not identifiable" and that their respective dates of birth had to be provided as well. Despite several requests, the Ministry failed to cite the AOB case references in its answer letters to the AOB, resulting in delays for the AOB and unnecessary additional work.

**Ministry not
organisationally
prepared for
complaints**

The Ministry answered questions concerning the failure to make payments to a large group of EU citizens with a short standard statement, which was also provided to those affected, in which it acknowledged the problems and assured that it was working "at full speed" on a solution. Up to the time of compiling this report, the Ministry had not informed the AOB concerning the reason for these problems or any action being taken by the Ministry to resolve them. In addition, many of the written answers sent to those affected, which were passed on by them to the AOB, were simply standard replies, which did not engage with the specific individual case.

3.10 The arts, culture, the civil service and sports

3.10.1 Ineffective preservation of cultural heritage for the Gosauzwang Bridge

A committed man considered the visual condition of the Gosauzwang Bridge in Upper Austria to be unacceptable. In fact, according to requirements set out in a 1969 notice, the traditional appearance of the originally elegant timber construction was supposed to be reinstated. However, both the authorities and *Salinen Austria AG* had failed to take action over the decades. The AOB examined the official processes, also taking account of historic developments (including in the law).

By an administrative notification of 23 April 1969, the Federal Office for the Care of Monuments (*Bundesdenkmalamt*) submitted an application at the request of "Austrian Saltworks/Saltworks Administration of Bad Ischl (*Österreichische Salinen/Salinenverwaltung Bad Ischl*)" concerning an alteration of the Gosauzwang Bridge. At the same time, it was established that there was still a public interest in the maintenance of this cultural heritage site. The Federal Office for the Care of Monuments allowed *Salinen* to replace the dilapidated wooden bridge with a steel structure. However, the steel structure was supposed to be clad with wood in order to maintain the traditional appearance. Some parts (e.g. the small half-timbered huts) were supposed to be made entirely from natural wood.

Maintaining traditional appearance

At some point later, either *Salinen* or the company it commissioned reported problems in complying with the requirements set out in the notice. Specifically, the affixing of wooden cladding to the newly built steel structure could result in dangerous structural problems. The AOB was unable to clarify why *Salinen* did not – as far as is apparent from the case file of the Federal Office for the Care of Monuments – object to these problems with the construction firm appointed as defects covered by the warranty, but rather invoked them before the Federal Office as a reason for the "impossibility" of fulfilling the requirements. The Federal Office and *Salinen* engaged with each other intensively before the notice was issued. Moreover, *Salinen* did not challenge the notice.

No enforcement of requirements set out in the notice

It was also unclear why, after more than ten years during which the Federal Office for the Care of Monuments called on *Salinen* on several occasions to comply with the law, the Federal Office eventually gave up rather than enforcing the requirements. Under the law applicable at that time, it would have been possible to require enforcement along with substitute performance at the cost of *Salinen*. By contrast, the President of the Federal Office stipulated in a memorandum of 19 January 1981 without any apparent reason that the requirements were "unrealisable". In the view of the AOB,

the failure by the Federal Office for the Care of Monuments to pursue enforcement was unlawful and constitutes a case of maladministration within the meaning of Article 148a of Federal Constitutional Law.

The "General Directorate of Austrian Saltworks" (*"Generaldirektion der österreichischen Salinen"*) was founded during the First Republic. It was charged with the financial management of the (former) state monopoly over salt. It remained part of the Austrian federal administration until 1978, and the ultimate legal entity controlling it was the Republic of Austria. As such, the economic assets owned by *Salinen* – e.g. the Gosauzwang Bridge – were also owned by the Republic. Accordingly, the rights and duties established by the Federal Office's administrative notification of 23 April 1969 were also vested in the Republic.

The company *Österreichische Salinen Aktiengesellschaft* was established under the terms of the Salt Monopoly Act (*Salzmonopolgesetz*) 1978. The Act transferred the tasks relating to the financial management of the monopoly over salt to this company. As a result, *Salinen* was detached from the federal administration to form an independent legal entity separate from the Republic of Austria. By virtue of the separation, all assets and all rights and duties vested in the Republic of Austria – including those under the law on the preservation of cultural heritage sites – were transferred to the newly created company.

Salinen AG obliged to comply with requirements since 1978

The Federal Office for the Care of Monuments disregarded this legal position when issuing the administrative notification of 11 January 1984. This administrative notification states once again, without any legal requirement to do so, that the maintenance of the Gosauzwang Bridge is in the public interest. No appeal was filed by the addressees of the administrative notification (including *Österreichische Salinen AG*), with the result that this administrative notification too became final.

Accordingly, the Federal Office for the Care of Monuments subjected the bridge to a preservation order in accordance with its condition in 1984, which was unsatisfactory due to the failure to comply with the previously applicable requirements. Due to a failure to state sufficient reasons, this interference with the legal effect of its own administrative notification of 23 April 1969 was unlawful. The Federal Office therefore disregarded the binding effect of its own decision. After it became final, the administrative notification of 11 January 1984 in particular revoked the requirements imposed in 1969.

1984 administrative notification cancels requirements

In the view of the AOB, the issue of the administrative notification of 11 January 1984 constitutes a further case of maladministration for which the Federal Office is responsible according to Article 148a of the Federal Constitutional Law.

From that point onwards, *Österreichische Salinen AG* was able to ignore entirely the requirements imposed in 1969. It should have been required to seek the approval of an amendment under the law on the preservation of cultural heritage sites, although it evidently had no interest in doing so. Legal entities such as *Österreichische Salinen AG* or now *Salinen Austria AG* that have been divested from the state administration are not subject to monitoring by the AOB.

**No reinstatement
of traditional
appearance**

During subsequent years, various initiatives were pursued – by persons including the former Governor of Upper Austria, although also by private individuals – with the aim of reinstating the traditional appearance of the Gosauzwang Bridge. State bodies raised the possibility of subsidies. However, all of these initiatives became stuck in the long grass. Instead, *Salinen Austria AG* submitted a further application seeking the approval of an amendment. It planned to replace the dilapidated steel structure with an aluminium structure. The Federal Office for the Care of Monuments approved the application by an administrative notification of 17 February 2016. *Salinen Austria AG* completed the renovation work in 2017.

In the view of the AOB, this administrative notification of the Federal Office is reasonable. However, the starting position for this assessment is not what the bridge's condition should have been according to the 1969 requirements, but rather its actual condition after the entry into force of the unlawful but legally effective administrative notification of 11 January 1984.

The reinstatement of the traditional appearance of the Gosauzwang Bridge sought by the committed citizen would only be possible in the event of cooperation between *Salinen Austria AG* and the competent authorities, including in particular the Federal Office for the Care of Monuments. However, no such initiative appears to be imminent.

3.11 Defence

Introduction

2022 saw a decline in complaints relating to defence. Overall, the AOB dealt with 26 cases in this area. Complaints concerned issues including the removal of a concrete-steel structure from the Second World War, employment law, the drafting procedure and intrusive noise caused by target practice by the Austrian Federal Army. The AOB launched ex-officio investigative proceedings after receiving an anonymous report concerning training at the Theresian Military Academy.

26 cases

3.11.1 Removal of Second World War bunker

A resident of Tyrol informed the AOB that agricultural land she owns in Innsbruck contained an 18 by 13 metre, iron-reinforced, enclosed concrete-steel structure. It dates back to the Second World War and is apparently significantly interfering with the agricultural usage of her property. Around 200 m² of her land is unusable. When cultivating the remaining fields, care must be taken not to let the plough become stuck and suffer damage. According to the information provided by the resident of Tyrol, an underground bunker is situated underneath the concrete-steel slab, and she used to play in it as a child. She would like the Republic of Austria or the Austrian Federal Army to remove the irritating bunker at public expense.

Unable to work fields

The AOB requested that the Federal Ministry of Defence provide a statement of opinion for the first time at the end of 2021, along with a proposal about what should be done with the bunker. In its first statement of opinion, the Ministry refused to act, asserting that there was "no obligation whatsoever for the Republic of Austria" to remove the concrete foundations. It stated that the Republic of Austria was not the owner, and that the case did not involve third-party ownership of a temporary structure. It argued that neither the Ministry nor the Austrian Federal Army is the legal successor of the German *Wehrmacht*.

Ministry refuses to act

The investigation was subsequently discussed in the TV programme *Bürgeranwalt* ("Advocate for the People"). During the programme, questions were put to an expert in munitions surveying. He stressed that it was likely that a bunker would be situated below the former anti-aircraft placement, in which anti-aircraft munitions would have been deposited. It would only be possible to establish whether the bunker represented a hazard if the concrete slab was properly opened. The expert said it was very likely that the bunker would contain war relics. All ground intervention measures would be extremely risky. Excavation work should therefore not be carried out without a thorough prior survey. During the programme, the expert offered

Expert proposes opening

to look for the entrance to the bunker at the cost of his own business and to establish whether it contained any war relics.

The AOB contacted the Ministry once again with this proposal, pointing out that the resident of Tyrol was being restricted in her ability to cultivate her land by the massive concrete slab. In addition, she felt extremely uneasy about the possibility that the likely bunker under her property might contain war relics.

Underground bunker is a temporary structure under third-party ownership

In legal terms, the AOB informed the Ministry that, in its view, neither the property owner nor any previous owners could be regarded as the owners of this Second World War concrete and steel construction. According to a judgment of the Supreme Court of Justice, the AOB took the view that the supposed underground bunker should be classified in legal terms as a temporary structure under third-party ownership built by the German Reich, which passed into its ownership at the time it was built. Under the terms of Article 22 of the Austrian State Treaty (*Staatsvertrag*) (Federal Law Gazette 1955/152) and Section 3 of the First Act on the implementation of the Austrian State Treaty (*1. Staatsvertragsdurchführungsgesetz*, Federal Law Gazette 1956/165), as the property of the German Reich it passed into the ownership of the Republic of Austria without any need for any of the documentary formalities required for derivative acquisition. Under the terms of the Federal Real Estate Act (*Bundesimmobiliengesetz*), inter alia a large number of former air raid shelters were transferred into the ownership of the Federal Real Estate and Property Corporation (*Bundesimmobiliengesellschaft*). The property owned by the resident of Tyrol along with the respective entry number could not be found in the Schedule to the Federal Real Estate Act A.1.2. (former air raid shelters). It should therefore be presumed that the bunker is still owned by the Republic of Austria.

Republic bears responsibility

In the opinion of the AOB, the Republic of Austria is responsible for the structure and must bear responsibility for any war relics present within the bunker. Accordingly, it must comply with the request made by the resident of Tyrol to remove it, provided that this is economically justifiable. According to Section 42 (5) of the Weapons Act (*Waffengesetz*), the Federal Ministry of Defence is responsible for the securing, transportation, safe storage and, as the case may be, destruction of war materiel, unless the materiel in question has been secured and seized under the terms of the 1975 Austrian Code of Criminal Procedure (*Strafprozessordnung*) (Federal Law Gazette No. 631/1975).

AOB: common course of action needed

After submitting its legal opinion, the AOB again requested that the Ministry issue a statement of opinion and contact the resident of Tyrol, staff from the Mine Clearance Service and the expert in munitions surveying, who was already involved in the case, in order to agree on a common course of action.

The Ministry then stated that the Weapons Act does not stipulate that the Ministry must carry out a targeted search for war materiel. Were the expert to identify any war materiel after opening the bunker, the Ministry's Mine Clearance Service would take on responsibility for the securing, transportation and, as the case may be, destruction of this war materiel. As regards the removal requested, there was no indication of "any responsibility whatsoever of the Ministry". Even if the Republic of Austria were the owner of the concrete slab, responsibility would lie with the Federal Ministry of Finance and not the Federal Ministry of Defence.

Referring once again to the judgment of the Supreme Court of Justice, the AOB countered that it was beyond doubt that the Republic of Austria was the owner of the concrete slab in question and of any underground facility. Although the Federal Ministry of Defence is not under any obligation under the terms of the Weapons Act to search actively for war material, the question of any active search by the Ministry was not at issue as the above-mentioned expert had offered to properly open (at his own cost) any bunker present. The AOB is sceptical as regards the Ministry's position that it does not have "any responsibility whatsoever" for any bunker from the Second World War. Even though the Ministry's Mine Clearance Service would only have to become involved in the event that war materiel were actually found, the AOB takes the view that the Ministry should at least engage with this matter.

A common course of action with the Ministry's Mine Clearance Service has not yet been agreed upon; on the contrary, further surveys and investigations over an undefined period of time have been prospected. The AOB has left it to the property owner to contact the expert on her own initiative in order to ensure the proper opening of any bunker. However, the property owner was requested to provide the Ministry's Mine Clearance Service with the date in good time. It will only be possible to establish conclusively whether a German *Wehrmacht* bunker containing explosives is in fact situated under the concrete slab, and whether demolition would be economically justifiable after the concrete slab has been properly opened.

Clarification of preliminary issues

3.11.2 Noise caused by shooting range in Völtendorf

A married couple living near the shooting range in Völtendorf complained about the noise caused by the Austrian Federal Army's shooting range. Despite the action previously taken in order to reduce noise, on some occasions one has the impression of living in a war zone. It does not make sense why the Austrian Federal Army has not built any enclosures around shooting stands in order to reduce noise levels.

