



**Report of the  
Austrian Ombudsman Board  
(Volksanwaltschaft)**

**to the National Council (Nationalrat)  
and to the Federal Council (Bundesrat)**

**Covering the 2006 Calendar Year**

(Abbreviated English Version)



## Preface

The present volume is a very abbreviated version of the original report compiled in German and consists of a general section, which describes the activities of the three members of the Austrian Ombudsman Board. In the following some cases involving human rights shall be mentioned.

The Ombudsman Board decided to add a special chapter on human rights to the annual reports beginning with the report on the year 2001. In this context also the present report deals with legal problems relating to human rights which the Ombudsman Board had to solve in 2006 when assessing complaints about administrative misconduct and infringements of legal provisions by federal and state authorities. So throughout the years a comprehensive mosaic about the human rights situation in Austria shall be created.

This report is submitted not only to the National Council but also to the Federal Council in accordance with the amendment to Art. 148d of the Federal Constitutional dated 13/8/1997, Federal Law Gazette 1997/87.

Both the original report written in German and the English translation are available free of charge from the Office of the Austrian Ombudsman Board (*Volksanwaltschaft*).

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# 1 Engagement and activity of the Austrian Ombudsman Board (AOB)

## 1.1 Development of activities

The AOB was engaged in 16 005 cases in the 2006 calendar year. 10 448 of the grievances concerned the administration sector. Investigative proceedings were instigated in 6 542 cases. Official proceedings were not yet completed or else the complainants still had means of legal recourse (legal assistance) open to them in the remaining 3 906 cases of grievance (comp. Art. 148a of the Federal Constitution [*Bundes-Verfassungsgesetz*]). *Ex officio* proceedings were launched in 70 cases.

**16 005 engagements led to 6 542 investigative proceedings.**

	<u>2005</u>	<u>2006</u>
<b>Contacts</b>	16 133	<b>16 005</b>
<b>Administration</b> (Federal & provincial administration)	10 796	<b>10 448</b>
<b>Investigative proceedings</b>	6 569	<b>6 542</b>
<b>Federal administration</b>	4 044	<b>3 911</b>
<b>Provincial &amp; district administration</b>	2 525	<b>2 631</b>

## Activities

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### Federal administration investigative proceedings

	Year 2005	Year 2006
Federal Chancellor's Office	19	30
Federal Ministry for European and International Affairs	23	38
Federal Ministry of Science and Research	95	95
Federal Ministry of Finance	237	276
Federal Ministry of Health, Family and Youth	109	140
Federal Ministry of the Interior	330	377
Federal Ministry of Justice	883	760
Federal Ministry of National Defence	52	59
Federal Ministry of Agriculture, Forestry, the Environment and Water Management	223	195
Federal Ministry of Social Affairs and Consumer Protection	1 049	930
Federal Ministry of Transport, Innovation and Technology	482	495
Federal Minister of Economics and Labour	472	462
Federal Minister of Education, Arts and Culture	68	52
<b>Federal administration total</b>	<b>4 042</b>	<b>3 909</b>
<b>Provincial and district administration total</b>	<b>2 525</b>	<b>2 631</b>

<b>File code</b>	<b>Investigative proceedings according to assignment area</b>	<b>2005</b>	<b>2006</b>
	<b>Assignment area of Ombudsman Dr. Peter Kostelka</b>		
BKA	Chancellor	19	<b>30</b>
SV	Federal Minister of Social Affairs and Consumer Protection	1 049	<b>930</b>
SV	Federal Minister of Economics and Labour (Labour Exchange Office area)	251	<b>259</b>
JF	Federal Minister of Health, Family and Youth (families area)	53	<b>88</b>
GU	Federal Minister of Health, Family and Youth (health area)	56	<b>52</b>
V	Federal Minister of Transport, Innovation and Technology (transport area)	446	<b>444</b>
AA	Federal Minister for European and International Affairs	23	<b>38</b>
	Provincial and district administration	567	<b>649</b>
	<i>Subtotal Ombudsman Dr. Peter Kostelka:</i>	<b>2 464</b>	<b>2 490</b>
	<b>Assignment area of Ombudswoman Rosemarie Bauer</b>		
FI	Federal Minister of Finance	237	<b>276</b>
LF	Federal Minister of Agriculture, Forestry, the Environment and Water Management (agriculture and forestry area)	202	<b>173</b>
U	Federal Minister of Agriculture, Forestry, the Environment and Water Management (environment area)	21	<b>22</b>
WF	Federal Minister of Science and Research	95	<b>95</b>
	Provincial and district administration	1 221	<b>1 218</b>
	<i>Subtotal Ombudsman Rosemarie Bauer:</i>	<b>1 776</b>	<b>1 784</b>
	<b>Assignment area of Ombudsman Mag. Hilmar Kabas</b>		
WA	Federal Minister of Economics and Labour	221	<b>203</b>
WA	Federal Minister of Transport, Innovation and Technology (Federal roadways, patent affairs and road-tax sticker areas)	36	<b>51</b>
I	Federal Minister of the Interior	330	<b>377</b>
J	Federal Minister of Justice	883	<b>760</b>
LV	Federal Minister of National Defence	52	<b>59</b>
UK	Federal Minister of Education, Arts and Culture	68	<b>52</b>
VORS	Chairman's scope of competence	2	<b>2</b>
	Provincial and district administration	737	<b>764</b>
	<i>Subtotal Ombudsman Mag. Ewald Stadler:</i>	<b>2 329</b>	<b>2 268</b>
<b>Total</b>		<b>6 569</b>	<b>6 542</b>

## Activities

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### 1.2 Completed cases

A total of 7 735 investigative proceedings were concluded in the year under review. A **formal recommendation** was required in 21 especially grave cases, a **formal declaration of grievance** in 7 cases. In 3 cases, the Ombudsman Board had to make an appeal against an ordinance.

**7 735 investigative proceedings concluded**

<b>Completed cases</b>	2005	<b>2006</b>
Grievance justified / objection	845	<b>786</b>
Grievance unjustified / no objection	3 499	<b>3 729</b>
Grievance impermissible	1 025	<b>1 002</b>
Grievance withdrawn	654	<b>515</b>
AOB not competent	1 682	<b>1 517</b>
Not suitable for treatment in terms of business rules and regulations	159	<b>155</b>
Formal declaration of grievance	16	<b>7</b>
Formal declaration of grievance and Recommendation	10	<b>21</b>
Appeals of ordinance	1	<b>3</b>
<b>Total completions</b>	7 891	<b>7 735</b>

### 1.3 Contacts with citizens and authorities regarding investigative proceedings in 2006

<b>Contacts with citizens and authorities</b>	<b>2005</b>	<b>2006</b>
Appointment dates	260	<b>211</b>
Visits	1 986	<b>1 535</b>
Information service	8 570	<b>8 571</b>
Written correspondence with complainants	19 556	<b>19 252</b>
of which outgoing letters to complainants	9 026	<b>8 574</b>
incoming letters from complainants	10 530	<b>10 678</b>
Written correspondence with authorities	10 149	<b>8 559</b>
of which to certified executive organs and authorities	5 228	<b>4 396</b>
from certified executive organs and authorities	4 921	<b>4 163</b>

### 1.4 Information service

Apart from the appointment dates, people seeking advice and assistance could visit the Board's information service in person daily from 8:00 a.m. to 4:00 p.m. or contact the information service by telephone at the Vienna number 01/515 05 ext. 100.

In addition, a toll-free service number (0800/223 223) with direct-dial option to all extensions was set up on September 14, 2001.

**toll-free service number**

Of the total of 8 571 telephone and personal contacts with the information service, 3 906 regarded administration.

The AOB was not competent to deal with the remaining 4 665 cases, which concerned mainly civil-law problems among private individuals. The largest number of these problems regarded family-law problems, mainly in connection with divorces and the consequences of divorces such as maintenance, child custody and visiting rights regulations.

**many civil-law problems**

### 1.5 Involvement of the Austrian Ombudsman Board in handling petitions and citizens' initiatives directed toward the National Council (Art. 148a para. 3 B-VG (*Bundesverfassungsgesetz* - Austrian Federal Constitution))

During the reporting period, the Ombudsman Board was assigned 7 citizens' initiatives and 19 petitions by the Petition Committee.

In respect of the citizens' initiative no. 3 regarding 'More safety in the school bus – the right to a seat for each child in school transport' / petition no. 3 regarding 'Safely to school - a seat and a safety belt for each child in kindergarten and school bus', the Ombudsman Board issued the following statement:

*Pupils, who have not yet reached the age of 26 and for whom family allowance is received, have the opportunity of taking part in the free transport for pupils, subject to the fulfilment of all other preconditions. If no suitable public transport should be available, municipalities and school keepers may apply for the establishment of occasional transport for pupils.*

*Already since 1980, the Ombudsman Board has been pointing out that in terms of traffic safety aspects, the transport conditions for children in school buses should be improved. This recommendation to the legislator also remains upheld (cf. 4<sup>th</sup>, 25<sup>th</sup> and 29<sup>th</sup> Activity Report to the National Council). Originally, two children between the ages of 6 and 12 were counted as one person, within the context of free pupil transport. In 1991, the disputed counting rule was changed from 2:1 to 3:2 and remains decisive until today, in the Motor Vehicles Act.*

*Article 106 para. 1 last sentence KFG (Kraftfahrgesetz - Motor Vehicles Act) 1967, in its valid version, states: With the calculation of the number of persons being transported by bus or bus trailer in regular motor vehicle service or in daily, occasional service, from and to school or a kindergarten, three children under the age of 14 are to be counted as two persons and children under the age of six are not to be counted.*

*This rule has the effect of increasing risk of injury, for example, with emergency braking, as within the context of transporting pupils with a bus, which is admitted for 50 seats and 45 standing places, it is completely legal to transport an unlimited number of children under the age of 6 and up to 142 older children, under the age of 14, to and from schools and kindergartens, on a daily basis.*

*Surveys by the Catholic Association of Families in 2004 at 112 schools in 7 federal states (6,752 questionnaires were evaluated), resulted in 47 per cent of the parents seeing problems with transporting pupils, in that school buses are, in fact, so overfilled, that the children are no longer able to move in them. The AUVA (Austrian Social Insurance for Occupational Risks) reached similar results with pupil surveys. The consequence: Bigger and faster children push ahead when getting in and out, for too few seats, while the others need to stand in the aisle/near the bus doors with their school bags, without child-friendly hand grips, which, in addition to the slippery*

*floors, sharp corners and edges and lack of secure stance in the entry and exit areas, etc. results in increased risk of injury. If one follows the AUVA, this is why injuries due to impact, falling, spraining one's ankle and falling down, as well as serious finger injuries and crushing from closing bus doors are not a rarity (see AUVA bulletin 'Safety in and Around the School Bus', <http://www.auva.at/mediaDB/48617.PDF>).*

*According to AUVA, in Austria, approx. 50,000 pupil accidents take place per year; of these, only a small percentage take place en route to/from school (7%) and of these so-called travel accidents, only a low percentage are associated with school bus transports (6%). The number of traffic accidents en route to/from school (2004: 454, 2005: 387) declined in 2005, however, the number of pupils injured in these remained the same, at 465 (source: Austrian Road Safety Board, Accident Statistics 2005).*

*Parent associations, the Catholic Association of Families, the Austrian Road Safety Board, ÖAMTC (Austrian Automobile, Motorbike and Touring Club) and ARBÖ (Austrian Automobile Club) have been promoting an amendment for many years, to no avail, which satisfies the safety requirements, which the federal legislator now regards as indispensable with the transporting of children in cars or minibuses, for transporting pupils, with at least a number rule of 1:1.*

*The existing statutory basis is in fact detrimental not only to transport safety and the safety of children, but also blatantly contradictory, because the gap between the legislation on the transport of children by private individuals (not only in 'family cars') and the transport of school children is increasingly becoming wider.*

*Transporting a child unsecured or only secured with an adult safety belt in a car or minibus, was regarded for a long time as a peccadillo. Since January 1, 2004, it has been legally regulated that children in a car must be secured by a child restraint system (i.e. car seats), appropriate to their age, height and weight. Since January 1, 1999, children in a car or minibus must have a fully-fledged own seat. Therefore, anyone who is travelling in his/her car or minibus with their own or other children under the age of 14, who are smaller than 1.50 cm, must satisfy the circumstance of kindergarten and school children, who are too small to only use the conventional three-point lap belt, by buying and using special vehicle seats equipped with belts for their safety. Through the penalty system which has been in effect since July 1, 2005, not only charges and administrative penalties (range of punishment up to € 5,000.00) are imposed, but also an entry in the register of driving licences. Anyone who is caught doing so again within two years, must attend special training and respectively, with three penalties, must give up their driving licence. From January 1, 2007, the mandatory use of child seats in cars and minibuses was further tightened: Child restraint systems, which have been tested according to the more than ten-year-old norm versions ECE 44/02 or even 44/01, have no place in a car anymore. Child seats that do not at least comply with the standard ECE 44 in the version 03 are regarded throughout Europe as being technically obsolete, so that the Austrian legislator not only prohibits their use with a penalty, but also their private onward sale.*