Like being in a war zone

The AOB welcomed the efforts taken to date by the Federal Ministry of Defence and by the Austrian Federal Army to reduce noise. According to

the documents presented by the married couple, some action has already been taken, such as the limitation of shooting times, the construction of an additional embankment as a sound barrier to the south-west of the range as well as the planned procurement of noise control tunnels. However, the AOB asked the Ministry to indicate any further planned measures to reduce noise as regards the issues raised by those affected.

**Joint usage by the
Lower Austria Police
Department**

Since the Austrian Federal Army's shooting range in St. Pölten-Völtendorf is currently being used also by the Lower Austria Police Department, the AOB also asked whether the Ministry was expecting intrusive noise to be reduced following the completion of the new police security centre. In addition, the AOB enquired whether target practice by the Austrian Federal Army could be conducted in future, at least in part, at the indoor shooting range planned by the Lower Austria Police Department at the St. Pölten police security centre.

The Ministry referred to the noise survey carried out by the Austrian Federal Army in 2020. This established that there were no grounds to conclude that there was any disruptive noise for neighbours. In spite of this, the Austrian Federal Army had implemented a variety of noise reduction measures. No further action was currently being planned, especially as it would now have to be considered whether the action carried out was effective. Noise control tunnels had only recently been built, and the noise-reducing effect of the foliage planted would only become apparent after a couple of years.

The Ministry stated with regard to the new police security centre (indoor shooting range) operated by the Federal Ministry of the Interior in St. Pölten that, once this facility has been completed, it is by all means expected that the Völtendorf shooting range will be used less by the Federal Ministry of the Interior. When asked whether the new indoor shooting range would also be used by the Austrian Federal Army, the Ministry pointed out that the needs of the Federal Ministry of the Interior and those of the Austrian Federal Army differed as regards the usage of the shooting range. Accordingly, it is currently considered that the Austrian Federal Army will not make much use of the indoor shooting range of the Federal Ministry of the Interior.

The AOB took note of the fact that it is not planned to use the new indoor shooting range jointly. However, the AOB could not understand the underlying argumentation concerning the "different needs" of the Austrian Federal Army and the Federal Ministry of the Interior, since until now the Federal Ministry of the Interior has evidently been able to use the shooting range of the Austrian Federal Army in Völtendorf.

As regards the married couple affected, it is therefore hoped that the reduction in usage of the Völtendorf shooting range by the Federal Ministry of the Interior, the recently built noise control tunnel and, over the longer term, also the noise-reducing foliage should result in an improvement of the stressful situation.

3.11.3 Allegations concerning degrading treatment at the Theresian Military Academy

A military cadet submitted an anonymous report to the AOB concerning exercises held during the course of officer training at the Theresian Military Academy between 31 January and 12 August 2022. The account contained serious allegations, up to and including torture and degrading treatment. Mindful of the fact that the public prosecutors' office has already launched an investigation, the AOB only asked the Ministry to state what action had been taken under disciplinary law in response to the allegations. In particular, the AOB asked whether the trainers concerned had been questioned or temporarily suspended concerning the serious allegations. With regard to an impending exercise in December 2022, which according to the military cadet was "not specified in any greater detail", the AOB also asked whether this would take place as planned, and which short-term precautions had been put in place by the Ministry in order to be able to prevent incidents such as those described.

The Ministry pointed out that after becoming aware of the allegations, the competent disciplinary authority had promptly launched a disciplinary procedure according to Section 61 (1) of the Military Discipline Act (*Heeresdisziplinargesetz*) 2014. However, since criminal investigations had been launched at the same time, this procedure had to be suspended pursuant to Section 5 (3) of the Military Discipline Act 2014.

Disciplinary authorities

In order to avoid jeopardising the criminal investigations, the public prosecutors' office had prohibited any form of investigative activity – such as questioning the trainers involved. No trainers have been suspended to date as an anonymous letter on its own cannot provide a sufficient basis for such serious action unless enquiries have first been carried out. However, the Ministry stated that, taking account of these allegations, officer training would no longer be carried out in December in the manner previously planned. A decision concerning any precautions will be taken after all investigations have been concluded. The AOB welcomes in particular the swift response with regard to the impending exercise. Since the investigations launched by the public prosecutors' office have ended in the meantime, the AOB assumes that the disciplinary procedure is following its course.

Impending exercise adapted

3.12 Agriculture, forestry, regions and water management

Introduction

111 cases In the year under review, the AOB dealt with 111 cases falling within the jurisdiction of the Federal Ministry of Agriculture, Forestry, Regions and Water Management. These concerned in particular water management, the implementation of the law applicable to forestry and agricultural subsidies.

3.12.1 Water law

Number of complaints declined slightly Complaints concerning water law declined once again in 2022. The previous years' trend thus continued, which is likely to be due primarily to the consequences of the COVID-19 pandemic.

Many of the complaints concerned alleged failures of the water law authority in disputes with water cooperatives or in relation with flood protection measures, as well as inadequate involvement of affected property owners in the amendment of hazard zone plans.

Inappropriate requirements for examining water quality

Water results only after the end of the bathing season A member of the tenants' association of a bathing lake complained about a requirement contained in a water law permit notice. According to this requirement, the Eisenstadt-Umgebung District Authority obliged the holder of the permit, who is also a lessor and tenant of the bathing lake, to submit water analysis results (only) by 15 November at the latest of the relevant calendar year.

The man objected that, in his view, the time limit set for submitting results was too late. Specifically, it did not make any sense to require presentation to the water law authority of evidence that the lake water is compliant with requirements only in November, i.e. months after the end of the bathing season.

No regular official controls During the course of the investigative proceedings, the Eisenstadt-Umgebung District Authority stated that the Bathing Water Hygiene Act (*Bäderhygienegesetz*) was not applicable to the bathing lake. This was apparently due to the fact that the lake is fed by groundwater and is only accessible for people from the surrounding properties. As a consequence, the bathing lake was also not subject to the official controls required under the Bathing Water Hygiene Act. It was stated that the bathing lake should be regarded as a private stretch of water under the terms of the Water Rights Act (*Wasserrechtsgesetz*) and that, being a stretch of water fed by groundwater, it required authorisation under water law.

As regards the requirement contained in the approval notice under water law, the Eisenstadt-Umgebung District Authority stated that the deadline for presenting results of 15 November of each calendar year in relation to issuing a new water right had already been set and hence adjusted.

Since the Bathing Water Hygiene Act was not applicable, the requirement is intended to test and maintain the groundwater level as well as the quality of the groundwater. The examination results must be submitted by the person responsible for compliance with the notice, and this person would be obliged to take the appropriate action in the event of deficient water quality.

The water law authority thus explained to the AOB in a comprehensible manner that the provisions of the Bathing Water Hygiene Act are not applicable. However, the AOB established that the requirement that the results have to be submitted (only) in November of the relevant calendar year is not adequate for ensuring proper checks that the groundwater feeding the lake is not contaminated. In the view of the AOB, there is no guarantee that the water law authority will become involved quickly if needed. The AOB suggested that the requirement be adjusted in line with its purpose.

Requirement not objectively justified

Hesitant response to deviations from flood prevention project

Three families complained to the AOB in relation to a flood prevention project concerning a failure by the Kirchdorf an der Krems District Authority to establish the condition required under water law. In particular – in contrast with the requirement laid down in the authorisation – a retention basin had not been created. In addition, an initially unforeseen intake channel was causing flooding. Enquiries carried out by the AOB established that, by a notice issued in October 2013, the District Authority had granted authorisation under water law to two municipalities to implement a flood protection project.

The municipalities announced in October 2020 that the hydraulic engineering measures had been largely implemented. The flood retention basin approved had not been built as poorer ground quality than anticipated had been found in the area concerned prior to the start of construction work. The municipalities asked that the additional construction work required in order to further improve water outflow conditions be approved on an ex-post basis during the course of the water law approval procedure as minor project changes pursuant to Section 121 of the Water Rights Act (*Wasserrechtsgesetz*).

Deviation from approval

However, the Kirchdorf an der Krems District Authority took the view that, considered overall, these deviations could not be regarded as minor and hence that supplementary water law authorisation was required. By a letter of September 2021, the municipalities submitted the request required by the District Authority, although without suitable submission documents.

In September 2021, the District Authority called on the municipalities to submit professionally prepared project documentation, failing which orders would be issued by the water law authority. Following the submission of project documentation, the District Authority held an oral hearing in September 2022 in the presence of the parties.

**Hesitant action by
the authority**

The AOB objected that around nine months had passed between the expiry of the deadline for the completion of construction work on 31 December 2020 and the submission of the application for the grant of supplementary authorisation, during which the water law authority had not stipulated what action should be taken to rectify the situation.

Deposits in the Traunsee lake – still no solution

In the Annual Report 2020 (pp. 155 et seq), the AOB pointed to the problem resulting from the lack of a legal basis for the obligation to clear up deposits of driftwood and flotsam in the Traunsee lake. The AOB established that the Water Rights Act (*Wasserrechtsgesetz*), the Forest Act (*Forstgesetz*) and the Waste Management Act (*Abfallwirtschaftsgesetz*) did not provide an appropriate regulatory framework.

In the Annual Report 2021 (p. 192 et seq), the AOB reported on the resolution adopted by the Diet of Upper Austria on 22 April 2021 as well as petition no. 69/Pet submitted to the National Council on 7 September 2021.

**Petition being
addressed**

On 28 September 2022, the petition was placed on the agenda of the National Council's committee for petitions and initiatives of citizens' action groups. The committee's appraisal was adopted concerning "the creation of a legal basis in federal law for the removal of pollution caused by flotsam and driftwood", 248/AUA. Most recently, the "Resolution proposal of National Council parliamentarian Andreas Kollross and colleagues" was presented at the session of the Environment Committee on 6 December 2022.

Although a legal basis for the removal of driftwood is clearly taking shape, it will still take some time to be completed. The AOB will monitor further developments.

3.12.2 Agricultural investment grants

On 12 October 2016, a farmer applied for a grant relating to the construction of a new building on an agricultural property. The grant was supposed to be worth around EUR 16,000. Following an initial grant of approval in principle by the Lower Austria Chamber of Agriculture as the processing authority, after all documents and statements had been submitted, it refused to pay out the grant several years later.

As justification, it stated that the farmer had started work on the project one day before the submission was made, in breach of the grant guidelines. This is apparent from an "order confirmation" from a timber construction company dated 11 October 2016, which was submitted by the grant applicant. *Agrarmarkt Austria* and the Federal Ministry of Agriculture confirmed the decision taken by the processing authority.

"Start of construction" one day too early

According to the Ministry's Special Directive on "Agricultural Development Project Grants 2014–2020", grants cannot be awarded for work where "the project has already commenced prior to the application". The project is deemed to have commenced either when construction work actually starts or at the time of the "first legally binding obligation concerning the order of equipment or the procurement of services or any other obligation that is indispensable for the investment". This condition is intended to act as an "incentive" to ensure that projects are only implemented with the assistance of the grant, and that support is not provided for projects that would have been implemented anyway.

The farmer stated that he had established contact with the timber construction company before making the submission in order to ensure that, in the event that the grant was awarded, it would be possible to start work before the winter of 2016. In addition, he had noticed when submitting the documents to the AOB that the timber construction company had only sent out the "order confirmation" in question for countersignature by an email of 18 October 2016 – hence after the grant was applied for. This could therefore constitute the earliest possible point in time of consistent declarations of offer and acceptance concerning the services, hence resulting in the conclusion of a legally binding contract (for the provision of works and services).

New circumstances

The AOB considered the refusal to award the grant as particularly harsh. Moreover, since grants are awarded by the administration acting as a private entity, enforcement would only be possible through litigation. The Ministry was therefore asked to review once again the decision on whether to award the grant, taking account of the new circumstances.

The Ministry arranged for the review to be carried out by *Agrarmarkt Austria*. It established that the grant applicant's version of events was plausible. Since it could therefore be assumed that a binding order confirmation within the meaning of the grant guidelines was only issued after the grant application was submitted, the grant was ultimately awarded. The AOB welcomed the efforts made by the Ministry to clarify the matter out of court.

Grant awarded

3.13 Social affairs, health, care and consumer protection

Introduction

The number of complaints relating to social public health insurance rose in 2022 (2021: 392, 2022: 426). In contrast, the AOB marked a fall in the number of complaints relating specifically to health care (2021: 1,749, 2022: 700). This is due to the significant decline in complaints involving COVID-19 as a result of the extensive easing of restrictions.

Long waiting times for reimbursement of costs

Once again, the AOB received a large number of complaints concerning the long processing times of the Austrian Public Health Insurance Office (*Österreichische Gesundheitskasse*), in some cases lasting for several months, for reimbursements following consultations by doctors that do not have a contract with the Public Health Insurance Office. In addition, due to the failure to fill public health insurance permanent positions, coupled with existing waiting times for particular types of treatment, insured persons are increasingly turning to doctors without such a contract. The Austrian Public Health Insurance Office conceded to the AOB that the volume of fees from doctors without a contract Public Health Insurance Office being processed as well as the processing time for cost reimbursements can vary significantly over the course of the year. The Health Insurance Office is therefore seeking to establish uniform processes and procedures as part of a service harmonisation initiative for processing claims in order to reduce waiting times for insured persons. In addition, the expansion of electronic communication options via the Social Insurance portal should reduce the burden on case workers at the Health Insurance Office. This should in turn shorten processing times. However, as far as the AOB is aware, these efforts have not resulted in any significant reduction in processing times. Efforts by the Austrian Public Health Insurance Office should therefore be stepped up and the necessary resources should be enhanced.

Incontinence care

Following the discussion of problems relating to incontinence care in the ORF TV programme *Bürgeranwalt* ("Advocate for the People"), large numbers of insured persons and their relatives once again approached the AOB, as the incontinence products provided were not sufficient. However, after contacting the Austrian Public Health Insurance Office, in most cases it was possible to adjust or increase allowances. The AOB has therefore called for adopting a flexible approach, tailored to the specific circumstances of each individual case. Complaints relating to insufficient incontinence care declined significantly over the course of the year.

3.13.1 Health

COVID-19 self-isolation still a major cause for complaints

For the third year in a row, the AOB received large numbers of complaints relating to problems with COVID-19 self-isolation. In 2022, most complaints were once again received from people who were required to self-isolate following a positive COVID-19 test or the suspicion of being infected from close contacts, but who had not received a written self-isolation notice. However, this was required by many employees as justification for their failure to attend work. Moreover, under the law applicable at the time it was also necessary in order to claim financial compensation for loss of income under Section 32 of the Epidemics Act (*Epidemiegesetz*) 1950.

Failure to issue self-isolation notices

The numerous investigative proceedings conducted by the AOB identified two main problems: first of all, it was clear that, even after two years of the COVID-19 pandemic, the health authorities were still not sufficiently equipped (in terms of both staff and technical resources) to comply with their obligations under the Epidemics Act. Secondly, the AOB identified a need for changes in the law, especially as the legal framework conditions for self-isolation according to Section 7 (1a) of the Epidemics Act are not suitable to combat a pandemic.

Lack of staff and need for change in the law

The AOB previously referred to this problem in the Annual Report 2020, volume "COVID-19" (pp. 22 et seq.). However, significant improvements either took too long or have still not been made. Despite repeated announcements by the authorities that self-isolation notices would be issued promptly and properly by additional staff working for the health authorities, until recently, the AOB was still receiving large numbers of complaints concerning self-isolation notices that were issued late or not at all.

In some *Laender* or districts, the health authorities were even provided with explicit internal instructions (decrees) not to issue any further self-isolation notices for particular classes of person due to a lack of staffing resources. A number of people from Salzburg, Lower Austria and Upper Austria contacted the AOB for this reason. In all cases, the substantive legal prerequisites for self-isolation were met, with the result that those affected stayed at home. However, self-isolation notices were not issued and the authorities justified this based on the issued decrees, which state that in case of a lack of staffing resources, persons such as close contacts no longer needed to self-isolate.

The AOB established that decrees or administrative practices of this type constituted maladministration, as they clearly violate the provisions of the Epidemics Act. According to Section 6 (1) of the Epidemics Act, the health authorities are obliged to take the necessary precautions without undue delay in order to prevent onward spread for each instance of infection or suspected infection with a reportable disease. Until the end of July 2022,

Decrees violate the Epidemics Act

this included in particular the self-isolation of persons who were infected, suspected of being infected or suspected of being infectious (Section 7 (1a) of the Epidemics Act). These persons may be isolated in order to prevent the onward transmission of a reportable disease if, having regard to the type of disease and the conduct of the individual concerned, there is a serious and material danger to the health of other people and no less severe means are available.

The administrative discretion when deciding whether or not to order self-isolation is limited to the criteria expressly provided for by law (including in particular dangerousness having regard to the type of disease and the conduct of the individual concerned, or the availability of less severe means). Staffing resources are not a criterion provided for by law that can be relevant for this discretionary decision.

Health Minister confirms legal opinion of AOB

The Federal Minister for Social Affairs, Health, Care and Consumer Protection, from whom the AOB requested a statement of opinion, confirmed in a letter of October 2022 that the health authorities only have limited discretion in relation to Section 7 (1a) of the Epidemics Act, which they must exercise in accordance with the Act. The Federal Minister stated that he was aware of the issue raised by the AOB and was pursuing dialogue with the *Laender* in an attempt to achieve pragmatic, citizen-friendly solutions.

Supreme Administrative Court: ex-post self-isolation notice not allowed

In a decision of 23 November 2021 (Ra 2021/09/0173), the Supreme Administrative Court of Austria clarified that self-isolation notices could only have future effect and that it was not possible to issue declaratory notices concerning self-isolation (occurring in the past).

Sensible amendment of Section 32 of the Epidemics Act

This led to the highly unsatisfactory outcome that neither the health authorities nor the person concerned had any opportunity (under administrative law) to correct or challenge unlawful action by the health authorities. Federal legislators have acknowledged that the (at times) high case numbers brought the health authorities to the limit of their capacity, and that they were no longer able to attend to the related administrative formalities. Following an amendment of Section 32 of the Epidemics Act, which came into force on 1 July 2022, entitlement to claim loss of income is no longer conditional as a mandatory requirement on a formally issued self-isolation notice. According to Section 32 (1a) of the Epidemics Act, as applicable pursuant to Federal Law Gazette I no. 89/2022, entitlement to compensation now also arises in the event of a positive PCR test result and provided that the person concerned was required to self-isolate.

Still no solution for close contacts

The AOB welcomes this change in the law, especially as it will create easier access to compensation payments for anyone who does not receive a self-isolation notice (which in itself is required) or who does so too late. However, the situation is still less satisfactory for those persons who, due to an administrative error, did not receive any self-isolation notice despite

qualifying as a close contact of a suspected case. For these persons, entitlement to compensation for loss of earnings is still not provided for by law, with the result that either employees must bear the loss of earnings themselves or employers must incur the financial burden of any continuing salary payments made in accordance with Section 1154b of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) or Section 8 (3) of the Austrian Employee Act (*Angestelltengesetz*).

In other cases, however, the AOB also identified excessive or unnecessarily long self-isolation notices. For instance, a 45-year-old man from Vorarlberg received a self-isolation notice from the Feldkirch District Authority on account of a (suspected) COVID-19 infection even though he had not at any time tested positive for COVID-19. Investigative proceedings initiated by the AOB confirmed the suspicion that it had been caused by a system error or a mix-up with another person with the same name. Thanks to a swift follow-up test arranged by the authorities, the period of self-isolation (which was substantively unjustified, but formally valid) could at least be kept relatively short at one to two days.

Excessive or unnecessarily long self-isolation notices

A Carinthian man from the District of Klagenfurt-Land complained that his period of self-isolation was not brought to an end at the time of a negative PCR test, but rather at the end of the day on which the result was presented. The AOB considered this complaint to be justified as well. The provisions of the Epidemics Act and the Self-isolation Regulation (*Absonderungsverordnung*) unequivocally state that self-isolation can only be directed "for the duration of the risk of infection".

Self-isolation only for the duration of the risk of infection

The Klagenfurt-Land District Authority should have ended the period of self-isolation at the time the test result was received since, once a negative PCR test result has been presented, there is indisputably no longer any risk of infection. The Ministry argued to the AOB that ending periods of self-isolation with the actual end of a day was "necessary in order to ensure openness and transparency". In view of the clear wording of the relevant legal provisions, which as mentioned above expressly limit the admissibility of self-isolation to the "duration of the risk of infection", the administrative practice defended by the Ministry is unlawful.

There was a further change in the legal situation on 1 August 2022. Following an amendment to the Self-isolation Regulation, people who are or are suspected of being infected or who are suspected of being infectious with COVID-19 may now only be subjected to a so-called restriction on movement and contact (Section 4a of the Self-isolation Regulation as applicable pursuant to Federal Law Gazette II no. 295/2022). While COVID-19 is still a reportable disease, self-isolation is no longer required. Persons who are subject to a restriction on movement and contact are no longer obliged to remain at home, although their activities are restricted. Specifically, they are obliged to wear an FFP2 mask at all times when outside the home for

No self-isolation after August 2022

the duration of the risk of infection. Furthermore, they are prohibited from entering facilities housing vulnerable at-risk groups (e.g. care homes).

**Epidemics Act
needs to be "future
proofed"**

What was apparent from the numerous investigative proceedings relating to COVID-19 self-isolation was, first of all, that in many cases the health authorities failed to comply adequately with their statutory obligations under the Epidemics Act, in particular due to a lack of staff resources, and secondly that the Epidemics Act needed and still needs to be amended in order to provide a suitable legal basis for future waves of infection. For instance, provisions on self-isolation should ensure that effective action can be taken to combat the risk of infectious diseases. In addition, transparent administrative practice should be ensured that guarantees legal certainty for those affected.

Problems with the coronavirus bonus for health care staff

Prerequisites Under the terms of the Federal Act on COVID-19 Grants (*COVID-19-Zweckzuschussgesetz*) and the Funding of Care Act (*Pflegefondsgesetz*), the payment of extraordinary benefits to employees in the health care sector should be enabled in recognition of the particular stress encountered during the COVID-19 pandemic. Providing personal care to people is not only highly demanding on a physical level but also psychologically stressful, especially during the exceptional circumstances of a pandemic. Taking the necessary protective measures results in additional work, which makes providing care significantly more difficult. As a result, the following groups of persons were supposed to receive a coronavirus bonus:

Entitled class of persons Support staff, care staff and cleaning staff at out-patient and in-patient support and care facilities and at partial residential day care facilities working in personal contact with persons requiring support or care.

Employees at medical institutions and facilities intended predominantly for in-patient rehabilitation who provide medical or non-medical support to patients involving in-person contact or cleaning services in the immediate vicinity of patients receiving care.

However, the Federal Act on COVID-19 Grants does not establish a direct entitlement to an extraordinary benefit for health care staff, but rather only allows the *Laender* to request the reimbursement of any such bonus from the Federal Government, provided that specific criteria are fulfilled. The coronavirus bonus was supposed to be paid out between 1 June and 31 December 2021 and was capped at EUR 500.

It was also stipulated that payment of the bonus should only be considered if the employees had worked for at least six months during the period of the COVID-19 pandemic for the institution paying the bonus, including at least three months in direct personal contact with patients receiving care.

Both this rule and its implementation by the *Laender* caused hardship for those affected if their employment relationship had ended or if they had changed jobs.

No coronavirus bonus for departing staff

For instance, a woman contacted the AOB stating that, after working for a number of years for the Vienna General Hospital until the end of September 2021, she had been working at the Hollabrunn Regional Clinic since November 2021. Between the two periods of employment she had worked at the Austria Center Vienna as an employee of the Samaritans carrying out COVID-19 vaccinations. However, a rule that applied to Vienna Health Association facilities stipulated that only staff with an active contract of employment on a designated day (i.e. 21 October 2021) who fulfilled the criteria for a COVID-19 bonus received the EUR 500 payment. Since the woman's employment relationship with the Vienna Health Association had ended on 30 September 2021, she was not paid a COVID-19 bonus.

Cut-off date in Vienna

Since she had not completed the minimum period of employment of six months required in Lower Austria for the payment of the COVID-19 bonus, having started work at the Hollabrunn Regional Hospital on 2 November 2021, the Health Agency of Lower Austria (*Niederösterreichische Landesgesundheitsagentur*) did not pay her the bonus either.

This case exemplifies how the arbitrary stipulation of a cut-off date in Vienna, even though there was no requirement in law for this, resulted in long-standing employees not receiving a COVID-19 bonus, despite having cared for COVID-19 patients throughout almost the entire duration of the pandemic.

It would still be possible to pay a coronavirus bonus as acknowledgement of this extremely demanding activity, because the Federal Act on COVID-19 Grants only states that it is no longer possible to refund the coronavirus bonus, as the payment should have been paid by the end of 2021 in order for this to be possible.

Coronavirus bonus still possible

The Ministry also stated that a change of employer should not have been taken as grounds for the refusal of the coronavirus bonus. As a result, the Health Agency of Lower Austria also paid out a coronavirus bonus to former employees who had stopped working for it. Despite intensive efforts and a discussion in the ORF television programme *Bürgeranwalt* ("Advocate for the People"), the Chief Executive Office of the City of Vienna refused outright to make retrospective bonus payments. It justified its decision arguing that the cut-off date was intended to ensure that the criteria for the payment of the coronavirus bonus to the approximately 30,000 employees of the Vienna Health Association could be reviewed in good time and that, despite extensive enquiries, payments could be made on time by the end of 2021.

No coordination by the Ministry The AOB continues to take the view that the payment of a coronavirus bonus to departed employees as acknowledgement of their extremely demanding work would still be possible and justified. As the complaints submitted to the AOB show, employers have not clarified entitlement to the coronavirus bonus amongst themselves, to the detriment of those affected, which has resulted in different practices in relation to payment in the different *Laender*. Therefore, the Health Department should also have specified in advance the prerequisites for the payment of a COVID-19 bonus and provided clarification in order to ensure uniform practice throughout the *Laender*.

Incorrect date of birth on vaccination certificate

Official change of date of birth A social worker contacted the AOB on behalf of a recognised refugee. His COVID-19 vaccination certificate featured a different date of birth from his identity card. It appears that the official change of his date of birth as part of the procedure for determining his age was not taken into account when the COVID-19 vaccination certificate was issued.

The social worker called the "green pass" hotline, which informed her that it was not possible to change the date of birth on the COVID-19 vaccination certificate. She also unsuccessfully contacted the Austrian Public Health Insurance Office and the Federal Office for Immigration and Asylum.