## Activities

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*If transporting of pupils takes place in the form of occasional minibus (up to eight seats) services, in consultation with the school keepers and municipalities, since 1999, the same rules have applied to these pupil transports, as with transporting in private vehicles. All children have a seat and must be accordingly secured. With respect to this legal development, it is comprehensible for the Ombudsman Board, that parents have little understanding for why accident prevention appears subordinate for the legislator, as soon as their children climb into larger buses within the context of transporting pupils in larger school buses. In view of the associated risks, the 3:2 number rule, which has remained unchanged since 1991, does not, in fact, appear to be justifiable anymore, as the traffic safety statistics clearly speak in favour of the 1:1 number rule.*

*However, there are repeatedly tragic traffic accidents, which revive the discussion again, of why safety aspects do not take effect with the daily bus journeys with kindergarten and school children. In this respect, it is particularly worth highlighting three accidents en route to/from schools, which took place in 2005, within a period of a few months in Upper Austria and are intended to document that one should not speculate with statistical probabilities, in the interest of children when transporting pupils. Without it being the fault of the respective school bus driver, in all three of these accidents, 65 school children were put into danger and unfortunately, some were also seriously injured. In January 2005, an articulated vehicle drove into the back of a stopped school bus containing 50 children, on the Rieder federal highway (B141). At the beginning of May 2005, a truck collided with a school bus in Eferding on the B 134 highway. The collision was due to the truck driver's failure to stop at a give way sign. As a result, the school bus was ripped off at the driver's seat. 10 children were injured, 2 seriously, as well as both drivers. An unrestrained boy, in particular, had enormous luck in that he 'only' received contusions, after being thrown through the windscreen of the school bus. At the end of May, a trainee from a bakery business had a frontal collision with a minibus containing pupils from the Neukirchen an der Vöckla Secondary School and died at the scene of the accident; the 51-year-old driver of the school bus and two pupils were seriously injured, while five suffered minor injuries.*

*Although it was planned in the ministerial draft of the 26<sup>th</sup> amendment to the KFG (Kraftfahrzeuggesetz – Motor Vehicles Act) [277/ME (XXII. GP)] to generally abolish the 3:2 rule for occasional transport service (i.e. for free journeys for pupils), as a result of objections by the Ministry of Finance in the 96<sup>th</sup> meeting of the Council of Ministers on June 14, 2005, it was resolved that the option should remain for motor transport services to also be permitted to transport on the basis of two seats for three children between the ages of 6 and 14. In the National Council meeting on September 28, 2005, a legislative decision took place, which only contained the abolishment of the 3:2 rule for occasional journeys or journeys to school events, ski courses and school weeks in the countryside. The overfilling of school buses was therefore also not eliminated with the 26<sup>th</sup> amendment to the KFG (Federal Law Gazette I no. 117/2005).*

*The fact that particularly larger school and public transport buses, which transport children on a daily basis, are frequently so obsolete in terms of safety technology that they do not even offer the theoretical possibility of*



*upgrading with safety belts, is also criticised repeatedly by the automobile driver clubs. Since 1999, all newly licensed buses must have safety belts for all transported passengers; however, the obligation to wear safety belts would not even be implementable, if these buses were used for transporting pupils, as long as every child is not granted an own seat, due to the 3:2 number rule. Where this does take place, injury consequences are minimised, as was shown by an accident involving a small school bus in St. Veit an der Gölsen in the District of Lilienfeld, which drove into the back of another minibus. According to the fire service, 4 children with slight injuries were lucky, as they were all wearing seatbelts ([noe.orf.at/stories/138149/18k](http://noe.orf.at/stories/138149/18k)).*

*Switzerland, Slovenia, Finland, France, Germany, the Netherlands, Spain, the Czech Republic and Belgium have long recognised that the 1:1 rule is a prerequisite for curbing overfilled school buses and transporting children safely. In addition to Austria, the 3:2 rule for transporting children only still exists in Ireland, Portugal and Great Britain.*

*Wherever transports are still carried out within the meaning of Article 106 para. 3 KFG (Kraftfahrgesetz – Motor Vehicles Act), using large buses, extra costs would be incurred through the use of larger, more state-of-the-art vehicles or through splitting of pupil transport across several means of transport. Since September 1, 1996, a self-contribution of € 19.60 per pupil and school year/per trainee and traineeship year must be paid for participating in free pupil/trainee transport.*

### 1.6 Legal assessments - legislative recommendations of the Ombudsman Board

In accordance with practice to date, the Ombudsman Board was also active again within the context of the assessment of legislative drafts, in respect of drafts on the following federal laws:

- Draft of a Social Security Amendment Act 2006 (SVÄG 2006) (VA 6100/2-V/1/06)
- Federal law, with which the Federal Budget Act will be amended (VA 6100/3-V/1/06)
- Draft of a Guardianship Act amending law 2006 (VA 2006) (VA 6100/6-V/1/06)
- Resolution of the National Council dated March 1, 2006 regarding a federal law, with which the University Act 2002 is being amended - 565/BNR /1308 d.B. XXII. GP/NR (VA 6100/12-V/1/06)
- Ordinance of the Federal Minister of Economics and Labour, with which the Foreigners Employment Ordinance – AuslBVO – is being amended (VA 6100/14-V/1/06)
- Lower Austrian Funeral Act 2007 (VA 8282/2-V1/06)
- Draft of a law, with which the Salzburg Corpse and Funeral Act 1986 is being amended (VA 8684/2-V/1/06)

### 1.7 Legislative recommendations to date

Since the **10<sup>th</sup> Activity Report to the National Council**, as well as in the previous reports, the Ombudsman Board submitted numerous legislative recommendations. These recommendations are also based on the resolution of the National Council E54 XVII. GP, which gave rise to the Ombudsman Board to also add to the reports, directories classified according to departments, regarding these recommendations. It can also be gathered from these directories, which recommendations have resulted in a legislative change and which were noted for implementation by the departments for government bills. The directories also contain recommendations in respect of which a reaction by the federal legislator is not anticipated during the foreseeable period.

Regarding the result of these legislative recommendations by the Ombudsman Board to the departments, reference can be made to the comments **in the 25<sup>th</sup> Report to the National Council and Federal Council for the Year 2001**, on p. 26 et seq.

## 1.8 International Contacts

### Conference of European Ombudsmen, Vienna June 11 – 13, 2006

In June 2006, the Ombudsman Board, together with the International Ombudsman Institute (I.O.I.), the world's largest association of ombudsmen, held a two-day conference, which took place in Vienna, in the parliament building premises.

**International conference in Vienna**

140 ombudsmen and delegates of ombudsman institutions from 45 Member States of the Council of Europe took part in it.

Initially, Prof. Kucsko-Stadlmayer (University of Vienna) presented the first results of the comparative study on the European parliamentary ombudsman institutions. In addition to a great deal of detailed information (see the I.O.I. homepage <http://www.ioi-europe.org> operated by the Ombudsman Board), it primarily emerges from this study that all Member States of the Council of Europe have national and/or regional ombudsman institutions. The ombudsman is therefore the absolute norm in a European constitution. In plenary discussions and working groups, the topics of 'Ombudsman and jurisdiction' and 'The implementation of human rights in Europe' were both particularly debated. Many thanks are owed to the speakers, Ombudsman Kochanowski (Poland), Ombudsman Melin (Sweden), the Chief Magistrate of the Austrian Supreme Court of Justice, Dr. Griss, the Commissioner for Human Rights, Hammarberg, and the ombudsmen, Fischbach (Luxembourg), Kaminis (Greece) and Abraham (United Kingdom).

This event was also particularly distinguished by the fact that it was opened by Austrian Federal President, Dr. Heinz Fischer. Many thanks are also owed to the President of the National Council, Prof. Khol, not only for his words of greeting, but also the generous support by the parliament and the employees of the parliamentary office, without whom this event would not have been possible. The financial support by the Federal State of Vienna and many private companies not only facilitated the exchange of experiences and discussion between the European ombudsmen, but also contributed to them becoming more familiar with one another.

All lectures and discussion contributions for the plenary meetings have been published in a conference report, and are available on the homepage of IOI Europe at <http://www.ioi-europe.org>.

### Research project by the University of Vienna

Since summer 2005, Univ. Prof. Kucsko-Stadlmayer has been carrying out a legal comparison study at the University of Vienna, between the systems of the European ombudsman institutions. As she explained within the context of the Vienna conference, *'the special focus of this project is on the legal tasks and authorities of these institutions; with this, the most important characteristics of the national and regional systems are to be highlighted. A special emphasis lies in two areas, in which particularly fundamental differences between these institutions are expressed: the protection of human rights and the relationship of the ombudspersons to independent judiciary.'*

**Comparative study by  
the University of Vienna**

Within the scope of its possibilities, the Ombudsman Board has supported this research project from the beginning (cf. **Report 2005**, p. 30), particularly by assisting with obtaining necessary information and establishing contacts to the respective ombudsman institutions. The study is intended to be completed in summer 2007, the result will be published by a specialist legal publisher.

### EU – Latin America Summit

At the express request of the **Federal Ministry for Foreign Affairs** (now: Federal Ministry for European and International Affairs) and the **'ADA-Austrian Development Agency'**, the Ombudsman Board provided organisational and content assistance in connection with the Round Table on **'Human Rights Procurators and Ombudsmen in Latin America and Europe'** arranged from **April 24 to 26, 2006** as part of the **'EU Latin America Summit'**, which took place during the Council of Europe presidency by Austria. Although the human rights situation in Central and South America, on the one hand and the old and new EU countries, on the other hand, is classified as being completely different, the EU-LAC Summit in Vienna was regarded as an excellent occasion for Ombudsman Boards, ombudspersons and/or human rights procurators to meet, in order to anticipate a review of existing networks and to examine what the respective institution in one country or region can learn and possibly adopt from the experiences of the others. The fact that a deepening of cooperations in the area of human rights is desirable in view of the rapidly growing economic interdependence between the regions, was undoubted at the event, which was partially moderated by **Ombudsman Dr. Kostelka** (cf. <http://www.real2006.net/eng/mesa.htm>).

**'Human rights procurators and ombudsmen in Latin America and Europe'**

### Council of Europe

Within the context of the Vienna conference, an interim report of the 'Group of Wise Persons' of the Council of Europe was presented. This working group was set up by the Council of Europe to discuss and prepare recommendations for relieving the European Court of Human Rights. Although the 14<sup>th</sup> Additional Protocol to the ECHR (at the time of this report going to print) has not yet come into effect (CETS 194 – Convention for the Protection of Human Rights (Protocol No.14), 13.V.2004), the options included in it for the European Court of Human Rights to process one complaint case out of around 86000 individual complaints within an adequate period does not appear sufficient. The **Group of Wise Persons** submitted its **final report on November 15, 2006** to the Committee of Ministers of the Council of Europe (CM(2006)203 November 15, 2006). In it, as already in the interim report, the group of experts recommends that the Commissioner for Human Rights aim at a closer cooperation with the ombudsmen, in order to be able to fulfil his expanded duties according to the 14<sup>th</sup> Additional Protocol to the ECHR. Ombudsman Dr. Kostelka, as Vice President of the International Ombudsman Institute (I.O.I.) arranged for a survey in this respect among all European national ombudsmen, the result of which was discussed with the Commissioner for Human Rights on the occasion of a meeting in Berlin. This meeting served to prepare the 9<sup>th</sup> Round Table Meeting of the Council of Europe with the national ombudsmen in Athens in 2007.

Cooperation with the ECHR

The topic was also discussed within the context of the **4<sup>th</sup> Round Table of European National Human Rights Institutions and the Commissioner for Human Rights** in Athens (September 27 - 28, 2006), at which Ombudsman Dr. Kostelka represented the ombudsmen boards, which are granted 'B Status' as national human rights institutions.

### European Congresses

As a guest speaker, Ombudsman Dr. Kostelka took part in the **Congress of Chairpersons and Deputy Chairpersons of the Petition Committees of the Federation and the States of the Federal Republic of Germany** (April 3 – 4, 2006), the conference on the topic of '**La Difesa civica in Italia e in Europa**' (October 16, 2006), held by the regional ombudsman for the Region of Tuscany and the **International Conference from November 20, 21 in Skopje**, organised in cooperation with the EU (TAIEX – Technical Assistance Information Exchange Instrument) and the ombudsman of the Yugoslav Republic of Macedonia.