Data from the Central Patient Register After investigative proceedings were launched, the Austrian Public Health Insurance Office stated that it did not have authority to change dates of birth, as this competence lies with the Electronic Health File Ombudsman (*ELGA-Ombudsstelle*). When confronted with the problems, the Ministry declared that the date used on the COVID-19 vaccination certificate had been taken from the Central Patient Register (*Zentrales Patientenverzeichnis*) of the umbrella association of public social insurance carriers. Since the vaccination certificate had been issued before the date of birth was changed, these details were not up to date in the Central Patient Register. The Ministry instructed ELGA Ltd. to issue a new vaccination certificate.

No assistance from the "green pass" hotline Finally, the Ministry referred the matter to the "green pass" hotline, which was operated by the Austrian Agency for Health and Food Safety (*Agentur für Gesundheit und Ernährungssicherheit*) on behalf of the Ministry. However, as mentioned above, in this case the "green pass" hotline was unable to provide the necessary assistance.

Discrimination in relation to blood donation ended

In 2022, discrimination against homosexual and transgender persons in relation to blood donation was ended. This reflected long-standing calls made by organisations and the AOB.

Based on two complaints, the AOB stated already back in 2010, that the blanket ban on blood donation by homosexual men on the grounds that it could be presumed that they are at higher risk of transmitting HIV and other infections, entailed considerable potential for discrimination. In 2015, the European Court of Justice also ruled that a blanket ban on blood donations by homosexual and bisexual men in France amounted to unlawful discrimination and called for differentiated risk assessments to be carried out at national level on the basis of epidemiological data. Over the last few years, complaints have also been made to the AOB by both homosexual men and transgender persons, who were refused the opportunity to donate blood.

A new Regulation on Blood Donation (*Blutspendeverordnung*) has been in force since September 2022. Blood donation is now only dependent upon individual at-risk conduct, and not on sexual orientation or sexual identity. In exactly the same way as for heterosexual persons, homosexual and bisexual men and transgender persons are now only asked about the number of sexual partners they have had during the three months prior to donating blood.

Homosexual and transgender persons now allowed to donate blood

When the new Regulation on Blood Donation came into force, it was still uncertain whether – for the first time – transgender persons would now also be legally allowed to donate blood. At a media event, which was held when the new Regulations entered into force, a homosexual man was admitted as a blood donor for the first time, while a transgender person wishing to donate blood was refused. The Ministry subsequently clarified that transgender persons are allowed to donate blood in the same way as anybody else.

No cost subsidy for recommended vaccination against Shingles

After being infected with chickenpox, the varicella-zoster virus remains within nerve cells for the person's entire life. If the immune response generated by an infection falls below a certain threshold level after a number of years, it is possible that the virus may reactivate causing shingles, a nerve inflammation, which can cause considerable pain and various after-effects. This illness affects around 30% of all people, with pregnant women and those who are immunosuppressed being exposed to a higher risk, and the frequency of illness increasing with age (50% of illnesses occur in persons over the age of 50). According to recent findings, the risk of a heart attack or stroke also increases for herpes zoster patients.

A dedicated vaccination can increase the immune response to varicella-zoster virus, thus preventing the emergence of shingles. According to current studies, the efficacy of the shingles vaccine is higher than 90%, and protection remains effective for a number of years.

Vaccination offers 90% protection

According to Austria's 2022 vaccination plan, vaccination against herpes zoster is recommended for persons over the age of 50. In addition, vaccination is also being intensively promoted following the release of the new, more effective inactivated vaccine Shingrix. However, the costs of full immunisation (two doses) are around EUR 500.

No cost subsidy for expensive vaccine

In several complaints to the AOB, some people objected that no cost subsidy was offered for this vaccination. For instance, a woman from Vienna stated that, although she fell under an at-risk group on account of her age (70) and poor state of health, she was unable to afford the high costs of vaccination out of her small pension.

AOB investigative proceedings established that, in the view of the Ministry and from a specialist medical perspective, it would be absolutely desirable to establish a cheaper and hence broadly accessible option for the herpes zoster vaccination. However, political agreement and appropriate financing models would be necessary in order for this to occur, over which the Ministry does not have any influence.

Preventive health care is a voluntary service

From a social insurance law perspective, it should be noted that the core task of statutory public health insurance is to treat illnesses. According to law, preventive measures such as vaccinations are largely conceptualised as voluntary services, which an insurance carrier may provide having regard to its financial resources. As a result, the costs of vaccination are only covered in exceptional cases, and here too only in the form of cost subsidies – as is the case for instance for the TBE vaccination.

Since public social insurance carriers are corporations governed by public law and established according to the principles of self-administration, they are managed by independent administrative bodies and decide under their own responsibility regarding all of their services. Nonetheless, health insurance carriers have conducted vaccination programmes on numerous occasions in the past (mostly in conjunction with individual *Laender*), such as vaccination against the flu, for instance.

Decision concerning subsidy a matter of insurers

As a result of the AOB's investigative proceedings, the Ministry nonetheless obtained a statement of opinion from the umbrella association of public social insurance carriers. In this statement, the umbrella association set out a number of considerations of a medical nature and under health insurance law, and also stated that, as a general rule, health insurance carriers could decide independently in which cases a vaccination subsidy would be provided, as well as its amount. The office of the medical superintendent of the health insurance carriers was therefore asked to indicate those cases in which a subsidy could be granted.

AOB recommends cost subsidy for at-risk groups

In view of the high costs of vaccination, the AOB suggested that people from that age group (over 50) for which the Ministry recommends vaccination as

well as people at an increased risk of falling ill with shingles be granted a cost subsidy.

3.13.2 Public health insurance

Failure to refund full amount as claim is out of time

The AOB regularly deals with cases involving co-insurance, where contributions are unlawfully collected. In January 2005, the Vienna Public Regional Health Insurance Office, which was competent at that time, informed a man that it would not be possible to obtain free co-insurance for his wife since, as of December 2004, he was obliged to pay an additional contribution pursuant to Section 51d of the General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*).

When the notice of charges concerning this additional contribution was examined by the Austrian Public Health Insurance Office, it was only established in 2021 that the wife had been bringing up her daughter and the man's step-daughter until they came of age in a shared household in Minsk. The Austrian Public Health Insurance Office then established that, due to the respective child-raising periods, the prerequisites for free co-insurance for the wife had been met since 2004. However, under the terms of the rule on limitation periods laid down in Section 69 (1) of the General Social Insurance Act, the contributions charged since this time could only be reimbursed for the period falling after January 2016.

Reimbursement only for five years

The man challenged the notice of the Austrian Public Health Insurance Office before the Federal Administrative Court, which upheld the decision made by the Health Insurance Office and only ruled that compensatory interest was due for the period falling between 14 January 2018 and 14 January 2021.

Section 69 (1) of the General Social Insurance Act provides that any right to reimbursement lapses five years after the respective payment was made, regardless of who is at fault for the payment of the social insurance contributions in question. The additional contributions paid between December 2004 and January 2016, amounting to around EUR 16,000, were not reimbursed even though it is not disputed that the prerequisites for free co-insurance were met during this period.

„Double“ insurance costs due to incorrect information

In September 2022, a man from Vienna contacted the AOB concerning incorrect information received from the Austrian Public Health Insurance Office regarding the co-insurance for his wife. According to Section 123 (1) of the General Social Insurance Act, spouses are entitled to be co-insured under public health insurance if they are ordinarily resident in Austria and

No waiting time for co-insuring spouse

do not have their own statutory public health insurance. Partners are also entitled to be co-insured if they have been living with the insured person for at least ten months and share the same household free of charge (Section 123 (7a) of the General Social Insurance Act). An additional contribution is payable according to Section 51d of the General Social Insurance Act for the period of co-insurance.

Incorrect information concerning supposed waiting period

In April 2021, the man from Vienna married his wife, who was not yet living in Austria at the time. After she relocated to Austria in July 2021, the married couple promptly contacted the Austrian Public Health Insurance Office in order to ask about options for co-insuring the wife until she started gainful employment of her own. On this occasion, the married couple were informed – as it subsequently transpired, incorrectly – that co-insurance would only be possible after the marriage had already been ongoing for ten months. As an interim solution, the Austrian Public Health Insurance Office recommended taking out private health insurance. The married couple followed this recommendation.

Taking out private health insurance

When the wife contacted the Austrian Public Health Insurance Office once again following the expiry of the supposedly mandatory ten-month waiting period and after terminating the private health insurance, she was informed concerning her entitlement to co-insurance and received her e-card (i.e. the Austrian health insurance ID-card).

To their great surprise, however, the couple also received invoices from the Austrian Public Health Insurance Office, demanding payment of around EUR 2,300 for co-insurance from August 2021. As the family was also in the meantime expecting their first child and the “double” payment of health insurance contributions entailed a significant financial burden, the man asked the AOB for assistance.

Cancellation of costs by the Austrian Public Health Insurance Office

After investigative proceedings were launched, the Austrian Public Health Insurance Office conceded that the married couple had been provided with incorrect information. The additional contributions for co-insurance had in fact been correctly demanded, as the wife was entitled to co-insurance from the time of relocation or the establishment of a joint household in Austria. However, since the married couple had taken out additional private health insurance due to the incorrect information provided by the Austrian Public Health Insurance Office, the Office declared that it was willing to cancel its own additional contributions for the duration of the period of “double insurance”.

Failure to approve an emergency drug

Necessary epilepsy drug

People regularly complain to the AOB concerning the failure by their public health insurance provider to approve drugs. For instance, a mother contacted the AOB concerning her son who suffers from epilepsy, which is normally

well managed with an anti-epileptic drug. However, in the event of acute seizures he requires an emergency drug in order to relieve cramps. The drug Buccolam® is required in such cases, each pack of which contains four ready-to-use syringes with an expiry date of between twelve and fourteen months, which must be administered orally as quickly as possible in an emergency.

In August 2022, the mother accordingly submitted a medical prescription issued by a paediatrician to the Austrian Public Health Insurance Office, requesting approval of this drug for a further year. The Austrian Public Health Insurance Office rejected the request and approved a substitute drug, which – however – is provided in glass phials, and not in the exact amount required in an emergency.

Unsuitable substitute preparation

The exact quantity needs to be transferred at a pharmacy from the phials into syringes so that they can be used in the normal manner. However, once the glass phials have been opened, the expiry date shortens from between twelve and fourteen months to four weeks. The mother was therefore required to exchange eight syringes every four weeks, as they must be held at various locations (e.g. school, therapists) so that they can be used quickly in the event of an emergency.

In addition, the administration of this substitute drug is also unsuitable since in a stressful situation the glass phials need to be opened by sawing off the top and extracting the exact quantity required into a syringe. This would not guarantee patient safety as the possibility of incorrect dosage cannot be entirely avoided owing to the need to administer the drug within a short space of time, which could result in significant damage to health. Furthermore, the mother pointed out that the drug Buccolam®, which can be used over a period of between twelve and fourteen months, costs around EUR 120, whereas the substitute drug would cost EUR 20 every four weeks. This means that, although usage of the substitute drug results in a cost saving in the short term, it does not over the longer term.

After a re-examination by the Medical Service, which also considered this argument, in this case the Austrian Public Health Insurance Office approved the emergency drug Buccolam®. However, the AOB takes the view that the Austrian Public Health Insurance Office should establish at the outset, by carrying out a careful examination, which drugs are required in order to ensure proper treatment for insured persons.

Re-approval of optimal emergency drug

Recourse claims against twelve-year-old pupil

The Austrian Public Health Insurance Office brought a recourse claim against an underage child, because the twelve-year-old school pupil had knocked over a fellow pupil during afternoon care at school by throwing a gymnastics ball at her. Based on the medical treatment provided to the girl, this recourse

Incident at school

claim amounted to around EUR 2,000. Due to the age of the child, the public prosecutors' office discontinued the criminal law investigation.

Incapable of fault As a general rule, for the purposes of the law on compensation, capacity for civil law responsibility for wrongful acts only arises upon reaching legal age, as is the case for responsibility under criminal law, i.e. upon reaching the age of fourteen. The law therefore establishes a presumption that underage children are in principle incapable of criminal or civil fault.

Liability on equity grounds as an exception Accordingly, under the terms of Section 1310 of the Austrian Civil Code, liability may only be imposed on equity grounds on children who are incapable of civil fault in specifically defined cases, as an exception to the general rule that underage children are incapable of civil fault.

When considering whether this exception should be applicable, the decisive consideration is whether the person who caused the harm was able to recognise the unlawful nature of their actions and would have been able to act in accordance with this judgment. What is known as "quasi fault" can be imputed on an exceptional basis, with reference to this consideration. The closer the age of the person who caused the harm to the legal age, the easier it is to conclude that they have the requisite capacity of judgement.

Even then, it falls to the discretion of the court to decide whether liability should be imposed on equity grounds. However, the aim when exercising this discretion is only to establish subsidiary liability in order to mitigate any hardship for the injured party. The decisive consideration when establishing the amount of the duty to pay compensation is whether the damage is covered by liability insurance or whether the person who caused the harm disposes of significantly greater assets than the injured party.

Prerequisites for liability not met These prerequisites are not met in this case since, at the time of the incident, the underage child was a pupil and did not dispose of any assets. Moreover, no liability insurance applied that would have been required to cover the loss.

Public Health Insurance Office withdraws claim Within the investigative proceedings the Austrian Public Health Insurance Office conceded that, based on these considerations, it is unlikely that court proceedings would impose liability on equity grounds, and hence withdrew the recourse claim.

The AOB takes the view that, in such cases, recourse claims should not as a general rule be made on the basis of the liability rule for children under the legal age, where such a claim would not be covered by any existing assets or liability insurance.

Drug requirements when on holiday

Approval possible for three months The Austrian Public Health Insurance Office approves a maximum prescription to cover three months of drugs, where this is medically reasonable and patients are responding well to treatment. This restriction is fundamentally

sound since, even in cases involving long-term treatment, attending doctors must examine whether an optimal treatment outcome can be achieved with a particular drug or whether a different drug needs to be prescribed.

However, this means that drug requirements will not be covered in the event of an extended holiday. Pensioners often travel abroad for several months at a time. One pensioner contacted the AOB stating that for a number of years he had been spending the summer months in Croatia with his wife at a campsite and that, on account of a chronic illness, he has for some time needed to take a particular drug over an extended period of time.

Not sufficient for extended stays abroad

Even in this case, the Austrian Public Health Insurance Office only provided advance approval for drugs to cover a period of three months, referring to the fact that insured persons and their family members are entitled to receive any medically necessary treatment in the respective country while on holiday in the EU. However, in order to do so, insured persons must find a doctor in the country in which they are on holiday that has a contractual relationship with the local health insurance carrier. The European Health Insurance Card must be presented to this doctor. The doctor can then issue a prescription, which can be used to obtain the drug at a local pharmacy.

However, problems can arise during stays abroad if the European Health Insurance Card is not accepted or if no doctor with a contractual relationship with the local health insurance carrier is available. In addition, foreign doctors can only prescribe drugs that are included in the schedule of prescribable drugs of the local public health insurance. Moreover, any national deductible excesses must be paid by patients themselves. However, insured persons can also buy the drugs themselves and submit the invoice to the department at the Austrian Public Health Insurance Office in charge of payments to doctors without a contract. Nonetheless, the cost reimbursement is determined on the basis of the domestic price, i.e. the costs that the Austrian Public Health Insurance Office would incur for the drug concerned under a public health insurance prescription, less the prescription charge.

The AOB takes the view that the Austrian Public Health Insurance Office should thus adopt a more flexible approach and, where justified by the circumstances of the specific individual case, approve drugs also for extended stays abroad, provided that the insured person has been responding well for some time to a particular drug and provided that there are no medical concerns regarding the retention of the drug concerned for an extended period of time.

Flexible solution required for chronically ill persons

Rehabilitation of children with impairments

For a number of years, the AOB has been calling for the expansion of needs-based rehabilitation for children. Following several years of negotiations between the Laender and public social insurance carriers concerning

Failure to take account of family circumstances

financing, as well as an invitation to tender by the umbrella association of public social insurance carriers, for the last few years there have finally been five contracting facilities with around 350 beds, at which children can receive the necessary rehabilitation following accidents, operations, illness or impairments. However, a large number of children are still unable to obtain treatment as too little consideration is given to the needs of families.

Stays at contracting facilities last for four or more weeks and are difficult for many parents to reconcile with work, the child's schooling and looking after siblings. This occurs in particular where a child with an impairment requires multiple periods of rehabilitation over an extended period of time.

There is also no legal entitlement for working parents to accompany their children during rehabilitation. Paid carer's leave of up to a maximum of two weeks per year and ordinary leave are not sufficient to cover periods of rehabilitation lasting for a number of weeks.

In one case, a mother was forced to turn down a necessary period of rehabilitation for her eight-year-old son for the second time as both parents work, a younger sibling also needs to be cared for and her son is unable to take so much time off school. Her son suffers from cerebral palsy and epilepsy and is reliant on regular periods of rehabilitation in order to learn how to perform everyday tasks.

Flexibility periods of stay necessary

Nonetheless, the Austrian Public Health Insurance Office continues to refuse to consent to a reduction of stays to two weeks. The Austrian Public Health Insurance Office stated that this was due to the medical need for extended stays. However, this is at odds with the expertise of the attending paediatric neurologist, who expressly stated in his doctor's letter that a shorter stay would be required on account of the child's epilepsy and the risk of a seizure. The AOB thus calls in general for the duration of stays to be determined flexibly, allowing for the possibility of two weeks of intensive therapy being approved, as is currently only offered at the "Kids Chance" facility in Bad Radkersburg.

Approval only for contracting facilities

The establishment of contracting facilities has also meant that tried-and-tested rehabilitation programmes are no longer approved by public social insurance carriers, even though programmes are not offered at the contracting facilities. As a result, the AOB was contacted in 2022 by numerous parents who were no longer able to travel with their children for two-week intensive therapy at Kids Chance in Bad Radkersburg, as Kids Chance does not have any contract with public social insurance carriers. Nothing even remotely similar to the special therapy concept applied by Kids Chance (interdisciplinary group therapy in the morning and individual therapy in the afternoon) is offered at a contracting facility. Also, this type of therapy is particularly suitable for children who on account of their impairment require structures that are as stable and as clear as possible and who are repeatedly reliant on rehabilitation over extended periods of time.

Intensive care requiring ventilation

Around 550 people in Austria need to be ventilated via a tracheostoma following an accident or due to severe illness. Out of these, more than two thirds are cared for at home. This provision of intensive care at home is only possible with the support of family members. However, families are often left in the lurch for months at a time and end up running around in circles as health insurance carriers and *Laender* are unable to agree on financing.

Too little assistance for people requiring ventilation

One woman from Tyrol contacted the AOB after having unsuccessfully tried for more than a year to obtain financing for intensive care at home for her mother, who requires ventilation. She suffers from an advanced muscular disorder and has been ventilated via a tracheostoma for 15 years. Until now, the father has been caring for the mother with the daughter's support. However, providing years of round-the-clock care has brought him to the limits of his resilience. Although the *Land* Tyrol has allocated 90 hours per month of intensive care to the mother, these hours are far from sufficient to adequately ease the burden on the family. Nevertheless, the Austrian Public Health Insurance Office ignored the official request issued by the attending doctor concerning 24-hour intensive care.

Under the terms of social insurance legislation, medical nursing care at home should be permitted instead of hospital care where compatible with the nature of the illness. Medical nursing care at home can only be provided by qualified carers and under medical direction, and covers medical services and qualified care services, such as the delivery of injections, special feeding, or treatment for bedsores. Basic care and domestic care do not form part of medical nursing care at home.

Medical nursing care at home

In a decision of 18 February 2020 (10 ObS 103/19y), concerning medical nursing care at home, the Supreme Court of Justice held that a requirement of ventilation should be regarded not as care but rather as an illness for the purposes of social law and that the necessary artificial ventilation constitutes life-sustaining treatment and hence a form of medical treatment.

Supreme Court decision provides clarity

The AOB has dealt with the case several times in the ORF TV programme *Bürgeranwalt* ("Advocate for the People"). The Austrian Public Health Insurance Office eventually declared that it would be willing to finance the necessary intensive care jointly with the *Land*.

This is not an isolated case. The AOB is therefore calling for uniform rules throughout the country concerning the financing of intensive care at home for people requiring ventilation and for agreement to be reached quickly between health insurance carriers and the *Laender*. The Federal Commission for the Implementation of Health Targets (*Bundeszielsteuerungskommission*) and one of its working groups have already been dealing with this issue for some time. It is urgently necessary to find a solution for this problem.

Uniform rules needed at the federal level

Refusal of necessary liposuction

Around 200,000 people suffer from lipoedema in Austria. This is a genetically caused progressive disease affecting adipose tissue, which can result in the uncontrolled multiplication of fat cells. Onset of the disease or relapses can often be caused by significant hormonal fluctuations, such as following pregnancy or at the start of the menopause. This means that women in particular are affected by this disease. Lipoedema causes not only weight gain but also considerable pain to the parts of the skin affected. Persons with this condition are often no longer able to work.

Often the only treatment option

The illness is generally resistant to diet and exercise and even conservative therapies such as lymph drainage and compression clothing only provide temporary relief from the pain. Experts therefore recommend liposuction as the only effective treatment. However, liposuction is only approved by health insurance carriers – if at all – with extreme hesitance. Those affected are exposed to major psychological strain and often have to wait a very long time for the necessary liposuction.

According to their own guidelines, health insurance carriers only consent to liposuction after all conservative therapies (lymph drainage, compression clothing) have been exhausted over an extended period of time and provided that a particular body mass index can be achieved through weight reduction – even though the illness is resistant to diet and exercise.

No liposuction despite a threat of inability to work

In the ORF television programme *Bürgeranwalt* the AOB reported – as a representative case for the many people affected – on a case involving an extremely active teacher who had never been overweight, who had been suffering from lipoedema since her last pregnancy. Her arms and legs had had to be operated on a few years before. At the time, the medical superintendent of the Insurance Institution of Public-Sector Employees, Railways and Mining (*Versicherungsanstalt öffentlich Bediensteter, Eisenbahner und Bergbau*) had recognised the illness and the need for liposuction. Following several complaint-free years, a relapse occurred. The woman was once again experiencing considerable pain to her arms and legs and unable to continue working as a teacher. She once again attempted, unsuccessfully, to relieve her pain through conservative therapies (lymph drainage, compression clothing). Diet and exercise also failed to have any impact on the progressive disease. The attending doctors thus recommended that the teacher undergo liposuction as soon as possible. However, on this occasion the Insurance Institution of Public-Sector Employees, Railways and Mining refused to cover the costs of liposuction without stating any reasons and without a closer examination or any consideration of the findings of the attending specialist doctors that were presented.

Legal right to any necessary medical treatment

According to Section 133 (2) of the General Social Insurance Act, insured persons are entitled to receive any necessary medical treatment from health insurance carriers. The AOB calls in general for a more sensitive approach

in such cases and a more precise examination by the respective health insurance carrier's medical service of both claims and the findings presented.

In the specific case, the insurance provider reconsidered the application after the AOB became involved, approved liposuction and covered the costs of the operation in accordance with the applicable tariff.

Reimbursement of e-card service charge

A man from Lower Austria who is now aged 66 asked the AOB for support in obtaining a reimbursement of the service charge for his e-card (i.e. his health insurance ID-card). The following year's service charge is collected by employers from employees on 15 November of each calendar year (Section 31c (3) (1) of the General Social Insurance Act). According to Section 31c (2) (2) of the General Social Insurance Act, some groups of people such as pensioners are exempt from the requirement to pay the service charge.

Service charge for e-card

The man from Lower Austria was working as an employee up until the end of November 2021 and has been receiving his pension since December 2021. In November 2021, the employer duly collected the service charge, which at the time was EUR 12.70. The insured person submitted a reimbursement request to the Austrian Public Health Insurance Office on the grounds that he was shortly due to draw his pension and would be exempt from the payment as a pensioner. Following repeated refusals by the Austrian Public Health Insurance Office to reimburse the service charge, the man contacted the AOB in the autumn of 2022.

Reimbursement requests

The AOB launched investigative proceedings and referred the Austrian Public Health Insurance Office to the special rule laid down by Section 31c (5) (2) of the General Social Insurance Act, which it appeared to have overlooked when refusing reimbursement. That provision requires that, upon request, health insurance carriers must reimburse the service charge to any person with health insurance under the terms of the General Social Insurance Act who is due to retire before 1 April of the following calendar year. Following a review the Austrian Public Health Insurance Office agreed and undertook to reimburse the service charge, as requested and applied for.

Reimbursement following AOB investigative proceedings

3.13.3 Pension insurance

Introduction

In 2022, the AOB received 445 complaints relating to statutory pension insurance. Compared to the previous year (2021: 413 cases), this represents a slight increase. Pension insurance carriers have always endeavoured to provide the requested statements of opinion and other documents on time and in a comprehensive manner.

More complaints

Improvements to pension splitting necessary

Gender pension gap 41.1%

Men earn more than women do. However, mothers are in a worse position compared to women who have not had children. If one parent – normally the mother – stops working or reduces the number of hours worked in order to focus on caring for and bringing up children, this will have a detrimental effect on that parent's future pension. This results in major differences in the amount of pension received. The gender pension gap in 2022 was 41.1%.

Voluntary pension splitting

Pension splitting enables savings to be shared between both parents' pension accounts in order to balance out any adverse financial consequences of time off to care for children. The Pension Harmonisation Act (*Pensionsharmonisierungsgesetz*) 2005 introduced Section 14 into the General Pension Act (*Allgemeines Pensionsgesetz*), which allows for the option of voluntary pension splitting. Parents can currently agree to do this until their children reach the age of seven. The parent who is not involved in childcare but rather working can arrange for up to 50% of their pension contributions to be transferred to the pension account of the other parent who is staying at home with the children. This involves "enhancing" the pension credits of the other parent. A transfer can be applied for at any time until the child's tenth birthday.

1,097 instances of pension splitting throughout Austria

In 2022, 1,097 applications for pension splitting were made. Compared to the previous year, this represents an increase of 10.58% (2021: 992; 2020: 951; 2019: 583). As in previous years, in 2022 the largest number of pension splitting applications were once again made in Lower Austria (220), followed by Upper Austria (213), Vienna (187) and Styria (150). The lowest numbers were received from Carinthia (35) and Burgenland (17). A total of 1,080 cases involved a transfer of the husband's future pension to his wife, with the opposite (i.e. the wife's future pension to the husband) only occurring in 17 cases.

As the figures show, the current opt-in form of pension splitting is barely used. The reason for this is that the option available under pension law for increasing the amount of an individual pension is not widely known. In addition, splitting has to be applied for, and is dependent upon the consent of the other partner.