The Ombudsman Board was also represented by experts at the 'Capacity Building' seminars, within the context of the **Eunomia** programme from June 1 – 3, 2006 in ('The Ombudsman's Oversight of the Police') and from September 14 – 16 in Ohrid ('The

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Ombudsman as an Institution of Administrative Reform'), the seminar of the **EU Citizens Commissioner** from June 18 – 20, 2006 ('Upholding Fundamental Rights – Sharing best practice') in Strasbourg and the **OSCE Meeting** from October 11 - 13, 2006 ('Human Dimension Implementation Meeting') and the 'Ombudsman against Double Discrimination of Women' organised by the **ombudsman for the region of Vojvodina and the OSCE**, from November 15 – 16 in Novi Sad.

### Bilateral contacts

The ombudsman for the Republic of **Albania**, Emir DOBJANI, visited the Ombudsman Board from May 13 – 16, 2006 for working meetings. During this, it was announced that the Ombudsman Board would support the training and further education of employees of the Albanian ombudsman within the scope of its possibilities. With the financial support of the KTC ('Know-how-Transfer-Center') of the Austrian Federation of Cities, financed by the BM f EIA (Federal Ministry of European and International Affairs), the first employees will be familiarising themselves with the mode of operation of the Ombudsman Board in spring 2007.

A high-ranking delegation of parliamentarians and employees of the ombudsman of **Uzbekistan** showed particular interest in the work of the Ombudsman Board, during discussions with the ombudsmen on December 13, 2006 in Vienna. In particular, this also involved issues surrounding portrayal in the media, within the context of the ORF broadcast, 'Ombudsman – Equal Rights for Everyone'.

As already announced in the last Report of the Ombudsman Board to the National Council and the Federal Council, two employees of the Ombudsman Board went on a three-day study visit to the **Slovakian ombudsman institution** (February 2006).

### International Ombudsman Institute (I.O.I.)

The focal point of the meetings of the IOI Europe Board, which take place at regular intervals, to which, in addition to the Vice President of the IOI, Ombudsman Dr. Kostelka, the parliamentary ombudsmen from Finland, Sweden, Northern Ireland and Catalonia belong, was on questions regarding the future content of activity and possibly necessary organisational changes within the IOI, as the world's largest association of parliamentary ombudsmen. At the board meeting of all regional directors of the IOI, which took place in Barcelona in October 2006, a working group was set up, which is intended to provide recommendations by the end of 2007.

**International Ombudsman Institute**

## 1.9 Public Relations Work

Since 1996, the Ombudsman Board has maintained a Website containing comprehensive information about its activities at <http://www.volksanwaltschaft.gv.at>. In April 2000, the Ombudsman Board began publishing its reports to legislative bodies on the Website, including those dating back to 1998.

In 2006, 130,906 visitors logged a total of 966,939 hits on the Ombudsman Board's Website.

The following Websites received the most hits:

'The Ombudsmen"	21,455 Hits
'Appointment dates"	13,825 Hits
'Function and Responsibilities"	12,378 Hits
'Complain form	12,151 Hits
'Up-to-date	8,785 Hits
'Selective processes'	7,716 Hits
'Reports'	5,385 Hits

The visitors came from the following countries:

Austria	799 421 Hits
Germany	64 461 Hits
Sweden	36 110 Hits
USA	20 394 Hits
Switzerland	4 935 Hits
Slovenia	3 647 Hits
United Kingdom	2 730 Hits
Czech Republic	2 508 Hits
Italy	2 361 Hits
Belgium	2 006 Hits

On the Homepage of the Ombudsman Board 131 countries accessed.

Since April 1, 1997, the Ombudsman Board has held the following email address:

[post@volksanwaltschaft.gv.at](mailto:post@volksanwaltschaft.gv.at)

Complaints may be submitted through an online form. 625 visitors submitted a complaint using the online form, while 4,406 sent an e-mail directly to the Ombudsman Board.

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### Ombudsman – Equal Rights for Everyone

The ORF (Austrian Broadcasting Company) reinstated its series 'Ombudsman – Equal Rights for Everyone' in January 2002. The show, in which the Ombudsmen discuss particularly noteworthy cases, immediately garnered a very positive response despite a slot in the broadcast schedule on Saturdays at 5:45 pm that typically has small audiences.

The 40 broadcasts in 2006 achieved an average market share of 32.3 percent (compared to 33,5 percent in 2005) with an average audience of 405,000 viewers (compared to 420,000 viewers in 2005). Thus, published television ratings show that the series counts among the most-watched shows on ORF 2 on Saturdays, even in households with cable or satellite service.

Period: January 1, 2006 – December 31, 2006

<b>Annual Ratings</b>			
<b>Target Group</b>	<b>Average Gross Rating Points in %</b>	<b>Average Gross Rating Points in Thousands</b>	<b>Market Share in %</b>
Adults aged 12+	6.0	405	32.3

Source: Teletest: Austria (all households)



## 2 Fundamental rights section

### Excerpt from the 24<sup>th</sup>/25<sup>th</sup> report of the Ombudsman Board to the Carinthian Parliament (2004 – 2005)

#### 2.1 Place-name sign dispute – Attempted by-passing of the findings of the VfGH (*Verfassungsgerichtshof* - Austrian Constitutional Court) (VA BD/4-BKA/06, 16-BKA/06)

With decision VfSlg. 16.404/2001, the VfGH – among others – rescinded the road signs referred to in Article 1 Section B) Point 1 of the ordinance of the Völkermarkt Regional Administrative Authority of August 17, 1982, along St. Kanzianer Strasse L116, regarding the place names contained in the version of the ordinance dated September 30, 1992: 'St. Kanzian' and 'St. Kanzian, Klopein' as being illegal on expiry of December 31, 2002.

With a decision dated December 12, 2005, V 64/-5, the VfGH, in Section B) point 3 lit. a and b of Article 1 of the ordinance of the Völkermarkt Regional Administrative Authority dated July 15, 1982, in the version of the ordinance dated November 11, 1998, rescinded the words 'Bleiburg-Ebersdorf' and 'Bleiburg' as being illegal and declared that the rescission would come into effect upon expiry of June 30, 2006.

Based on the direct applicability of the constitutional provision of Art. 7 point 3 second sentence of the Vienna State Treaty, the VfGH emphasised the legal obligation of the district administrative authority, 'upon enacting the traffic police ordinance, to define the place name in both German and Slovenian language. With respect to the Slovenian place name, this is – as long as an ordinance by the federal government pursuant to Article 12 para. 2 of the Law on Ethnic Groups does not apply – to be defined by the district administrative authority, under its own responsibility.'

In January 2006, the Ombudsman Board became aware that the place names, 'St. Kanzian' and 'St. Kanzian, Klopein' are still only posted in German language, more than three years after the rescission declared by the VfGH coming into effect. Furthermore, the Carinthian Governor, Dr. Jörg Haider, and the Deputy Governor, Gerhard Dörfler, announced several times in the media that they intended to prevent the definition of place names in German and Slovenian language, which was regarded by the VfGH as being necessary under constitutional law, in its decision V 64/05. On February 8, 2006, the 'shifting and new position-

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ing' of single-language place-name signs was carried out in the presence of, and with the assistance of, both holders of office.

In decision VfSlg. 12.927/1991, the VfGH determined that:

*If the responsible body issues an ordinance, in similar circumstances, which does not in the least satisfy the legal view presented in the rescinding decision of the Constitutional Court, it not only burdens the ... ordinance anew with illegality, but also brings itself into the realm of suspected, deliberate perversion of justice.'*

In view of the above described factual and legal situation, the impression was gained by the Ombudsman Board that the legal views described in the decisions VfSlg. 16.404/2001 and V 64/05 were not satisfied, despite an unchanged factual situation. As this already represents a **grievance** in the administration within the meaning of Art. 148a para. 1 first sentence in conjunction with Art. 148i para. 1 first sentence B-VG (*Bundesverfassungsgesetz* – Austrian Federal Constitution), with respect to Sect. 87 para. 2 VfGG (*Verfassungsgerichtshofgesetz* - Constitutional Court Act), the Ombudsman Board decided to initiate an **official** investigation procedure in the matter, pursuant to Article 148a para. 2 in conjunction with Article 148i para. 1 first sentence B-VG.

The District Commissioner of Völkermarkt provided extensive copies of administrative files and two statements in these proceedings, upon request by the Ombudsman Board.

With respect to the decision V 64/05, the intention of the District Commissioner of Völkermarkt is affirmed to issue a new ordinance, which satisfies the legal view of the Constitutional Court regarding the traffic signs 'place name' and 'end of place', by providing for bilingual place names. However, (so far) this has not yet taken place:

The District Commissioner purportedly prepared an ordinance draft dated March 2, 2006, which displayed efforts to provide for the Slovenia place name for Bleiburg to be shown as 'Pliberk' and respectively, that for Ebersdorf as 'Drbeša ves', on the basis of a statement by the Director of the Carinthian State Archive. Subsequently, the ordinance draft containing the posting of bilingual place names on the B 81 in the area of Bleiburg and Ebersdorf was communicated by the District Commissioner to the responsible Deputy State Governor, Gerhard Dörfler, as he had declared an 'approval reservation', with an instruction dated November 8, 2005, for all ordinance procedures relating to town areas for the entire District of Völkermarkt'. However, Deputy State Governor, Gerhard Dörfler, has so far not granted

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approval. According to media reports, he is purported to have justified this with the draft being based on an 'incorrect VfGH decision' (see: 'Abschiedsgeschenk die Verordnung' in 'Die Presse' dated March 7, 2006; 'Zweisprachige Ortstafeln verordnet' ('Order for bilingual town signs issued') in 'Der Standard' dated March 8, 2006).

In light of this situation, the majority of the Ombudsman Board (against: Ombudsman Mag. Stadler) felt compelled to bring about a constitutionally conform legal situation with the VfGH by submitting an application for rescission to the VfGH

- 1) regarding the place names, 'St. Kanzian' in Sect. 1 Section B) points 1, 3, 4 and 5 of the ordinance by the Völkermarkt district administration dated May 12, 2005 in respect of traffic restrictions for the L116 St. Kanzianer Strasse, and
- 2) the place names, 'Ebersdorf' in Section B), point 3 category 'In the direction of Lavamünd', lit. a and b and category 'In the direction of Sittersdorf', lit. c and d of Article 1 of the ordinance by the Völkermarkt Regional Administrative Authority dated July 15, 1982 in the version of the ordinance dated February 7, 2006, and
- 3) the place names, 'Bleiburg' in Section B), point 3 category 'In the direction of Lavamünd', lit. c and d and category 'In the direction of Sittersdorf', lit. a and b of Article 1 of the ordinance by the Völkermarkt Regional Administrative Authority dated July 15, 1982, in the version of the ordinance dated February 7, 2006,

in each case, due to illegality as a result of the contravention of Article 7 point 3 second sentence of the Vienna State Treaty.

With the decision announced on June 26, 2006, the VfGH determined the illegality of the 'place-name sign relocations' and by the power of its previous case law, rescinded the respective sections of the ordinance regarding the place-name descriptions of 'Bleiburg' and 'Ebersdorf', without setting a further deadline. With respect to 'St. Kanzian', the application was rejected with the reasoning that in light of the 1991 and 2001 census, this locality is not to be regarded as an administrative district any longer, with a mixed population within the meaning of Art. 7 point 3 of the Vienna State Treaty.

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From today's point of view, this report is to be supplemented as follows:

With an ordinance of the federal government dated June 30, 2006, Federal Law Gazette II no. 245/2006 (Topography Ordinance Carinthia), the place names for Bleiburg and Ebersdorf were defined in both German and Slovenian language.

With an ordinance draft dated June 30, 2006 [VK6-STV-1091/2005 (036/2006)], the Managing District Commissioner of Völkermarkt, Dr. Christine Hammerschlag, also ordered the setting up of bilingual place-name signs in the draft of a traffic police ordinance and submitted this for approval. The minister for transport (*Verkehrslandesrat*) of Carinthia ordered ITEK Kaltenhauser OEG in Klagenfurt to manufacture at the same time three large town signs of 'Bleiburg/Pliberk' and one large and one small town sign of 'Ebersdorf/Drveša vas'. The minister for transport was present at parts of the manufacturing process.

However, approval was also withheld for this ordinance draft, after failure of the 'constitutional solution' and with respect to Bleiburg and Ebersdorf, again, no bilingual description of these topographical titles was ordered in the new ordinance by the Völkermarkt Regional Administrative Authority. On the contrary, the place-name description in Slovenian language was only expressed subordinately as a separate road traffic sign, in the form of an 'supplemental sign' within the meaning of Sect. 54 para. 1 StVO (*Straßenverkehrsordnung* - Road Traffic Regulations).

As supplemental signs are not permitted to be used according to Article 54 para. 4 StVO, 'if their meaning can be expressed through another road traffic sign', this approach also appears to be illegal. Therefore, in August 2006, the majority of the Ombudsman Board (against: Ombudsman Mag. Stadler) again felt compelled to submit a new application to the VfGH for rescission of the illegal wording of the new ordinance of the Völkermarkt Regional Administrative Authority.