Even if agreed to, only irrevocable after taking legal effect

Compared to previous years, there were more complaints in 2022 concerning the legal rules applicable to pension splitting. For instance, one couple concluded an agreement concerning voluntary pension splitting for the years 2014 to 2023. The Austrian Pension Agency (*Pensionsversicherungsanstalt*) decided in a written notice to transfer only partial credits for the years 2014 to 2020. The husband will have to make further applications for future calendar years.

The risk that men might not honour the agreement reached and that credits might be lower, or not applied at all, is borne by mothers who have agreed to work for fewer hours in future years, so they can care for the children. The promised discussions among pension insurance carriers with a view to achieving a standardised approach have not yet borne fruit.

In one case, a parent of six now grown-up children was shortly due to reach the statutory retirement age. The application for pension splitting made by the husband was correctly refused by the Austrian Pension Agency in accordance with the applicable law. The husband hopes that the rules on pension splitting will be changed soon so that he can transfer pension account credits to his wife.

Hopes for change to the rules

He objects that the transfer of credits can only be applied for up to the child's tenth birthday. The option of pension splitting should be available until retirement since, when planning a family, many women have not yet thought about how high their pension will be.

The Ministry's argument in favour of the ten-year window for protecting women "soon after birth" is not very convincing. According to the competent social department, women should be protected from partners who wish to put off the decision until a later date, as it is possible that they may divorce in the meantime.

In a case involving a married couple from Lower Austria, by a notice dated March 2015, partial credits of the husband covering the years from 2009 until 2014 inclusive, totalling around EUR 2,800, were transferred to the wife. The credit on the wife's pension account on 1 January 2014, i.e. prior to splitting the pension, was around EUR 8,600. The credit into the wife's pension account on 1 January 2014, i.e. following the pension split, amounted to EUR 9,500. This results in a difference in the wife's pension account of around EUR 1,400 following the transfer (without uprating) or EUR 1,500 (with uprating).

Difference after pension splitting

Instead of a one-to-one transfer, for the years before 2014 the pension credit of his wife, who had been involved in childcare, was "enhanced" by a lower amount. He had not been informed about this by the Austrian Pension Fund. Now the pension splitting decision has become final for the years 2009 to 2014.

For persons who have received a credit into their account, due to the legal rules applicable to calculation, the credit transferred is not the same as the credit received. In such cases, the partial credits transferred are credited only in part, i.e. for a smaller amount. In response to an enquiry, the Austrian Pension Agency informed the AOB that an advance calculation was now being automatically carried out in all cases for transfers relating to periods before 2014.

Advance calculation

Withdrawal of open-ended disability pension

An insured man has been receiving a disability pension since 2015, which was granted on an open-ended basis. It was awarded to him following a lung transplant. In 2020, he applied for care and nursing allowances. The Austrian Pension Agency invited him to attend a medical examination. However, he was unable to attend any of the three examination appointments proposed, as he was suffering from recurring infections with fever. He telephoned and sent an email to apologise. After failing to attend an examination appointment also in January 2021, the Austrian Pension Agency issued a notice, withdrawing the disability pension from him due to a breach of the obligation to cooperate. However, the notice in question was only received by the insured person a number of weeks later, as he had been admitted to intensive care with an acute lung rejection. After he was discharged from hospital following a long period of admission, he noticed that his pension had been stopped and he was no longer receiving any income. He was unable to pay his rent and other everyday living costs, and no longer had any health insurance.

Withdrawal of disability pension unlawful

The AOB established that the disability pension had been unlawfully withdrawn. First of all, the insured person could not be said to have violated the obligation to cooperate, especially as the examinations had been instructed in order to assess his support needs, and not to review the disability. Secondly, once a benefit has been granted, it can only be withdrawn if the insured person has been informed in advance of the consequences of the failure to comply with the obligation to cooperate, which did not occur in this case.

Notice cancelled

After the AOB established that the pension had been unlawfully withdrawn, the Austrian Pension Agency cancelled the notice on an *ex-officio* basis and thus continued to pay out the disability pension without any interruption.

3.13.4 Social affairs

Lack of “social accuracy” of one-time payments

Massive inflation in 2022

2022 was characterised by strongly increasing inflation rates and in some cases, massive price rises. Persons with a low income found it particularly difficult to bear the costs of their basic needs such as housing, heating and buying food without external assistance.

Relief package

Following the adoption of the first two relief packages, in June 2022, the Federal Government presented the third – and, with a total of around EUR 28 billion, also the largest and most extensive – package of measures designed to provide relief to persons in Austria. As announced by the Federal Chancellor, the aim was not to “give out helicopter money”, but rather to achieve relief that was as targeted as possible. This package of measures was subsequently approved by the National Council.

Alongside structural and long-term forms of relief (abolition of “cold progression”, enhancement of welfare benefits, etc.), the package of measures also contained various allowances and one-time payments.

Specifically, an extraordinary one-time payment for pensioners of up to EUR 500 was established, which was paid out in September 2022 along with pensions (Section 772a of the General Social Insurance Act and parallel provisions). In addition, in September 2022 recipients of the compensatory allowance (“minimum pension”), social welfare, unemployment benefit or sick pay also received a payment of EUR 300 as a one-time inflation allowance (Section 771 (1) of the General Social Insurance Act and parallel provisions).

Extraordinary one-time payment of up to EUR 500

The AOB received numerous complaints in the autumn of 2022 concerning these relief measures – largely from pensioners. Critical issues were the (low) level of social accuracy and the relatively complicated nature and lack of transparency in the structuring of one-time payments.

The contents of complaints and discussions with those affected clearly show that, due to the broad range of different one-time payments, older persons especially lost track of the benefits they were entitled to, and when they would be paid.

Most complaints concerned the adverse consequences for persons with a low pension when extraordinary one-time payments were calculated. The amount of these one-time payments is actually tiered according to overall pension income. However, the highest relief payment of EUR 500 is only made to pensioners with a gross monthly pension of around EUR 1,200 to 1,800. The relief payment is lower for higher pensions of up to EUR 2,250, whereas no one-time payment is made at all for pensions above EUR 2,250. However, the relief is also lower for smaller pensions as the mechanism chosen for paying it is based on the income tax paid by entitled persons. Due to the upper limit for negative tax, any person with income or a pension that is so low that no income tax is payable will only receive a small one-time payment. Persons receiving a pension of up to EUR 960 only receive a one-time payment of 14.2% of their overall pension income, whereas those with a pension of between EUR 960 and 1,199.99 receive a (linearly increasing) one-time payment of between 14.2% and 41.67% of overall pension income.

Lower one-time payment for smaller pensions

Many persons with smaller pensions thus barely received any benefit from these allowances. The lower extraordinary one-time payment was in part offset by the one-time inflation allowance of EUR 300, at least for recipients of the compensatory allowance. However, persons with a low pension – slightly higher than the threshold set for the compensatory allowance – did not receive any inflation allowance of EUR 300 and only received a small extraordinary one-time payment.

Lack of social accuracy For example, a 55-year-old woman from Vienna contacted the AOB concerning the amount of the extraordinary one-time payment made to her retired husband. The married couple were living with their 13-year-old daughter using the mother's net monthly income of EUR 1,800 and the father's pension of EUR 411.23. He did not receive any compensatory allowance, as the family income was higher than the threshold. The family stated that it urgently required financial support, although the husband only received a one-time payment of EUR 61.55 on account of his low pension. There was also a female pensioner from Lower Austria who could not understand why, despite her low pension (just under EUR 1,000), she only received an extraordinary one-time payment of EUR 176 – in contrast to persons receiving a higher pension.

Ministry defends rules The AOB could understand the criticism objecting to a lack of social accuracy in the one-time payments. The Federal Minister asserted in his statement of opinion that the one-time payment of EUR 500 had been originally planned as an anti-inflation allowance under tax law, although in order to achieve its effect more quickly it was decided to make direct payments. However, since the link with income tax payable was also maintained for the direct payment, persons with a low pension also received a low one-time payment. However, the Federal Minister referred to the variety of additional financial support measures and other one-time payments designed with social accuracy in mind, for which in particular vulnerable persons and persons with a small pension should qualify.

In addition, a large number of retired civil servants employed by the *Laender* contacted the AOB after discovering to their surprise that, in contrast with most pensioners, they did not have any entitlement to the extraordinary one-time payment of up to EUR 500.

No one-time payment for (former) civil servants employed by the *Laender* In fact, federal legislators did not have the opportunity, when adopting the resolution on the third relief package, to enact statutory provisions to ensure one-time payments for (former) civil servants employed by the *Laender*, as these fell within the competence of the *Laender*. However, the *Laender* had not decided to provide any comparable support.

Relief via anti-inflation allowance Federal legislators had made provision for them by establishing an anti-inflation allowance of up to EUR 500 in Section 124b (407) of the Income Tax Act (Einkommensteuergesetz). Any persons who were also entitled to receive a pensioners' allowance but had not received an extraordinary one-time payment were entitled to it. This allowance reduces the amount of income tax payable. Authorities paying out pensions were required to roll over amounts by 30 September 2022 pursuant to Section 77 (3) of the Income Tax Act, resulting in a recalculation and a reduction of the amount of income tax paid during the current year, thus consequently also providing relief quickly.

Annoyance due to offsetting of one-time payments

In 2022, the National Council and the Federal Council resolved to make a number of "one-time payments" in order to avert the negative consequences of the COVID-19 crisis and high inflation rates. However, this also caused annoyance and a lack of understanding among persons who were unable to benefit from the one-time payments despite their precarious circumstances.

Numerous complaints were received by the AOB in the spring of 2022, objecting that an inflation allowance of EUR 150, which was awarded to recipients of the compensatory allowance as well as benefits paid by the Public Employment Service Austria, was offset as income against social welfare payments.

The AOB established that federal legislators had expressly stipulated in Section 66 (4), second sentence of the Austrian Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*) that Section 66 (1), second and third sentences of the Austrian Unemployment Insurance Act also applied to this one-time payment. However, in this context the legislator failed to refer to Section 66 (1), fourth sentence of the Act, according to which the one-time payment referred to in Section 66 (1), first sentence of the Act qualified as a non-offsetable benefit within the meaning of the Social Welfare Fundamental Act (*Sozialhilfe-Grundsatzgesetz*).

Complex legal situation

Since federal legislators did not classify this benefit as a non-offsetable benefit within the meaning of the Social Welfare Fundamental Act, district authorities were legally obliged to implement this legislative decision. The decisions reflected the existing legal situation.

Offsetting was legal

Deficient assessments of entitlement to care and nursing allowances for dementia

In many cases, assessments of entitlement to care and nursing allowances for persons with a severe cognitive or mental impairment, including in particular those suffering from dementia, fell far short of the amount of time and psychological effort required for their care and support. Thus, once again in 2022, a large proportion of complaints concerning the award of care and nursing allowances related to the assessment of entitlement to care and nursing allowances in relation to dementia. In most cases, the AOB was able to obtain the correction of the decision and a higher assessment for care and nursing allowances during investigative proceedings.

Many justified complaints regarding dementia

The incorrect classification was due in particular to the fact that the hardship allowance for persons with a severe cognitive or mental impairment, including in particular dementia, was not taken into account and appraisers did not have the necessary knowledge to be able to assess the implications of cognitive or mental impairments for care needs.

No consideration of the hardship allowance

For instance, the family of a woman suffering from severe dementia contacted the AOB because the Austrian Pension Agency had reduced the care and nursing allowances from level 3 to level 1 following a re-examination, in spite of the fact that the dementia was progressing and there was no possibility of any improvement in the condition. During this re-examination the expert from the Department of General Medicine established that she could attend to her own personal hygiene and use the toilet independently again and refused the hardship allowance, in spite of the severe dementia and the circumstances that made the provision of care more difficult (disorientation, lack of understanding, restricted understanding of language, lack of planning skills, etc.).

Following a further assessment by a specialist from the Department of Neurology and Psychiatry it was in fact established that her state of health had deteriorated, following which the care and nursing allowances were raised to level 4.

The hardship allowance plays a key role in the assessment of entitlement to care and nursing allowances for persons with a cognitive or mental impairment, including in particular those suffering from dementia. The hardship allowance provided for pursuant to Section 4 (5) and (6) of the Federal Care Allowance Act (*Bundespflegegeldgesetz*) is intended to cover at least in part the circumstances that made the provision of care more difficult due to dementia (e.g. lack of awareness of illness, defensive attitude, lack of understanding, restricted language skills, lack of planning skills, etc.).

Raising of the hardship allowance

As of 1 January 2023, this hardship allowance was increased from 25 to 45 hours per month. In doing so, legislators have acted on a long-standing argument of the AOB that the hardship allowance should be raised.

However, this increase in the hardship allowance only has a marginal impact on the fact that the threshold and minimum levels under the Classification Ordinance under the Federal Care Allowance Act are based primarily on the need for assistance and care in the event of bodily impairment, and the need for care of persons with a cognitive or mental impairment is not sufficiently described in the ordinance.

Review of the Classification Ordinance necessary

The AOB is therefore still calling for a review of the Classification Ordinance and an improvement to the quality of expert opinions by involving sufficiently trained (specialist) doctors and nursing staff as well as more involvement of family members in procedures relating to care and nursing allowances. During assessments, persons suffering from dementia often attempt to present the situation better than it is in reality. This dynamic can be countered by involving relatives and care staff in the assessment process.

No entitlement to care and nursing allowances with public health insurance in another EU member state

The AOB is regularly contacted by persons in need of care who have been living in Austria for decades, but are not entitled to care and nursing allowances because they do not have health insurance in Austria as they draw a pension from another EU member state.