The fact that it mattered a great deal to the responsible member of the Carinthian state government that this, from his point of view, 'creative solution of the place-name sign debate' was actually pursued, is documented by photographs on the homepage of the state government (<http://www.ktn.gv.at/-?siid=33&arid=4556>), which show the State Governor, Dr. Jörg Haider and Traffic Officer, Gerhard Dörfler on November 22, 2006, at the installation of monolingual place-name signs in the locality of Schwabegg/Žvabek. The bilingual place-name signs ordered by the Völkermarkt Regional Administrative Authority at the be-

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ginning of May, shortly before the state treaty celebrations, on the occasion of the 50-year anniversary of the Vienna State Treaty, were exchanged on the basis of a new traffic police ordinance, at the instruction of the suspect and replaced by an – offset, blue-outlined – place-name sign with the description 'Schwabegg' and a supplemental sign, with the description 'Žvabek'.

With a decision dated December 13, 2006, V 81/06, the VfGH rescinded the ordinance sections that were disputed by the Ombudsman Board as being illegal. With this, it is now finally clarified that an approach that conforms to the state treaty, the constitution and legislation, in this context, can only exist if bilingual place-name signs are posted wherever it is required according to the now settled case law of the VfGH, regarding the constitutional term of the 'administrative district with a mixed population within the meaning of Art. 7 Z 3 second sentence of the Vienna State Treaty'.

Topographical titles, particularly place-name signs, the setting up of which is authorised by administrative act/announcement, now not only mark the borders of an established town area, with all of the resulting legal consequences from the StVO, but also, demonstrate through the language(s) in which they are formulated and the place names used, which language(s) their inhabitants speak and which ethnic and cultural group(s) they belong to. To this extent, they possess a high degree of symbolic-discursive value. In this context, reference is made to the conclusion of the Constitutional Court in its decision 12.836/1991, according to which '*... topographical titles of the type under discussion, in accordance with the purpose of the standard, do not provide relief for members of minorities, but rather, are intended to inform the general public that an obvious – relatively larger number of members of a minority live here...!*'.

It is correct that the Constitutional Court, in its decision dated December 14, 2004 (VfGH V 131/03) emphasised that '*in the absence of sufficiently individualised party interest in adhering to this objective standard, no subjective right for individual members of minorities can be derived from Art. 7 point 3 second sentence of the Austrian State Treaty 1955, that topographical titles and descriptions be formulated in German, as well as the language of the minority!*'. However, in the same decision, the Constitutional Court also derives from the wording of this standard, '*that the provision of Art. 7 point 3 of the Austrian State Treaty 1955 represents an obligation of the Republic of Austria/an order to its bodies, under international law, to formulate topographical titles and descriptions bilingually!*'.

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The case law of the Constitutional Court already understood those provisions 25 years ago, as serving the protection of minorities, as a 'value decision by the constitutional legislator for the benefit of protecting minorities' (thus, expressly VfSlg. 9.224/1981).

On the basis of the (majority) resolution passed on January 26, 2007, the Ombudsman Board prompted an ordinance examination procedure with the Constitutional Court, regarding the illegal place-name descriptions in Schwabegg/Žvabek (against: Ombudsman Mag. Kabas). The Ombudsman Board has passed a (majority) decision to ensure, by all means available to it, that the value decision of the federal constitutional legislator for the benefit of protecting minorities, is neither thwarted by the federal government, nor by the member of the Carinthian state government, who is responsible for traffic matters.

### 2.2 Fundamental constitutional requirements of the federal constitution (Arts. 18 and 129 et seq. B-VG)

#### 2.2.1 **Rescission of an approval pursuant to Sect. 134a Luftfahrtgesetz (Aviation Act) (VA BD/445-V/05, Federal Ministry of Transport, Innovation and Technology-15.500/00122-I/PR3/2006)**

*An Austrian citizen who, on the basis of the legally stipulated reliability examination by the Federal Ministry of the Interior, based on Article 173 para. 16 Aviation Act (Luftfahrtgesetz - LFG), had his airport pass revoked by the civil airport keeper, approached the Ombudsman Board, after his application for access to files was rejected as being inadmissible by the Federal Ministry of Transport, Innovation and Technology, with an official notification dated December 23, 2005, with reference to Sect. 134a para. 4 LFG.*

Sect. 134a para. 4 LFG provides for 'notifications' of the Federal Ministry of Transport, Innovation and Technology to the civil airport keeper, that misgivings exist against a person examined by the security authorities, within the meaning of the Directive (EC) No. 2320/2002 ('has been notified'). Such a 'notification' has the legal consequence that the civil airport keeper is not permitted to issue an airport pass for the person affected and respectively, must revoke an already-issued airport pass.

According to the Ombudsman Board, Sect. 134a para. 4 LFG must be interpreted in conformity with the constitution, such that the person affected by this measure must be granted a right to defence in the proceeding resulting in 'notification' and therefore (also) has a right

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to receipt of this notification. Any other interpretation result is ruled out, as it would assume unconstitutional content in Sect. 134a para. 4 LFG:

As an airport pass is a prerequisite for lawful access to the security area of an airport, a person who may not receive/retain a pass on the basis of a notification by the Federal Ministry of Transport, Innovation and Technology may no longer be employed in an activity for which access to the security area is a prerequisite.

In view of these legal consequences, the 'notifications' in question intervene in the private autonomy of the civil airport keeper, because they restrict him in the freedom to decide for himself, which persons he can employ in which functions and thus also intends to grant access to the security area of the airport. The same also applies to companies in a legal relationship with the civil airport keeper and requiring personnel with access to the security area, in order to fulfil their resulting obligations.

As the private autonomy – and particularly the right to conclude contracts under private law – according to the case law of the VfGH (cf. in principle, VfSlg. 14.500, 14.503/1996 and 17.071/2003), is fundamentally protected by the constitutional ownership guarantee, in any case, an intervention exists in a constitutionally protected legal position of the civil airport keeper/the contractual partner, as an employer.

At the same time, due to the associated legal consequences, the 'notification' additionally intervenes in the constitutionally protected (by Art. 6 StGG – *Staatsgrundgesetz* – Basic Law) freedom to perform commercial activities by the (potential) employee, because every person who may not have an airport pass issued/has an airport pass revoked, on the basis of a respective 'notification', may not enter into/maintain an employment relationship with a civil airport keeper/his contractual partners, for the implementation of which, access is necessary to the security area of the airport. In the light of the settled case law of the VfGH on Art. 6 StGG – see example of VfSlg. 16.740/2002, 16.927/2003 and 17.238/2004 – in this context, a serious intervention in fundamental rights must also be spoken of, because employment/exercise of a profession is made virtually impossible for the person negatively affected by the 'notification'.

In its case law, the VfGH has always emphasised that the constitutional definition of an official notification fulfils constitutional functions, among these, particularly ensuring legal protection with respect to the administration (cf. e.g. VfSlg. 11.590/1987, VfSlg. 13.223/1992



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and 13.699/1994). To the extent that this case law is relevant in this context, it can be summarised with the following quotation from decision VfSlg. 17.018/2003:

*'The VfGH has already declared in VfSlg. 13.223/1992 and emphasised in VfSlg. 13.699/1994 that a legal regulation is unconstitutional, which, despite intervention into the legal sphere of an affected party, does not provide for any option to combat the legality of this intervention and allow it to be examined by the public courts.'*

It also follows this line, when the VfGH emphasises in its case law – already justified with VfSlg. 2455/1952 and underlined in VfSlg. 16.772/2002 – that the sense of the constitutional principle of the federal constitution culminates in all acts by state bodies being justified in law and ultimately, in the constitution. A system of legal protection institutions guarantees that only such actions appear permanently secured in their legal existence, which were passed in agreement with the higher level actions, on the basis of which they are brought about.

Ultimately, in decision VfSlg. 12.184/1989, the VfGH expressly regarded a legal provision which empowers the authority to issue an incriminating notification, as contravening the rule of law principle.

In summary, it can therefore be noted that a legal regulation that empowers an authority to pass an individual sovereign act, without granting the negatively affected citizens a legal protection option, in the form of a complaint (at least) to the VfHG, is not reconcilable with the legal protection system anchored in the constitution and is therefore unconstitutional.

According to the Ombudsman Board, the following consequences result from the above described legal situation:

Based on the fact that the 'notification' by the Federal Ministry of Transport, Innovation and Technology intervenes in constitutionally guaranteed rights of the civil airport keeper/his contractual partners as employers, as well as in those of the (potential) employee, it must be regarded as an 'official notification' within the meaning of Art. 144 B-VG, in an interpretation conforming to the constitution, because an intervention in constitutionally guaranteed rights may only be carried out in conformity with the constitution by way of a notification, which is ultimately opposable before the VfGH. This official notification must be delivered to the civil airport keeper/his affected contractual partner, as well as the (potential) em-



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ployee, to whom an airport pass will not be issued/from whom an airport pass must be revoked, due to the results of the security examination.

An additional constitutional problem results, if the notification intended to qualify as an official notification – as in the case of this complaint – is exclusively delivered to the civil airport keeper, but not to the affected employee. In cases of a subsequent security examination, massive intervention takes place in the constitutionally guaranteed right of the employee to freedom to exercise a profession, without him receiving an official notification and thus, the option to assert his misgivings regarding the legality of the decreed measure with the public courts. However, with this, he is specifically robbed of the legal protection option that the VfGH has regarded as being constitutionally indispensable, in its case law cited above.

As can be gathered from the official notification, which is the subject of the complaint, the Federal Ministry of Transport, Innovation and Technology nevertheless regards the approach chosen as being compulsory, as Article 134a para. 4 does not establish a legal relationship between this person and the ministry. If this view were accurate, Article 134a para. 4 LFG would be unconstitutional, for the reasons mentioned above, due to non-fulfilment of the requirements of the federal constitutional legal protection system.

The Ombudsman Board concedes that Sect. 134a para. 4 LFG explicitly only looks at the case of the 'notification' to the civil airport keeper regarding existing security misgivings and does not expressly mention whether the respective notification must also be sent to the (potential) employee. However, on the basis of the constitutional situation as described above, the conformity with the constitution of the legal provisions under discussion can only be answered in the affirmative, if it is regarded as admissible in an interpretation conforming to the constitution – and thus, consequentially, as necessary – to also deliver the 'notification' from the federal minister to the 'potential' employee negatively affected in its constitutional sphere. That view is supported by the fact that the VfGH (*Verfassungsgerichtshof* - Austrian Constitutional Court) has held that a provision is in line with the Constitution if it is applied by analogy (e.g. VfSlg. 15.197/1998 and 16.350/2001) and neither the wording of the legal provision nor the legislator's intention expressly excludes the delivery of the 'notification' at issue to the (potential) employee.

In view of these considerations, the Ombudsman Board resolved unanimously, in the collegial meeting on May 12, 2006, that the official notification of the Federal Ministry of Transport, Innovation and Technology, with which the application of the plaintiff for access to files

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due to lack of right to defence was rejected, represents a **grievance** in public administration. In order to eliminate this grievance, the Federal Ministry of Transport, Innovation and Technology was issued a **recommendation** to ensure that the official notification subject to complaint, be officially rescinded, through the application of Article 68 para. 2 AVG 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991 - General Administrative Procedure Act 1991) and the notification dated September 20, 2005, which was delivered to the civil airport keeper, be delivered to the plaintiff, as well as in future cases, to clearly formulate the notification to the civil airport keeper as an official notification and also deliver this to the person affected.

With a letter dated July 17, 2006, the Federal Ministry of Transport, Innovation and Technology informed the Ombudsman Board that this **recommendation** would not be complied with, because, in its opinion, the wording of Sect. 134a para. 4 LFG did not leave any room for an interpretation conforming to the constitution, in the sense of the **recommendation** by the Ombudsman Board.

The Ombudsman Board is currently carrying out a system audit, within the scope of which it is to be clarified, in how many cases the reliability examination provided for in Sect. 134a Aviation Act has resulted in non-issuance/revocation of an airport pass to date. After completing the system audit, the Ombudsman Board intends to issue an invitation to a discussion group, where, with the involvement of the Federal Ministry of Transport, Innovation and Technology, the Federal Ministry of the Interior and the Federal Chancellery-Constitutional Service, ways are to be sought for finding a solution which adequately takes into account all affected interests, which could also form the basis for possible legislative measures.

### 2.2.2 Non-issuance of an official notification (VA BD/364-V/04)

*An employee of Österreichische Post AG applied for officially notified confirmation of his permanent use as a financial advisor. In its investigation procedure in this context, the Ombudsman Board determined that an officially notified processing of this application had also still not taken place after nearly ten months.*

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As the VfGH declared in its decision VfSlg. 13.223/1992, 'it is incongruous with the Constitution for state authorities to circumvent mandatory legal protections by failing to issue an official ruling as required by constitutional law.' In its subsequent decision VfSlg. 13.699/1994 the VfGH determined, in this context, that 'it assumes an understanding of the rule of law principle, ... that administrative acts, which have significant legal effects, may not be legally construed as uncontestable administrative acts, because the constitutionally guaranteed legal protection system would otherwise remain idle. ... On the contrary, the rule of law principle requires the official determination of legal consequences to be linked to a form, which enables constitutionally designated legal protection.'

The fact that the non-approval of an application to determine permanent use as a financial advisor has significant legal consequences, presumably does not require further justification. However, it follows from this that it is constitutionally necessary to make a decision on the application of the applicant by way of official notification, in order to enable him to take the constitutionally provided legal protection route.

In the proceedings subject to complaint, the Ombudsman Board was ultimately able to persuade Post AG to fulfil its legal obligations and issue the official notification.

### 2.3 Right to a fair trial (Art. 6 ECHR)

#### 2.3.1 Excessively long duration of proceedings

Within the scope of the fundamental rights section of the **29<sup>th</sup> Report to the National Council and the Federal Council** (p. 315), the Ombudsman Board noted that the risk of undermining the constitutional state by not processing applications within an adequate period continues to represent a very serious problem of state organisational law, which is a recurrent theme throughout the entire administrative activity of all local authorities. During the reporting year, numerous cases were again submitted to the Ombudsman Board, in which the boundaries of the admissible duration for administrative proceedings were far exceeded. These findings are to also be documented by several examples in the following:

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### 2.3.2 Fee stipulation after 10 years (VA BD/343-V/06)

*Mr. H. contacted the Ombudsman Board in connection with fee stipulations. The plaintiff submitted official notifications from Austro Control dated February 1/2, 2006, with which fees in the amount of € 790.55 / € 383.27 were imposed on him for the inspection of a specified aircraft, on August 2, August 24 and September 9, 1995/on October 1, 1996.*

In its recent case law on the rule of law principle, the VfGH (*Verfassungsgerichtshof* – Austrian Constitutional Court) takes the general view that the principle that 'the legal system must provide adequate and efficient legal protection' (thus literally VfSlg. 14.702/1996) can be deducted from the rule of law principle. The purpose of legal protection devices required under constitutional law 'is to provide a certain minimum of actual efficiency to persons seeking legal protection' (cf. in principle, VfSlg. 11.196/1986, 16.772/2002 etc.).

In its case law to date, the VfGH has not issued a statement regarding the requirements to be derived from the rule of law principle for the maximum admissible duration of administrative proceedings. However, against the background of the case law outlined above, there can be no doubt that, also in light of the factual efficiency of legal protection provided by the rule of law principle, which aims at the timely maintenance and guarantee of a factual position, the admissible duration of an administrative proceeding is constitutionally limited:

If, for constitutional reasons, it is not (even) appropriate to generally burden the party seeking legal protection unilaterally with all consequences of a potentially illegal official decision until his request for legal protection is finally handled, it is even less appropriate to delay the handling of the administrative matter over a period of years and thus entirely negate the constitutional state notion of legal security to the level of legal execution, in the individual case.

It must therefore be noted that the constitutional dictate of factual efficiency of legal protection includes a right to legal review within an adequate time period. The adequacy of the duration of proceedings will also need to be assessed according to the circumstances of the individual case, from a constitutional point of view. In doing so, the complexity of the case, from an actual and legal point of view, the behaviour of the party seeking legal protection and the authority in the proceedings and the significance of the matter for the party must be used as a basis for evaluation criteria. In doing so, the legislator is constitutionally obligated to create an authority structure, which can guarantee the handling of administrative proceedings within an adequate period of time. Therefore, regardless of the reasons having caused it (personnel shortage, organisational changes, shifting of responsibilities,

unexpected increase in work, etc.), overburdening of the authority may never justify an intrinsic excessive duration of proceedings.

In view of these basic principles, the **entitlement** of this **complaint** is evident for the Ombudsman Board, because a time period of approx. 10 years having passed between the subsequent examination of an aircraft and the stipulation of the designated fee cannot be justified by anything.

### **2.3.3 Judicial enforcement of the rights of neighbours in the case of private nuisance caused by guests outside business premises**

*Neighbours of catering operations are frequently exposed to nuisance caused, not by the establishment itself, but rather, the behaviour of the guests outside of the business premises. The trade law provisions offer no/only insufficient assistance in this respect. In contrast, the courts affirm liability under neighbouring rights by the innkeeper for the behaviour of guests.*

With the Trade Law Amendment Act 1988, Federal Law Gazette no. 399/1988, in the provision of Sect. 74 para. 3 Trade and Industry Code, the precondition for an approval obligation under business premises law through the behaviour of guests in business premises was revoked to the extent that this was restricted to private nuisance caused by persons in the business premises. With this, the legislator has significantly reduced the scope of responsibility of the trade authority, as well as the neighbourhood protection.

The behaviour of guests outside of the business premises can now only give rise to the ordering of earlier closing hours under the limiting preconditions of Sect. 113 para. 5 Trade and Industry Code 1994. In concrete terms, the legislator has restricted this obligation (of the municipality in its own sphere of competence) to move closing hours forward to those cases in which *'the neighbourhood is repeatedly, unreasonably disturbed by non-punishable behaviour of guests outside the premises of the hospitality facility, or if security police misgivings exist'*.

In the assessment of the circumstance of 'by non-punishable behaviour', the respective provision of the respective state police law for delineating punishable from non-punishable behaviour must particularly be considered, so that the moving forward of closing hours cannot be ordered, if the behaviour of guests outside of the business premises, e.g. can be sanctioned as undue noisiness, according to administrative penal law provisions. In practice, it is barely possible for the neighbour to prosecute those causing undue noise, as the

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identity of the respective persons are only known to him in exceptional cases and by the time the security authorities have arrived, they will have departed.

However, the regulation regarding the moving forward of closing hours also fails completely in those cases in which the nuisance caused by the guests takes place in areas that are no longer included in the adequate vicinity of the entrance door. The lapse of the word 'directly', in the word sequence, 'through ... behaviour of guests (directly) in front of the business premises', effected by the Trade Law Amendment Act 1992, Federal Law Gazette no. 1993/29, expanded the spatial scope in which the guest behaviour is relevant for the moving forward of closing hours, however the content of the regulation continues to be so restrictive, that a legal execution of this standard can only effect the necessary improvements for neighbourhood protection in exceptional cases.

In the **Ombudsman Board Report 2003** on page 245, it is already pointed out that the execution of legally intended neighbourhood protection in the provision of Sect. 113 para. 5 Trade Law Amendment Act 1994 can barely be complied with and, in the opinion of the Ombudsman Board, it cannot be in the interest of the legislator, to retain provisions that are not implementable in the sense intended.

While the reduced abutting owner rights in the Trade, Commerce and Industry Regulation Act bring with them an undesired enforcement deficit in public law, in the opinion of the Ombudsman Board, the civil law affirms this necessary, further neighbourhood protection in respect of the provisions of Sects. 364f ABGB (*Allgemeines Bürgerliches Gesetzbuch* - Austrian Civil Code).

For the justification of liability under neighbouring rights, it is not necessary for the courts that the neighbour carries out the disturbing actions himself. On the contrary, the behaviour of others is also attributed to him, if he puts up with the detrimental effect, although he is entitled to prevent it and would have been in a position to do so. It is sufficient that the detrimental effect is an attributable consequence of an operation set up on this property. It is then immaterial that the nuisance is ultimately based on the independent decision of a third party. If the innkeeper is therefore aware that the neighbouring property has already been disturbed by his guests on repeated occasions, he is obligated to ensure, through adequate means, that such actions are avoided in future. The innkeeper should have prevented the nuisance through suitable measures (refusal to serve alcoholic drinks or threat/imposing of

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bans from entry, etc.), or at least have significantly contained them (Austrian Supreme Court August 29, 2000, 1 Ob 196/00f).

Certainly, the obligation of a neighbour operating a catering establishment should not be overstretched in respect of the avoidance of inadmissible actions, such that he needs to send a controlling body to follow every guest leaving the establishment, in order to prevent contamination on neighbouring properties. However, if he is aware that the neighbouring property has already been repeatedly contaminated, he should be obligated to ensure adequate measures for the future avoidance of such nuisance. The trader is therefore also responsible for the detrimental effect that exceeds the usual local measure, if the effect has not been created on his property. It is sufficient that the detrimental effect is an attributable consequence of an operation set up on this property.

It is then immaterial for the judicature, under civil law, that the nuisance is ultimately based on the independent decision of a third party. If the innkeeper therefore fails to carry out suitable measures, despite being aware of nuisance caused by his guests outside of his business premises, injunctive relief justifiably exists against him, under neighbouring law.

Defence claims of neighbours are according to the Austrian Supreme Court 'civil rights' in the sense of Art. 6 ECHR (OGH July 8, 2003, 4Ob137/03f). In relation to business premises, from the point of view of fundamental rights, Art. 2 ECHR (Right to life), Art. 8 ECHR (Right to respect for the residence) and Art. 5 StGG / Art. 1, first additional protocol to the Council of Europe Human Rights Convention (Right to sanctity of property) also come into consideration.

The insufficient instrumentation under trade law has the effect of excluding the legal hearing of the neighbour. As a result, the existing meagre public law regulations, not least, hinder the protection of the neighbour from nuisance by the behaviour of guests outside of the business premises, from the point of view of fundamental rights. A change in the legal situation by the trade legislator in the direction of expanding the protection of the neighbours from nuisance by guests outside of the business premises therefore appears necessary.



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### **2.3.4 Court proceedings (VA BD/43-J/06, BMJ-A909.825/0003-III 5/2006)**

*In January 2006, N.N. filed a complaint regarding the long duration of proceedings by the Wiener Neustadt District Court. Two cases, which were joined in the hearing of September 3, 2001 for the purposes of the procedure and of judgment, dealt with the complaints for damages for pain and suffering lodged by the complainants on 25 June 2001 as a result of a traffic accident.*

The proceedings in the first legal process, until the hearing with conclusion of the proceedings on March 20, 2003, was characterised by the obtaining of several expert opinions, whereby this resulted in delays, in that the experts appointed by the court requested postponement due to overwork/returned the file without an opinion. It came to a further delay in the proceedings, because after the conclusion of the hearing on March 20, 2003, the judgement was only prepared with a date of July 28, 2003, in contravention of the standardised period of four weeks in Sect. 415 Zivilprozessordnung (ZPO - Code of Civil Procedure).

After the plaintiffs had lodged an appeal against the judgment and an appeal against the costs order on September 22, 2003 and after the defendant had lodged a reply to the plaintiffs' appeal against the judgment and their appeal against the costs order on October 22, 2003, the file was not submitted to the responsible Wiener Neustadt Regional Court, but submitted to the Lower Austrian Local Health Insurance Fund for inspection purposes in February 2004.

Only after the joint application of the parties dated January 21, 2005, to submit the file for decision to the Wiener Neustadt Regional Court, on March 7, 2005 the case was finally – after a standstill in the proceedings of one year and four-and-a-half months after the reply of October 22, 2003 – submitted to the Wiener Neustadt Regional Court.

Why the file was not submitted to the appellate court earlier is – as the Federal Minister of Justice stated in her comment – inexplicable. Because the file was with the judge and did not appear in audit lists of the electronic register as being open, after preparation of the judgement, these proceedings were not apparent to supervisory bodies.

Already with a decision dated March 30, 2005, the Wiener Neustadt Regional Court agreed to the appeal, rescinded the judgement of the Wiener Neustadt District Court (partially) and referred the case back to the court of first instance hearing the case for a new judgement.



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On April 7, 2005, the file arrived at the Wiener Neustadt Regional Court, on April 15, 2005, one of the plaintiffs was ordered to pay a deposit against costs and to correct the appeal against the costs order; simultaneously, the appeal decision was delivered to the parties.

After the resubmission of the corrected appeal against the costs order on May 13, 2005 and the application of one of the plaintiffs for approval of court assistance dated May 17, 2005, there was a situation of deadlock for another nine months. Only on February 13, 2006, a trial was announced for March 3, 2006, in which the proceedings were closed. The judgement of the Wiener Neustadt District Court was signed and prepared on March 10, 2006.

The long time span between the return of the file from the court of review and the announcement of a hearing for oral proceedings on February 13, 2006 is also no longer comprehensible. In this case, the 'reopening' of the proceedings failed to be listed in the register, after reaching the legal review decision that rescinded the judgement, which is why it continued to appear in the audit lists as completed.

In the case at hand, the supervisory authority measures were implemented in such a manner that the employees of the Wiener Neustadt District Court departments were informed about the necessity of carefully keeping the register and the responsible judge was encouraged to always implement proceedings within an adequate period of time and in a targeted manner. Furthermore, regular visits to the office of this judge were announced by the Superintendent of the Wiener Neustadt District Court. The Ombudsman Board was also assured that the President of the Vienna Neustadt Regional Court would include the court department of the responsible judge under his special supervision and continue to report on the status of the court department, so that he could decide on any other necessary measures under public service law.