Persons are entitled to care and nursing allowances in Austria (pursuant to Section 3 (1) of the Federal Care Allowance Act), if they are ordinary residents in Austria and if they receive one of a closed list of Austrian financial benefits (old-age pension, etc.). Even if a basic benefit of this type is not received, Austrian citizens and persons with equivalent status (especially EU citizens) are entitled to care and nursing allowances pursuant to Section 3a of the Federal Care Allowance Act, unless another member state is responsible for care benefits under the EU Coordination Regulation (Regulation 883/2004), and provided that they are ordinarily resident in Austria.

Coordination Regulation governs competence over care provision

The ECJ has dealt repeatedly with the classification under the law on benefits of care-related cash benefits such as care and nursing allowances. Within a cross-border context, this classification has an effect in particular on any potential obligation to export care and nursing allowances to other EU member states. The key issue is whether care and nursing allowances must be classified as an insurance benefit pursuant to point (a) of Article 3 (1) of Regulation 883/2004 or as "special non-contributory cash benefits" (financed largely out of tax) pursuant to Article 70 of Regulation 883/2004.

Cash benefits paid under public health insurance that fall within the geographical scope of Regulation 883/2004 must be exported. On the other hand, non-contributory cash benefits have characteristics both of social security and of social assistance. These benefits cannot be exported and are granted exclusively in the member state in which the persons live, in accordance with its respective legal requirements. For instance, the Austrian compensatory payments or the welfare benefit under Book II of the German Social Security Code ("Hartz-IV" benefit) (both of which are largely funded by tax revenues) are ineligible for export as the ECJ has explicitly classified these benefits as non-contributory cash benefits.

In two decisions, the ECJ has considered the classification of Austrian care and nursing allowances, which it has held to be health insurance benefits, the payment of which falls to the competent carrier, which must also bear the costs of non-cash benefits in the event of illness – i.e. generally the member state paying the pension (ECJ judgment of 21 February 2006 in Case C-286/03, *Hosse v. Austria*; ECJ judgment of 8 March 2011 in Case C-215/99, *Jauch v. Austria*).

ECJ: care and nursing allowances are public health insurance benefits

Austria exports care and nursing allowances to EU

Under the terms of this ECJ case law, Austria now exports care and nursing allowances each year to EEA member states as well as Switzerland. As at 31 December 2020, a total of 790 persons resident in the EEA or Switzerland were receiving Austrian care and nursing allowances.

Some EU member states refuse to allow export of care and nursing allowances

In contrast, a number of EU member states take the view that there is no such duty to export national care and nursing allowances. Thus, whereas Italy itself grants care and nursing allowances that are comparable to the Austrian allowances where care is needed, it classifies these benefits as “social benefits” or “non-contributory cash benefits” pursuant to Regulation 883/2004 and hence does not allow these benefits to be exported to other EU member states. Other EU member states such as the Netherlands, Hungary and Romania also only grant care and nursing allowances or financial support benefits, where care is needed, to persons who are resident in the country.

In many cases, EU citizens living in Austria, or Austrian citizens who have lived and worked in another EU member state only find out that they will not receive care and nursing allowances either in Austria or in the EU member state that bears the costs of their health insurance at an advanced age after the need for care has already arisen.

In the summer of 2022, the Austrian wife of a 90-year-old Italian man contacted the AOB for this reason. He had worked in Italy and was drawing an Italian pension, although the married couple had been living together in Austria since the 1990s. As he required care, he applied for care and nursing allowances initially in Austria and subsequently also in Italy. The Austrian Pension Agency rejected the application on the grounds that Italy was responsible. However, the competent authorities in Italy also subsequently concluded that he was not entitled to any care and nursing allowances, as he was not ordinarily resident in Italy.

In another case an adult guardian of a pensioner from Luxembourg living in a care home in Tyrol, who had severe dementia, contacted the AOB. While the Luxembourg health insurance carrier (CNS) accepted that it was generally responsible for providing care and nursing support, it nonetheless rejected the application for care-related support benefits. In Luxembourg, care and nursing support is only provided in the form of non-cash benefits (e.g. direct payment of costs for admission to a care facility) in the event of in-patient admission to a care facility. In situations falling within the scope of Regulation 883/2004, non-cash benefits under health insurance are provided by the carrier in the member state of residence (in this case Austria) on behalf of the competent member state (in this case Luxembourg). In Austria, however, the Austrian Pension Agency pays cash benefits rather than non-cash benefits in the event that any care-related additional costs arise. The costs could only be borne by the Luxembourg carrier if the Austrian insurance

carrier were to pay upfront and provide the non-cash benefits concerned. However, since the law does not provide for the provision of such benefits by the Austrian insurance carrier and care provision is structured differently in Austria than it is in Luxembourg, the Luxembourg health insurance carrier refused the application.

In response to this case, the AOB contacted the Ombudswoman of Luxembourg in order to promote coordination in the provision of care among EU member states.

**Contact with
Luxembourg
Ombudswoman**

The AOB also enquired with the Federal Minister for Social Affairs, Health, Care and Consumer Protection concerning problems relating to the failure to grant care and nursing allowances in cross-border cases, and asked him to engage in bilateral or pan-EU efforts to achieve appropriate coordination among the member states, as well as compliance by the member states with the procedure required under EU law in a manner that guarantees the rights of those affected.

The Federal Minister confirmed in his statement of opinion that not all EU member states comply with the rules on the allocation of competence over the grant (and export) of care-related benefits. However, an examination must be carried out in each individual case in order to establish whether the benefits concerned are (exportable) insurance benefits under Regulation 883/2004 or (non-exportable) non-contributory cash benefits. If this examination establishes that any care benefits granted by an EU member state are insurance benefits, but the member states concerned nonetheless refuse to export these benefits to Austria, this must be presumed to constitute a breach of EU law. The Federal Minister pointed to the option of involving the SOLVIT network or (thereafter) the EU Commission in order to ensure a comprehensive examination and rectification of these problems in the event of any (potential) breaches of EU law.

**Ministry suggests
involving SOLVIT and
EU Commission**

Cost settlements for moves between care homes in different *Laender*

Since 2018, the AOB has regularly been receiving complaints from care home residents, who could not move to a care home in another *Land*, due to problems relating to charging or covering of costs.

The reason for this is the termination of the agreement concluded pursuant to Article 15a of Federal Constitutional Law on 31 December 2017, which settled the reimbursement of costs in matters relating to social welfare. As a consequence, there is now no longer any basis for reimbursing social welfare costs to carriers situated in a different *Land*. This agreement also provided, among other things, for reciprocal cost reimbursement in the event of transfer to a care home in a different *Land*.

**Removal of the
statutory basis**

No agreement among *Laender* for years Since the *Laender* have not yet reached a comparable agreement, there are now considerable differences between the rules applicable to the reimbursement of costs in the individual *Laender*.

A 97-year-old woman from Styria wished to move from a retirement home in Eggenberg (Styria) to a nursing home in Bad Goisern (Upper Austria) due to extraordinary family circumstances. She no longer had any social or family contacts in Styria. Her son had been living abroad for decades, while her daughter had very little free time, as she was caring for her husband who had severe Parkinson's disease. On the other hand, the four children of the woman's now deceased brother, with whom she had had a close relationship over the years, lived in Upper Austria. All four of them lived in the immediate vicinity of the nursing home chosen in Bad Goisern and were willing to make frequent visits to their aunt. The nursing home in Bad Goisern had already guaranteed a place.

In another case, a man wanted to move from a nursing home in Styria back to a nursing home in Vienna, as he would have more social ties in Vienna.

In both cases, the *Land* Styria refused to cover the costs as residence in (a nursing home in) Styria was a prerequisite for the provision of assistance payments pursuant to Section 4 of the Styrian Social Welfare Act (*Steiermärkisches Sozialhilfegesetz*). Persons requiring assistance could choose among facilities recognised by the regional government of Styria under Section 13a of the Styrian Social Welfare Act.

In another case, a 78-year-old woman wished to move from a nursing home in Klagenfurt to a facility in Frauenkirchen (Burgenland) due to extraordinary family circumstances. She no longer had any relatives since her daughter had died the previous year. Her only point of contact was her adult guardian, who lived near to Frauenkirchen. Since the 78-year-old woman was unable to pay the monthly costs (around EUR 5,000) of in-patient care out of her own income, in addition to care and nursing allowances, she was reliant on social welfare payments.

Although she is now living at the facility in Frauenkirchen, as desired, for the first six months she was however forced to cover the costs entirely herself. The authorities in both Carinthia and in Burgenland had refused to cover the costs.

Hardship clauses do not exist nationwide In some *Laender* (Lower Austria, Burgenland), hardship clauses were introduced following the termination of the agreement among the *Laender*. That means, provided that the other prerequisites are met, assistance is also provided for in-patient care at nursing homes outside these *Laender* if this is necessary, for example in order to avoid social hardship due to family or personal reasons. However, these regulations do not exist nationwide.

Alongside numerous examinations of individual cases, which often do not result in favourable outcomes for those involved – given the lack of an appropriate statutory basis – the AOB has previously also carried out *ex-officio* investigative proceedings and asked the Federal Minister for Labour, Social Affairs, Health and Consumer Protection, who had competence at the time, to provide information concerning all of the efforts being made by the Federal Government to arrive at a harmonised national solution. In her statement of opinion the Federal Minister stated that competence lies with the *Laender* and indicated that the Ministry was making efforts to ensure that the issue would once again be dealt with comprehensively at the Conference of Social Affairs Officials from the *Laender*.

Federal Government refers issue to *Laender*

Given the absence of an appropriate statutory basis, no misconduct on the part of the implementing administrative authority can be identified. However, the AOB objects that, to date, neither the Federal Government nor the *Laender* have taken any meaningful steps to resolve the situation satisfactorily for the large number of people affected.

Harmonised national solution urgently needed

Disability passes – lack of staff causes long proceedings

In 2022, the AOB was once again contacted by affected complainants, who criticised the extremely long proceedings before the Ministry of Social Affairs Service (*Sozialministeriumservice*) for the extension of disability passes or parking permits. These are often caused by waiting times for examination appointments stretching to a number of weeks.

Long waiting times for examination appointments

The long duration of proceedings is a major challenge for many of those affected, as they are reliant on their disability passes or parking permits in everyday life as well as the associated benefits.

Back in January 2021, a woman from Upper Austria applied for a disability pass for her son, who has been severely disabled since birth (along with the additional annotation concerning “unfitness to use public transport” or a parking permit). The woman lodged a challenge within the applicable time limit against the refusal to include the additional annotation. An invitation to attend an examination appointment in December 2022 was then issued by the competent office of the Ministry of Social Affairs Service in the *Land*. It was not possible to attend this appointment since, on this day, the child was required to attend a follow-up appointment in hospital. When the woman from Upper Austria asked the Ministry of Social Affairs Service to reschedule the examination appointment, she was informed that a new appointment could not be granted until February 2023.

In September 2022, a man from Salzburg applied for the extension of his disability pass or parking permit (which was valid until 31 January 2023). He was informed that it would take some time to process the application and it

could not be stated with certainty whether the extension could be granted prior to the expiry of the validity period for the pass or permit issued.

Lack of medical experts

Investigative proceedings initiated by the AOB established that – due to chronic shortages of medical staff and a lack of available medical experts – there are currently serious delays in processing applications, with the result that proceedings often last for longer than the maximum length of six months, as provided for by law.

According to the official statements of opinion, the Ministry has already taken action to counter this trend, such as increasing the fees paid to medical experts. It is anticipated that the measures will have positive effects on the recruitment of medical experts in the foreseeable future, with the result that the length of proceedings can be normalised once again.

AOB recommends general reduction of decision-making period

The AOB welcomes the action taken to deal with the lack of medical experts. At the same time, the AOB once again recommends that the deadline for deciding on applications for new disability passes or parking permits, or extensions for existing passes or permits, be generally reduced from six months to a maximum of three months.

4 Legislative recommendations

4.1 New recommendations

Federal Chancellery

Legislative recommendation	Reaction of Department	Details
In order to promote effective access to justice, a duty to provide information concerning legal aid and jurisdiction should be incorporated into Section 61 (1) of the General Administrative Procedure Act. The limitation laid down by Section 44b (2) of the Administrative Penal Act should be removed, or at least the thresholds should be lowered.	The Federal Chancellery rejected the proposal.	Annual Report 2022, volume "Monitoring Public Administration", p. 41 et seq.
The AOB recommended that the childcare allowance be extended in cases involving hardship also for persons receiving the means-tested childcare allowance.	The Federal Minister for Women, Family, Integration and the Media sees no need for change.	Annual Report 2022, volume "Monitoring Public Administration", p. 92 et seq.
The AOB established that any application for means-tested childcare allowance can only be rejected by an administrative notice.	The Minister has announced that the form is likely to be changed.	Annual Report 2022, volume "Monitoring Public Administration", pp. 93 et seq.
The AOB recommends an expansion of the arrangements that are considered to be equivalent to gainful employment (e.g. marginal earnings threshold) for the purpose of the award of family benefits.	The Federal Minister for Women, Family, Integration and the Media sees no need for change.	Annual Report 2022, volume "Monitoring Public Administration", pp. 95 et seq.