Notwithstanding these measures that have now been undertaken, in the case under review, the Ombudsman Board **determined a grievance** with the judicial administration due to the accumulated breach of the duty of care that came to light because of unjustified delays in proceedings with the Vienna Neustadt District Court.

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### Excerpt from the 23<sup>rd</sup>/24<sup>th</sup>/25<sup>th</sup> Report of the Ombudsman Board to the Styrian Parliament (2003 – 2005)

#### **2.3.5 Determining of procrastination in a building approval procedure; infringement of convention, in the case of reference to the ECHR – Municipality of St. Johann/Saggautal (VA ST/219-BT/03, Styrian Association of Towns and Municipalities L/32-Dr.Wenger/La-6623**

Already in its **21<sup>st</sup>/22<sup>nd</sup> Report to the Styrian Parliament**, the Ombudsman Board **needed to file a complaint** due to failure in agreeing to an approval application and gross defects in a building approval procedure in the Municipality of St. Johann im Saggautal. Ultimately, after significant delays and repeated infringement of the obligation to comment, the Ombudsman Board received an official notification from the mayor, which had been delivered to the plaintiffs on February 24, 2003.

Soon afterwards, the plaintiffs again approached the Ombudsman Board and filed a complaint that its appeal against this official notice had not been acknowledged.

In fact, it took nearly another year, before a decision was available. Thus, the Municipal Council decided on the appeal of the plaintiffs dated February 27, 2003 with an official notification dated February 5, 2004. The reasons for the duration of the proceedings could not be specified. It must therefore be assumed that the municipality continued deliberately to protract the proceedings. This had been already highlighted in the **21<sup>st</sup>/22<sup>nd</sup> Report to the Styrian Parliament**.

Such long proceedings not only give the plaintiff the – conceivable – impression that the preservation of his rights is intended to be withheld. It also represents an infringement of Art. 6 ECHR. Thus, in the case of G.H. versus Austria (judgement dated October 3, 2000, Appl. No. 31266/96), the ECHR recognised that a matter regarding a building issue which took 5 ½ years, in which the Austrian Administrative Supreme Court (*Verwaltungsgerichtshof* - VwGH) was also called upon, represents an infringement of the requirement of adequate duration of proceedings.

In this case, 5 years passed until the availability of a decision by the Municipal Council. If this decision is to be contested further, the ECHR – even under the assumption that the subsequent authorities decide in the quickest possible manner – would recognise an in-

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fringement of the convention. Purely for purposes of completeness, it is therefore added that the legal question pending judgement is anything other than 'particularly difficult'.

### 2.4 Right to the statutory judge (Art. 83 para. 2 B-VG)

#### 2.4.1 **11-year duration of proceedings with the Independent Administrative Tribunal (VA BD/52-I/05, UVS Vienna UVS-PR248/2005-4, Federal Ministry of the Interior-506/1515-II/1/c/05)**

*In 1994, a plaintiff filed a complaint due to a guideline infringement with the Vienna Independent Administrative Tribunal, which rejected this complaint as being late in 1997. The Administrative Supreme Court rescinded the official notification in 1998, due to illegality of its content. In the investigation procedure of the Ombudsman Board, it emerged that, after the rescission of the official notice, the Vienna Independent Administrative Tribunal carried out an oral hearing, however the file disappeared later on. The Independent Administrative Tribunal took action to retrieve the file only within the authority at issue, although it harboured the suspicion that the file could have been sent to another authority by mistake. Instead of contacting the competent authority to retrieve or reconstruct the disappeared file, the Vienna Independent Administrative Tribunal just accepted the fact that the file had disappeared.*

Apart from the fact that the Independent Administrative Tribunal already required more than 2 years for the illegal rejection of the plaintiff's complaint, it did not order any sufficient steps to end the proceedings during the following seven years. The obligation of the authority to render a decision is already standardised in sub-constitutional law, namely in Sect. 73 AVG (*Allgemeines Verwaltungsverfahrensgesetz* - General Administrative Procedure Act). A decision must be made on petitions by parties and appeals, without unnecessary delay, at the latest, six months after their submission.

In addition to the sub-constitutional provision, which justifies a right to completion of the petition in the form of an (appealable) official notification, reference is also made to the constitutional provision of Art. 83 para. 2 B-VG, which grants the right to the statutory judge. Under the term, 'judge', the VfGH includes every state authority, i.e. also administrative authorities (for the first time in VfSlg. 1443/1932). pursuant to the case law of the VfGH (*Verfassungsgerichtshof* - Austrian Constitutional Court) the right to the statutory judge is infringed by the official notification from an administrative authority, if the authority assumes a responsibility to which it is not legally entitled or if it illegally rejects responsibility and thus refuses to carry out a decision on a matter (VfSlg. 14.590/1996, etc.).

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In the opinion of the Ombudsman Board, it makes no difference whether the authority illegally refuses to decide on a matter because it declares itself as not being responsible or it completely deliberately fails to make any decision on the matter. In this case, the Vienna Independent Administrative Tribunal refused to make a decision over a period of 7 years and therefore infringed the right of the plaintiff to the statutory judge.

### **Excerpt from the 24<sup>th</sup>/25<sup>th</sup> report of the Ombudsman Board to the Lower Austrian Parliament (2004 -2005)**

#### **2.4.2 Illegal declaration of a subsequent obligation; serious procedural deficiencies – Municipality of Tulln (VA NÖ/414-G/04, Municipality of Tulln 8503-02038-5)**

N.N. approached the Ombudsman Board and submitted that the Municipality of Tulln had pressured him with complaints and petitions to the Administrative District Authority of Tulln regarding the connection of the property ... to the local water supply line. This, despite knowledge that a legal connection obligation order did not exist.

The result of the investigation procedure of the Ombudsman Board was:

With an official notification of the mayor of the Municipality of Tulln dated May 13, 2002, N.N. was obligated to connect his property to the public water supply line by June 28, 2002.

As reasoning, it was pointed out that every building containing common rooms, were to be supplied with faultless drinking water. As a drinking water assessment with a negative result existed for the building's well, a connection must take place to the public water supply line.

It is established that the case file does not contain any negative drinking water assessment. However, prior to receiving the official notification, N.N. was requested on two occasions to submit a drinking water assessment.

The official notification was delivered to N.N. on May 16, 2002. He filed an appeal against it on May 28, 2002. With a letter from the Municipality of Tulln dated October 11, 2002 and December 12, 2002, N.N. was again requested to submit a drinking water assessment.

As this request was also not complied with, the Administrative District Authority of Tulln requested the initiation of administrative criminal proceedings pursuant to Article 12 para. 1

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L. 2 Lower Austrian Water Supply Line Connection Act 1978, with a letter dated December 20, 2002.

With a letter from the Municipality of Tulln dated June 5, 2003, N.N. was notified about the initiation of the criminal proceedings by the Administrative District Authority, again requested to submit a drinking water assessment and informed that the initiation of the enforcement proceedings would be applied for, in the event of non-compliance. This application was also subsequently filed.

As gathered from the documentation, an appeal decision for the Municipal Council of the Municipality of Tulln was prepared in September 2002; however, this did not reach the agenda of the Municipal Council meeting, at the recommendation of the responsible committee of the Municipal Council. Only with a decision on June 21, 2004, did the Municipal Council of the Municipality of Tulln deal with the application, by rejecting the appeal dated May 28, 2002 as unjustified and affirming the contested official notification.

With a date of June 21, 2004, an official notification by the mayor of the Municipality of Tulln was issued in respect of number 8500-02038-1, with which the official notification dated June 21, 2004 (*note*: this can only mean the official notification of the Municipal Council) was rescinded pursuant to Sect. 68 para. 2 AVG (*Allgemeines Verwaltungsverfahrensgesetz* - General Administrative Procedure Act). This was justified by the fact that the date of the Municipal Council decision was not correct.

Furthermore, with a preliminary appeal decision by the mayor dated August 23, 2004, the appeal of the plaintiff dated May 28, 2002 pursuant to Sect. 64a AVG 1991 was approved and the contested official notification rescinded without replacement.

The plaintiff filed an appeal against this preliminary appeal decision with a letter dated October 4, 2004.

In this respect, the Ombudsman Board notes that:

1. Taking into consideration the relevant material law (Lower Austrian Water Supply Line Connection Act), organisation law (Sect. 61 para. 1 Z. 1 Lower Austrian Municipalities Act) and procedural law provisions (Sect. 64a, para. 2 AVG 1991 in its valid version) it becomes clear that all authorities that had decided in the matter since June 2004 were not responsible.

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- a) Initially, the Municipal Council, was not responsible for deciding on the appeal, which was open since 2002. Since the coming into effect of the 8<sup>th</sup> Lower Austrian Municipal Ordinance amendment on January 1, 2000, the responsibility is allocated to the town council (see Sect. 61 para. 1 Z. 1 Lower Austrian Municipal Ordinance 1973).
- b) It was also inadmissible to rescind the decision of the Municipal Council again with the official notification of the mayor dated June 21, 2004. Only the Municipal Council is entitled to intervention into the non-appealability of its decision, according to Sect. 68 para. 2 AVG 1991.
- c) Ultimately, the mayor was not responsible when he allowed the appeal with his official notification dated August 23, 2004 and rescinded his own official notification dated May 28, 2002, without replacement. Article 64a AVG provides that the authority can process the appeal within two months after submission with the authority of first instance, by means of a preliminary appeal decision; after this, the responsibility is transferred to the appeal authority. In this case, the appeal was filed by the plaintiff on May 29, 2002. Therefore, in 2004, no competence existed anymore to amend or rescind the official notification dated May 13, 2002, on the basis of Sect. 64a AVG 1991.

In all three cases, N.N.'s entitlement to a lawful judge (Art. 83 para. 2 B-VG - *Bundesverfassungsgesetz* - Federal Constitution) has been infringed (VfSlg 2007/1951, etc.). The misjudgement of the legal situation therefore afflicts all of the mentioned official notifications with qualified illegality. These should not remain in legal existence.

2. a) In order to return the proceedings to constitutionality, it must initially be decided whether the legal remedy submitted on October 5, 2004 was asserted on time. With respect to the incorrect description as an appeal, *reference is made to the decision of the Administrative Supreme Court (Verwaltungsgerichtshof - VwGH) dated April 1, 2004, 2003/20/0438*. Late or inadmissible submission applications are to be rejected by the authority which has made the preliminary appeal decision (Sect. 64a para. 3 last sentence AVG 1991).
- b) Then, the responsible municipal council pursuant Sect. 61 para. 2 no. 1 Lower Austrian Municipal Ordinance must nullify the official notifications of the mayor

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dated June 21, 2004 and August 23, 2004 pursuant to Sect. 68 para. 4 point 1 AVG 1991.

- c) (Only) the legal effect of these decisions clear the path for the Municipal Council to amend its appeal decision dated June 21, 2004 on the basis of Sect. 68 para. 2 AVG, such that the appeal of the plaintiff dated May 28, 2002 can be granted and the official notification of the mayor dated May 13, 2003 pursuant to Sect. 66 para. 4 AVG 1991 can be rescinded without replacement.
3. Ultimately, N.N. is to be informed that he can apply for an exemption from the connection obligation. The precondition for this is that the continued use of own water supply lines must not endanger health. Assessment from a state authorised inspection institution or an expert, by whom test sampling is also to be carried out, should already be attached to the application – as clarified in Sect. 2 para. 3 Lower Austrian Water Supply Line Connection Act 1978. Mandatory connection is to be assumed, until it has been legally determined that a property is exempted from mandatory connection.
4. Infringement of the provisions of the Lower Austrian Water Supply Line Connection Act 1978 is to be punished with administrative penalties, according to Sect. 12. The steps taken in this respect by the Municipality of Tulln are not objected to by the Ombudsman Board. Incorrectly, the Lower Austrian Independent Administrative Tribunal assumed in its decision dated July 9, 2004 that the question of unlawfulness depends on the existence of a legally effective connection obligation notice. As initially described, this is not required according to the Lower Austrian Water Line Connection Act 1978.

Fortunately, the Municipality of Tulln took up the recommendations of the Ombudsman Board. The respective steps under procedural law were initiated within a period of one month. Therefore, from the point of view of the Ombudsman Board, additional instances were not necessary.

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### Excerpt from the 23<sup>rd</sup>/24<sup>th</sup>/25<sup>th</sup> Report of the Ombudsman Board to the Styrian Parliament (2003 – 2005)

#### **2.4.3 Noise pollution by fire service sirens; accumulated misjudging of the legal situation – Municipality of Ilztal (VA ST/261-BT/03)**

On October 10, 2003, Mr. and Mrs. N.N. filed a complaint with the Ombudsman Board regarding the noise pollution by a siren system mounted on a neighbouring commercial building ..., KG (*Katastralgemeinde* – cadastral district) Neudorf. In an activated state, the acoustic pressure of the siren reached a level that was hazardous to health.