Federal Ministry of Education, Science and Research

Legislative recommendation	Reaction of Department	Details
If the interpretation applied by the Ministry of the term "international competitive standards" as used in the Universities Act does not reflect the legislator's intention, it should be made more specific.	The Ministry has not issued a statement concerning any initiatives regarding this matter.	Annual Report 2022, volume "Monitoring Public Administration", p. 64 et seq.

Federal Ministry of the Interior

Legislative recommendation	Reaction of Department	Details
The deadline for election results should be legally brought forward by one or two weeks in order to ensure that polling cards from abroad reach the electoral authorities in a timely manner.	Although the Ministry has welcomed the suggestion, no initiatives have been pursued since 2019.	Annual Report 2019, volume "Monitoring Public Administration" (only available in German) Annual Report 2022, volume "Monitoring Public Administration", p. 108

Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology

Legislative recommendation	Reaction of Department	Details
More specific prerequisites concerning the requirement of good character or reliability for persons working as drivers should be incorporated into the Occasional Transportation Act.	The Ministry sees no need for action.	Annual Report 2022, volume "Monitoring Public Administration", p. 182 et seq.
The AOB recommended the incorporation of a rule into the Bus Services Act, which could ensure the suitability of parking spaces for buses operating scheduled services (also) with reference to the aspect of neighbourhood protection.	The Ministry raised (<i>inter alia</i>) potential issues under EU law.	Annual Report 2022, volume "Monitoring Public Administration", p. 182 et seq.

Federal Ministry of Social Affairs, Health, Care and Consumer Protection

Legislative recommendation	Reaction of Department	Details
The AOB recommended an automatic pension splitting model.	The Ministry informed the AOB concerning negotiations ongoing at political level.	Annual Report 2022, volume "Monitoring Public Administration", pp. 222 et seq.
The AOB considers that it is necessary to extend the limitation period for the recovery of incorrectly paid social insurance contributions in order to avoid hardship cases.		Annual Report 2022, volume "Monitoring Public Administration", p. 222

4.2 Implemented recommendations

Federal Ministry of Education, Science and Research

Legislative recommendation	Reaction of Department	Details
The AOB recommended that receipt of a study grant before the start of self-sufficiency should not exclude eligibility for a maintenance grant.	The legislator implemented this recommendation within the amendment of the Student Support Act – Federal Law Gazette I. no. 75/2022 (Section 31).	Annual Report 2002 (only available in German)
The AOB recommended the indexation of student grants.	According to Section 32a of the Student Support Act, as in force pursuant to Federal Law Gazette 1 no. 174/2022, student grants and student scholarships will be subject to an annual adjustment on 1 September 2023.	Annual Report 2006 (only available in German)
The AOB recommended increasing the age limit for eligibility for a student grant.	The age limits of 30 and 35 were each increased by three years according to Section 6 of the Student Support Act, according to the amendment published in the Federal Law Gazette I. no. 75/2022.	Annual Report 2009 (only available in German)

The AOB recommended re-assessing the condition of a five-year centre of vital interests in Austria for awarding a mobility grant for Austrian citizens.	The requirement was abolished in the amendment of the Student Support Act published in the Federal Law Gazette I. no. 75/2022 (Section 56d).	Annual Report 2015 (only available in German)
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Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology

Legislative recommendation	Reaction of Department	Details
The AOB recommended a reduction in the cost of extending temporary driving licences for chronically ill persons.	In an amendment to the Driving Licence Act published in Federal Law Gazette I no. 121/2022, Section 8 (2a), the legislator complied with this in part by granting an exemption from stamp duty and administrative fees.	Annual Report 2005, p. 33 et seq. Most recently Annual Report 2022, volume "Monitoring Public Administration", p.177

Annex

Keynote speech by Dr Judith Kohlenberger on 8 June 2022 at celebrations to commemorate the 45th anniversary of the Austrian Ombudsman Board (AOB) in Parliament.

45 Years: the Austrian Ombudsman Board taking the pulse of the nation

For 45 years, the Austrian Ombudsman Board has been giving citizens the feeling that they are being listened to and that they can take action to challenge arbitrariness. Moreover, this is possible irrespective of education, financial resources or family background.

More than 79 years ago in 1951, having suffered persecution on account of her Jewish heritage, the German-born émigré philosopher Hannah Arendt wrote in the USA of the “right to have rights” – a famous quote that is often used out of its proper context. This gets to the core of what Arendt would later refer to as “the one human right”, namely the right to be a member of a community, a nation state, a people, or on an abstract level of a shared understanding and history. As a refugee, having escaped from Nazi Germany, both she and many others were denied precisely that right. Indeed, following numerous reforms and broad improvements in international protection for refugees, the question of belonging is still a central one even today.

Upholding the humanity of every individual

In fact – and this is a little less well known – Arendt’s famous quote goes further, and carries even more weight: she not only wrote of the “right to have rights” but also of the “right of every individual to belong to humanity”, and this right must also in turn be guaranteed by humanity. After the previous legitimising and explanatory systems that existed before the emancipatory battles of the 19th and 20th centuries, such as “nature”, “religion” or “history”, which prescribed who belonged to the category of “human being” and who did not (women, slaves, the destitute), gradually lost their efficacy, the fundamental humanity of each individual could only be conceded by people themselves. This resulted in considerably greater freedom, but also a great deal more responsibility than ever before in the history of humanity. This is because the task of upholding the humanity of each individual person always and unconditionally, and placing it at the heart of all political and individual action, always considering the “face of the other”, as Polish philosopher Zygmunt Bauman put it, and taking it as a maxim for guiding one’s own decisions, is a task on which humanity always diligently works and yet time and again catastrophically fails to live up to.

Even without a pandemic and a war in Europe, we could still have appreciated this painful truth: we need only glance at the EU’s external borders and the systematic and persistent dehumanisation of incomers that is practised there. This includes children

living in dirty and filthy conditions on Lesbos, pregnant women who take to the sea in desperation or asylum seekers who are “kept safe” for months on end in prison-like facilities, whose only crime was to search for safety and freedom – a glance at all of this would be more than enough.

However, it is precisely the upheavals and disruptions of the last few months (often referred to as a “turning point”) that have made it even clearer to us western Europeans that we ourselves are not living up to Arendt’s call to guarantee “the right to belong to humanity”. War has returned to Europe, war crimes are being committed again on an unimagined scale on this blood-soaked continent and millions have once again lost their homes and loved ones.

Authoritarianism starts where loneliness gains the upper hand

However, Arendt would not be the great Arendt if she were not to offer a potential antidote. It is no coincidence that the slogan the “right to have rights” appears in her masterwork “The Origins of Totalitarianism”. Arendt astutely examines how peoples and societies become susceptible to tendencies such as authoritarianism. This happens specifically when the loneliness of the individual gains the upper hand: if a person no longer feels a sense of belonging, is no longer part of a community, or even no longer shares human experience. Whenever people feel isolated, marginalised, excluded or rejected, this opens the door for autocratic tendencies. The marginalised then gain a feeling of belonging from radicalisers, charlatans, autocrats, the false promise of camaraderie and the cosy feeling of an *esprit de corps*. According to Arendt, a free democracy is based on the premise that everyone can feel at home and participate in an open society, or that everyone is guaranteed their own humanity.

She argues that “the experience of not belonging to the world at all... is among the most radical and desperate experiences of man”. Let us not misunderstand this: Arendt is not talking about simply being on one’s own, i.e. not among other people. Indeed, one could argue that in the networked, digitalised world of today in which we all carry our friends (or rather our friends and followers) with us all the time in our smartphone, being alone is not even possible any more. If we are living through a pandemic of loneliness precisely now, and not simply due to the coronavirus, it is not due to the physical distance between us, but rather above all the emotional distance – or, as Arendt might have put it, because we no longer “fit in”, we no longer belong to one another. Many of us have been cut off from others, be they people, ideas or institutions.

Institutions can also create a sense of belonging

Loneliness in this highly political sense therefore does not mean being “on one’s own” or “alone”, but rather being surrounded by others, in the midst of society, at the scene of events and yet not belonging, not being able to create any contacts or even being exposed to the hostility of others (and indeed even the hostility of the authorities). Deep, destructive loneliness is the opposite of belonging.

However, belonging for Arendt, expressed through contact and the absence of hostility, also relates to civic institutions, authorities and state structures, which can either promote or destroy that sense of belonging. Indeed, pursuing this line of thought a little further, in a truly metaphysical sense, the aim is to tell a shared story, to recount about a country, a people and a time in which everyone has their space, feels a sense of belonging and gives meaning to their own lives.

This brings me to the central role that the Austrian Ombudsman Board plays in our Republic. The Austrian Ombudsman Board ensures precisely this sense of belonging, this feeling of being listened to and the "right to have rights". Not feeling isolated and marginalised, but rather assured of one's own, inalienable humanity. The humanity of each and every individual must be a priority consideration in particular in dealings with administrative authorities and bureaucracies, as Arendt herself described with reference to the meticulously planned and efficiently executed crimes of National Socialism. It is this, that will protect us against arbitrariness, maladministration, intentional wrongdoing or presumed incompetence.

Protection against administrative arbitrariness

The Austrian Ombudsman Board has been doing precisely this for 45 years. It aims to provide protection against administrative arbitrariness and ensure access to the law for those who do not have the necessary financial resources, sufficient education and familiarity with the law, the right socio-economic background, the right family or the right origin. Irrespective of the actual lived circumstances of people, which are so decisive for the opportunities and possibilities that arise for us from day to day, the Austrian Ombudsman Board stands at the side of everyone who has not been treated fairly by the Austrian authorities, or who has perhaps even been mistreated. As Arendt would put it, these people have been denied their humanity. Indeed, Arendt had situations such as these specifically in mind: not the abstract granting of rights, including in particular fundamental human rights, but rather also the guarantee of being able to lay claim to them and to be guaranteed them. The Austrian Ombudsman Board has been seeking to provide this guarantee for 45 years now.

When carrying out my own research into escape and migration, I have repeatedly engaged with people whose humanity seems to be more precarious than our own, as we come together here well dressed and in a spirit of celebration. These are the marginalised of our society, who – in the globalised, late-modern world of the 21st century – are the refugees, asylum seekers and migrants, who literally have no voice in our country. This is true in a political sense since, due to strict nationality laws and the related financial hurdles, they are often never able to secure Austrian citizenship, and thus according to Arendt achieve a sense of belonging to a community, which is associated with a right to have a say in the affairs of this community. Consider a refugee from Syria who had completed university studies there and who now delivers packages as a driver for an Amazon subcontractor, where the pressure of work increased so much during the pandemic that he and his colleagues no longer had time to go to the toilet during the day and rather had to urinate into plastic bottles. When I asked this Syrian

deliveryman why he did not insist on his rights as a worker, which are guaranteed to everyone in Austria, and of which we are proud, he answered: "Because it's not my country. Because I don't belong here."

He might, by all means, have workers' rights on some abstract level, but in practical terms, he knows that he doesn't have the right to enforce them, because he's not someone who belongs here, and perhaps never will be. According to Arendt, access to justice begins with access to a community; to something shared. The abstract right is not worth much without the concrete opportunity to enforce it and to be guaranteed it.

In purely geographical terms, this access to justice already starts outside the country's borders. It happens for instance when asylum seekers look to cross over the border into Austria, but are unlawfully refused entry by the border police (in breach of international law), which in some cases has involved violence. As the Regional Administrative Court of Styria recently held, these "pushbacks" were "systematically" applied and resulted in Austria being criticised before the Council of Europe.

The canary in the coalmine

This marginalisation and exclusion in a geographical sense goes hand in hand with social marginalisation and exclusion. Beyond the country's borders, it may be refugees and deportees such as Arendt whose access to justice is hindered or even made impossible. Inside the country, it may be persons with disabilities, those living in poverty or the homeless who do not belong, and who therefore cannot always enjoy their rights. And we don't have to look back too far into the past to recognise that, since time immemorial, it has been the denial of rights to precisely these marginalised and excluded groups, these "people who don't really belong" to a society, that operates as a gateway for illegitimate tendencies and breaches of the fundamental and freedom rights of all. Within a democracy, they literally act as the canaries in the coalmine: if they suffocate, it means that we'll all be gasping for breath soon.

Success, strength and perseverance for the Austrian Ombudsman Board

The Austrian Ombudsman Board is therefore also a yardstick for the rule of law and fairness, freedom and justice in our country. It promotes not only participation in the law, but also, in a figurative, almost more momentous sense, participation in society as a whole, as well as a sense of belonging to the state and to a shared narrative. As Arendt would see it, it is also a bulwark against that form of loneliness and lawlessness that renders societies susceptible to totalitarian and radical tendencies. The rule of law only works within a community in which the humanity of all is fundamentally guaranteed, and not just that of some of us. As such, the Austrian Ombudsman Board, which has also been vested with a mandate under the Constitution of protecting and promoting human rights, offers a counter-narrative to our world's isolation, polarisation and division. This counter-narrative is rooted in a sense of belonging and the universal nature of basic rights and access to justice, as they cannot be denied for some, while

continuing to apply for others. Accordingly, as the US writer and icon of the civil rights movement Maya Angelou put it around 50 years after Arendt, thinking in a very similar vein: equal rights, fair play, justice, are all like the air; we all have it or none of us has it.

I would like to congratulate the Austrian Ombudsman Board – which takes the pulse of the nation and at the same time ensures that it can breathe – on its 45th anniversary and would like to wish it, and thus all of us, great success, much energy and plenty of courage for the next 45 years. And also a long breath of perseverance.

Editor

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