From the documentation submitted, the Ombudsman Board gathered that an application by the plaintiff to remove the siren system was rejected by means of an 'official notification' from the mayor of the Municipality of Ilztal dated May 28, 2003 in respect of GZ. 163-29/2003. Misgivings were raised against the decision in respect of formal and material law. The Ombudsman Board therefore approached the Municipal Council of the Municipality of Ilztal in an open appeal procedure.

With a covering letter dated November 27, 2003, the mayor of the Municipality of Ilztal submitted the respective building file, attaching the appeal decision, which had been issued in the meantime. From the documents, the following facts arise:

On November 29, 2002, the plaintiff filed a complaint with the Municipality of Ilztal, that on the neighbouring commercial building ..., KG Neudorf, a siren system had been installed, which resulted in 'noise nuisance, which is unreasonable and hazardous to health', when operated. The facility was built without appropriate building permission. Therefore, an application was filed for removal within the meaning of Article 41 Apr. 3 Styrian Building Code (specifically: Styrian Building Law 1995 in its valid version).

With a letter dated February 20, 2003, the mayor of the Municipality of Ilztal notified the plaintiff about a noise level measurement. The measurement was carried out by the company that built the system. A letter from the responsible official physician with the Weiz Regional Administrative Authority refers to this. According to the physician, no hazard to health can be assumed with proper operation of the siren.

In a statement comprising several pages, the plaintiffs criticised that the significant facts of the case had not been properly gathered. For example, the acoustic pressure had not been



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measured on the boundary of the property. Therefore, doubt must be cast on the extent to which the measurement values communicated to the official physician were relevant.

On March 31, 2003, the official physician again dealt with the facts of the complaint. From the file documentation, it is not apparent that these comments were made available to the plaintiffs.

With an 'official notification' dated May 28, 2003 in respect of GZ 163-29/2003, the mayor of the Municipality of Ilztal rejected the application filed by the plaintiffs for removal of the siren system, due to a lack of right to defence under the Styrian Fire Service Act 1985. The reasoning is stated as follows: *'The legal regulations in connection with the siren systems are ultimately to be regarded as special regulations with respect to the Building Law'*. The dispatch ends with the words: The Mayor. An illegible signature is added.

The appeal filed correctly in terms of form and deadline, was rejected by the Municipal Council of the Municipality of Ilztal with an official notification dated November 24, 2003 in respect of GZ. 163-69/2003. As justification, the Municipal Council states that it is not necessary to obtain an approval when complying with a legal obligation. This could *'even result in grotesque situations, in an extreme case, that the mayor could not find a single location in an entire village, where he could – in accordance with his legal obligation – grant his own municipality the approval to mount a siren. According to the Municipal Council, this situation arises also elsewhere in the Austrian legal system: Specific matters are to be regulated factually and thus also the mounting of the fire service sirens in Neudorf.'*

In this respect, the Ombudsman Board notes that:

Initially, the law dated March 5, 1985, enacted with the fire service regulations (Styrian Fire Service Law 1985), Styrian Law Gazette 1985/49, in its valid version, is relevant. Pursuant to Sect. 6 para. 1 of this Law, the Municipality is obliged to create and/or install, at suitable locations, the public fire reporting facilities as well as alarm and reporting devices necessary to alarm the fire brigade. It is furthermore obliged to duly mark these facilities and devices and to ensure their operation and/or operativeness by regular inspections.

If the fire reporting facility consists of a technical facility (fire alarm facility) and if suitable municipality-owned properties are not available, the owners/authorised agents of suitable properties must tolerate the building and maintaining of public fire reporting and alarm facilities on their properties, as well as entering the property, without a right to claim compensa-

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tion. Such fire reporting and alarm facilities are to be built such that the use of the property is not significantly hindered. To the extent that it is necessary for carrying out a building project or a change to the property, the fire reporting and alarm facilities are to be changed accordingly (Sect. 6 para. 2).

On the basis of submitted photographs, it is furthermore assumed that the facility in question involves a structural facility within the meaning of Sect. 4 point 12 Styrian Building Law (Stmk. BauG 1995), Styrian Law Gazette. 1995/59 in its valid version. Therefore, the provisions of noise protection apply, as they are regulated in Sect. 43 para. 2 point 5 Stmk. BauG 1995. According to these, the structure must be planned and executed such that noise perceived by the users or by the neighbours is kept to a level that is not hazardous to health and with which satisfactory living and working conditions are ensured.

A glance at the Styrian Building Law also clarifies that facilities that fall under the Fire Service Law, are not exempted from the scope of the Styrian Building Law.

Based on the assumption that one and the same life circumstance can be viewed from various aspects and the allocation of a matter to the area of responsibility of either a Land or the Federation does not rule out that specific subject areas can be regulated according to different aspects (so-called 'aspect theory', VfSlg. 5025/1965, etc.), the Ombudsman Board submitted to the Municipal Council of the Municipality of Ilztal, in the pending appeal proceedings, that the provisions of the Styrian Fire Service Law 1985 and the Styrian Building Law 1995 exist alongside one another and therefore the plaintiff's application was to be decided on its merits.

This suggestion was not taken up. On the contrary, the Municipal Council withheld agreement on the matter from Mr. and Mrs. N.N., with statements that – with all due respect – cannot be interpreted as complying with existing legislation (cit: '*certain matters must be factually settled and thus also the mounting of fire service sirens in Neudorf*').

The decision harms the plaintiffs in terms of protected fundamental rights values. Thus, the principle of equality is violated, when the authority justifies the official notification insufficiently and inadequately or with statements which are not acceptable as reasons. Such a violation, equating to lawlessness is qualified by the Constitutional Court in settled case law as 'arbitrariness' (VfSlg. 11.851/1988, 10.997/1986 etc.). In this respect, it already rescinds the contested official notification. In the case at hand, the authority also illegally rejected its

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responsibility and thus refused to carry out a decision in the matter. This violates the constitutionally guaranteed right of the plaintiffs to proceedings before the statutory judge (Art. 83 para. 2 B-VG).

These massive misgivings, which extend into the constitutional sphere, also prompt the Ombudsman Board, notwithstanding the petition submitted against the official notification, to recommend to the Municipal Council of the Municipality of Ilztal, to rescind the decision dated November 24, 2003 pursuant to Sect. 68 para. 2 AVG 1991 and to submit the petition of the plaintiff dated November 29, 2002 for handling. The fact that the plaintiffs have a legal right to this, results from Sect. 41 para. 6 Stmk. BauG 1995.

In view of the fact that the misgivings in this case were submitted to the Municipal Council of the Municipality of Ilztal in an open appeal procedure, it is also recommended to compensate the plaintiff for the costs of submitting the petition.

The Municipality of Ilztal could not manage to agree to this last recommendation. However, it did – as urged by the Ombudsman Board – call a building hearing. During the course of this hearing, a noise measurement also took place. Its result prompted the siren to be switched off and subsequently dismantled.

### 2.5 Freedom of movement and residence, freedom of access and emigration (Arts. 4 and 6 StGG Staatsgrundgesetz - Basic Law, Arts. 2, 3 and 4 of the fourth Additional Protocol of the European Convention on Human Rights)

#### 2.5.1 **No passport or photo identification card for stateless persons (VA BD/225-I/06, 326-I/06, NÖ/689-POL/06; BMI-LR2240/0198-II/3/2006)**

*Several complainants turned to the Ombudsman Board indicating that although residing legally in Austria they did not have the possibility to obtain an aliens' passport or a photo identification. These cases did not only concern immigrants or refugees whose citizenship was unclear or who were stateless, but also former Austrian citizens who lost their Austrian citizenship, for example by joining the French Foreign Legion.*

The complaints focused mainly on the need for a photo identification card, since such identification is required both by governmental authorities and private individuals, e.g. employers. On the one hand, the persons concerned may even not have the possibility to pick up

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mail deposited with their postal office. On the other hand, they do not have the possibility to leave Austria. The *Fremdenpolizeigesetz* (Aliens' Police Act) provides as condition precedent to issuing an alien's passport that 'the Republic of Austria has a positive interest' in issuing such travel document, a requirement that represents a major challenge for many persons concerned.

The Ombudsman Board is aware that an alien's passport enables persons concerned to leave Austria and travel to other countries, thus entailing some responsibility on the part of the Republic of Austria in this respect. It is, however, comprehensible that persons concerned rely on their right of freedom of movement, in particular pursuant to Art. 2 of the fourth Additional Protocol of the European Convention on Human Rights. In one case, the complainant observed that he wanted to emigrate to his brother in Brazil. Within the Austrian legal system, Art. 4 of the Basic Law provides the freedom of movement of persons and capital. Pursuant to Art. 6 para. 1 of the Basic Law every national can take up residence and domicile at any place inside the boundaries of the state. Art. 2 of the fourth Additional Protocol of the European Convention on Human Rights extends this right to everyone who has a legal residence in Austria. This freedom of movement granted as a fundamental right within the Austrian state borders is restricted by the absence of a photo identification card from the perspective of residence registration and aliens legislation. Pursuant to Art. 2 para. 2 of the fourth Additional Protocol of the European Convention on Human Rights everyone has the right to leave any country - including his/her own. Since an aliens' passport, as explained above, may only be obtained with great difficulties, it is impossible for persons concerned to also exercise this fundamental right.

### 2.6 The Principle of Equality (Article 7 B-VG – Federal Constitution, Article 2 of the *Staatsgrundgesetz* (Basic Law of the State))

#### 2.6.1 A. Legislation

##### 2.6.1.1 Treatment of students of nursing schools (VA W/260-VERK/06, BMSG-530101/0012-V/10/2006)

*Ms. L. turned to the Ombudsman Board in connection with the treatment of students of nursing schools in Vienna by 'Wiener Linien' (Vienna Public Transport Department) arguing that the latter were worse off than all other pupils, students and apprentices with respect to free school commuting by public transport on Sundays and holidays.*

The Ombudsman Board points out that also the provisions of the *Familienlastenausgleichsgesetz* – FLAG (Family Relief Act) on the reimbursement of fares must comply with the requirements emanating from the principle of equality of the Federal Constitution. As the VfGH (*Verfassungsgerichtshof* – Constitutional Court) has explicitly pointed out in its rulings VfSlg 13.890/1994 and 16.820/2003, a restriction of a benefit to specific employment relationships may be justified under the principle of equality only if certain conditions are fulfilled. In the second case mentioned above, the VfGH considered it a violation of the principle of equality if apprentices are excluded from reimbursement of fares only because the legislator has chosen not to regulate apprenticeship contracts.

Furthermore, the VfGH explained in its ruling VfSlg. 8793/1980 twenty-five years ago that for assessing whether provisions of the FLAG comply with the principle of equality the 'economic burden resulting from the care for a child is stated as the prime criterion pursuant to the system provided by the legislator in the FLAG.' The 'economic burden' referred to by the VfGH is independent of whether or not the child has entered into an apprenticeship contract or attends a nursing school.

In the light of these rulings of the VfGH the equal treatment of apprentices and students of nursing schools with respect to the use of public transport at favourable conditions is required unless there are substantial and compelling reasons justifying an unequal treatment.

The Ombudsman Board therefore recommended a legislative amendment reflecting the desire of the complainant to enable students of nursing schools to use public transport at favourable conditions.

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### 2.6.2 B. Execution of the Law

#### 2.6.2.1 Rejection of applications for exemption from the TV and Radio receiver fee on unsubstantiated grounds (VA BD/123-V/04, 313-V/06 a.o.)

*Applications for exemption for TV and Radio receiver fees are regularly rejected in official notifications by the Gebühren Info Service (Radio and TV Fee Information Service) on the unsubstantiated ground that the household's income exceeds the upper limit for eligibility.*

The VfGH has consistently ruled that official notifications founded on unsubstantiated grounds are deficient to an extent that violates constitutionally guaranteed rights. (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) (see VfSlg. 16.334/2001, 16.439/2002 and 16.607/2002). Such official notifications violate the constitutional right of equality of all citizens before the law.

As outlined in the **28<sup>th</sup> Report of the Ombudsman Board to the National Council and the Federal Council** (p. 323 et seq.), the official notifications of the Gebühren Info Service (TV and Radio Fee Information Service) reject any applications for exemption based on the fact that statutory requirements are not met, whereby it remains unclear for the addressee of the notification on which determinations of fact the official notifications of Gebühren Info Service (TV and Radio Fee Information Service) are based. This is just the sort of bogus justification that the VfGH considers as a violation of the fundamental right of all citizens to stand equal before the law.

In its **recommendation** dated July 9, 2004, the Ombudsman Board determined that this practice amounts to a **grievance** in the public administrative system. At the same time, the Ombudsman Board **recommended** that the Finance Ministry take immediate action to ensure that the Gebühren Info Service (TV and Radio Fee Information Service) amends its method of communicating the rationale for its official notifications to align it with the statutory requirements of Sects. 58 para. 6 and Sect. 60 of the AVG (*Allgemeines Verwaltungsverfahrensgesetz* - General Administrative Procedure Act) of 1991 and ensure the constitutionally granted right of all citizens to stand equal before the law in accordance with the case law of the VfGH.

Although the Federal Ministry of Finance guaranteed in its communication dated September 7, 2004 to implement this **recommendation** and stated in its communication dated June

20, 2006 that 'the Gebühren Info Service (TV and Radio Fee Information Service) had completed the project of including automatic explanations of the grounds in official notifications rejecting applications for exemption' and that the project had been launched in due time on May 25, 2006, the Gebühren Info Service (TV and Radio Fee Information Service) was not able, by the editorial deadline of this report, to include – in those official notifications which did not fully make allowance for the point of view of the party – a reasoning that complies with the provisions of the AVG and the requirements of the principle of equality. Repeated requests of the Ombudsman Board to the Federal Ministry of Finance concerning the progress made regarding the necessary adaptation of the EDP system have remained unanswered since February 2005 despite several queries (!), which itself represents a (further) administrative **grievance**. This gives rise to the impression that Gebühren Info Service (TV and Radio Fee Information Service) is not interested, at least for the time being, in a legally consistent execution of the law which is compatible with the legal interpretation by the Supervisory Authority.

Since the implementation of laws and court rulings of the supreme courts must not depend on fiscal considerations and since the unconstitutional state of affairs described above, has not ceased for more than two and a half years after the said **recommendation** of the Ombudsman Board, the latter will continue, with all instruments available, to urge the Gebühren Info Service (TV and Radio Fee Information Service) to perform its sovereign tasks in conformity with the Constitution and the relevant laws.

### **2.6.2.2 Limited duration of validity of and/or suspension of driving licences with unsubstantiated reasoning (VA BD/377-V/05, 74-V/06 und 121-V/06)**

*When dealing with complaints against the limited duration of validity of and/or the suspension of driving licences, the Ombudsman Board had to point out in the reporting year that the respective official notifications had been issued by the competent authorities partly with unsubstantiated reasoning.*

As pointed out above, the VfGH has consistently ruled that official notifications founded on unsubstantiated reasoning are deficient to an extent that violates constitutionally guaranteed rights. An official notification that 'justifies' the limitation of the validity period of and/or the suspension of driving licences merely by reference to the respective legal provision, which allows such limitation and/or suspension, without giving any explanation why the re-



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spective requirements are fulfilled in the case at hand, violates the constitutionally granted right of all citizens to stand equal before the law.

The Ombudsman Board recognised the respective **complaints as justified** since they had been raised against official notifications which allowed for the limitation of the validity period of and/or the suspension of driving licences without substantiated reasons, leaving it unclear on which medical disability the measures adopted were based. In the case VA BD/377-V/05, set out in more detail on page 242, the Ombudsman Board managed to have the limitation of the validity period of the driving licence at issue annulled. In the other two cases, the official notification at issue could not be set aside, because the Ombudsman Board discovered in the course of the investigative process that a constitutionally valid approach would not have led to another substantive decision of the authority issuing the driving licence.

### **2.6.2.3 Discrimination against married couples of mixed nationality by the Foreign Nationals Law Package 2005? (VA BD/96-I/03, BMI 70.011/645-III/4/06)**

*A Serbian national filed a complaint with the Ombudsman Board regarding the excessive duration of proceedings for granting a permanent residence permit. As stated under point 6.1.3.1 of the part of the report dealing with the Austrian Ministry of the Interior, investigations have been conducted also into suspected cases of bogus marriage.*

The legal position of so-called 'married couples of mixed nationality', whose problems have been also addressed by the media, has become more difficult since the **Foreign Nationals Law Package 2005** entered into force.

This prompted the Austrian Ministry of the Interior to issue a communication to all heads of the Offices of the Provincial Governments competent for the execution of the (*Niederlassungs- und Aufenthaltsgesetz – NAG*) Settlement and Residence Act. It stated that applications originally filed pursuant to the *Fremdengesetz 1997* (Aliens Act 1997) in Austria, had not become generally inadmissible by the NAG. The breach of the formal requirement to file applications from abroad should therefore not lead to the inadmissibility of such applications and to a mere formal decision. In the case of substantive grounds for refusal, the Austrian Ministry of the Interior referred to the Right to respect for Private and Family Life pursuant to Art. 8 ECHR and the prohibition of arbitrariness introduced by the VfGH which is a corollary of the principle of equality.



The VfGH considers it to be arbitrariness on the part of the authority, which affects constitutional rights, if the authority frequently fails to rightly assess the legal situation; furthermore, if it fails to perform investigations in a decisive point or if it fails to conduct any proper investigations (VfSlg. 8808/1980, 11.718/1988 and many others). With respect to Art. 8 ECHR and the case law of the VfGH on the federal constitutional law, Federal Law Gazette 390/1973 (Federal Constitutional Law of July 3, 1973 on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination), regarding the prohibition of arbitrariness, the Austrian Ministry of the Interior considered it necessary, also due to extensive media coverage, to instruct the law enforcement authorities to avoid hardship in cases that had been pending before the new legal provisions came into force.

### **2.6.2.4 Vienna Medical University - Change to a new curriculum (VA BD/39-WF/06 a.o., Vienna Med. Univ. 82-lfd.)**

In the interest of systematic presentation, this case will be set out on page 318 under point 14.1.1.1.3, German version.

## **2.7 Data Protection (Section 1 of the Federal Data Protection Law 2000)**

### **2.7.1 Inadmissible Dissemination of Sensitive Health Data (VA BD/583-SV/06)**

*The Ombudsman Board was informed that in connection with the execution of doctor's orders for transportation, a patient is obliged, pursuant to an established practice, to hand over such order to the taxi driver who has to forward it to his company for settling accounts with the respective local health insurance fund. In this manner, both the taxi driver and the persons entrusted with the settlement of accounts with the local health insurance fund at his employing company are informed about the envisaged diagnosis and/or therapy and the medical reasoning for the order for transportation.*

According to the constitutional provision of Sect. 1 para. 1 of the DSG 2000 (*Datenschutzgesetz* – Austrian Federal Data Protection Law), everyone has a claim to confidentiality of data concerning his person, to the extent that an interest meriting protection exists. Paragraph 2 of this constitutional provision explicitly provides that with respect to the use of personal data (to the extent that such use is not vitally important to the health or well being of the affected person or is undertaken with his approval), restrictions to the right of confi-

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dentiality are allowable only for the predominantly justified protection of third-party interests. For the use of data deemed especially protection-worthy, further restrictions are intended in the quoted constitutional provision, among others that use be restricted to cases requiring the 'protection of important public interests'. It is further explicitly ordered that the use of data in the case of allowable exceptions be undertaken in the mildest possible manner required to attain the desired goal.

According to the legal definition of Sect. 4 point 2 of DSG 2000 all health data is to be regarded as 'sensitive' as well as 'especially protection-worthy'. These data are under a general restriction, which can be lifted only for the exceptions exhaustively listed in Section 9 of the *Datenschutzgesetz*. In order to effect the legal situation thus created, Sect. 14 of DSG 2000 contains a detailed commitment to implementing procedures for data protection, including, in particular, the duty of ensuring the proper use of data.

The Ombudsman Board managed to trigger discussions in the investigation at issue on preventing diagnosis data as basis of an order for transportation from being received by the transport provider in the future. Instead, the data should be communicated directly to the competent health insurance company, which can compare it with the transport invoice and thus review the legality of the transport.

The respective electronic adjustments may only be made once the required legal bases has been established. On the basis of the new *Gesundheitstelematikgesetz* (Law on the Use of Telematics in the Health Sector) the so-called *Gesundheitstelematikverordnung* (Ordinance on the Use of Telematics in the Health Sector) is being drafted. It might establish the necessary legal bases so that the indicated problem will soon belong to the past.

The Ombudsman Board will oversee this issue and push for a quick change in the current state of affairs, which is undoubtedly far from satisfactory.

### **2.7.2 Inadmissible dissemination of data (VA BD/10-BKA/06, Federal Pension Authority 2060/622)**

*The Federal Pension Authority considered Mr. H.'s letter dated January, 28 and posted on January, 29 as complaint and subsequently forwarded the complainant's health data to the Linz Regional Court, although the official notification rejecting the complainant's application for care allowance was served upon him only on February, 5.*

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The Ombudsman Board considers that the principle according to which the commencement of a complaint must be facilitated is inherent in the *Bundespflegegeldgesetz* (Federal Care Allowance Act) and that therefore a complainant must be given the possibility to lodge a complaint without facing too many legal obstacles. At the same, however, it recognises that a letter for being judged as complaint requires that an official notification on the granting of care allowance must have come into legal existence through receipt at least at the time the letter was posted.

Since no official notification had come into existence in the above sense in the case at hand, the written submission of January, 28 neither could be regarded as a complaint nor was the transmission of the data necessary for the Federal Pension Authority to exercise its statutory functions. Despite the good intention to facilitate the commencement of a complaint, the forwarding of statements to the Linz Regional Court must therefore be considered as violation of the fundamental right to data protection laid down in Sect. 1 the DSG 2000 from an objective point of view.

### 2.8 Right to Respect of Private and Family Life (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms)

#### 2.8.1 **During the gathering of required information, 'incognito adoptions' must be taken into consideration (VA BD/88-V/04, BMVIT-14.500/0155-I/CS3/2005)**

*According to Sect. 19 para. 1 of the Führerscheinggesetz (Driver's License Law), theoretical and practical training at a driving school may be begun at the age of 16, if an advanced authorization to drive a class 'B' vehicle is applied for and approved. The juvenile applicant must provide, among other information, the names of one or two people who will accompany him/her during instructional drives. In addition, it is required to produce a declaration of consent from the parent or guardian, if a chosen escort is not also his legal representative.*

*The form to be filled out in the context of this application (Internet Form number 19) contains, on page one, questions concerning the person of the applicant, who must provide not only his surname, but also his surname at the time of birth, other earlier family names and the first names of his biological parents.*

For the reasons set out in the Fundamental Rights Section of the **28<sup>th</sup> Report to the National Council and the Federal Council** (p. 344), the Ombudsman Board is of the opinion

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that the application form does not meet the requirements of Art. 8 para. 1 ECHR. The Federal Ministry of Transport, Innovation and Technology was therefore **advised** on June 2, 2004 to alter the form in question in a manner that conforms with the Constitution, so that no required entries about 'Family name at the time of birth' nor 'Forenames of biological parents' be requested of the applicant.

The responsible Ministry informed the Ombudsman Board that a constitutional solution to the indicated problems would be found within the framework of the project 'Redesign of the Process of Issuing a Driver's License'. The claims of the Ombudsman Board have been comprehensively considered in the amendment to the Enabling Ordinance to the Driver's Licence Law, in force since March 1, 2006, Federal Law Gazette II number 66/2006.

### **2.8.2 Notification of closure of ban on residence proceedings (VA BD/120-I/06, BMI-1006336/0006-II/3/2006)**

*In connection with a complaint concerning the duration of ban on residence proceedings the Federal Ministry of the Interior informed the Ombudsman Board that official residence proceedings were initiated ex officio and that therefore the authority was under no obligation to render a decision pursuant to Sect. 73 AVG (Allgemeines Verwaltungsverfahrensgesetz - General Administrative Procedure Act). According to the Ministry of the Interior, Austrian legislation does not provide for an obligation to notify persons concerned of the stay of proceedings. It argued that such notification was a service provided merely on a voluntary basis. The Ministry of the Interior argued that it was not necessary to regulate, by way of decree, the compulsory notification of persons concerned of stays of proceedings. This would also apply to expulsion proceedings.*

Ban on residence proceedings and expulsion proceedings are initiated ex officio. This means that the person concerned has no right to claim a decision from the authority pursuant to Sect. 73 AVG, although these proceedings related to matters of vital concern. The Federal Ministry of the Interior argued to the Ombudsman Board that the mere commencement of such proceedings would (initially) not change or worsen the residential situation of a foreigner.

Such line of argumentation completely ignores the personal background of persons concerned. Still, the Right to Respect for Private Life should ensure the individual a private area in which he/she can freely unfold and develop his/her personality. Family life encompasses all family members who actually live together and/or to whom a specific relationship of dependence exists.

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It is obvious that a ban on residence procedure may infringe the Right to Respect for Private and Family Life. This circumstance should be considered by the authority. As long as the person concerned is left in uncertainty as to whether this procedure is still pending or has been stayed, he/she and his/her family find themselves in an extremely onerous situation. In view of the possible issuance of a ban on residence, not only organisational measures at an economic (e.g. leases, loans etc.), but also at a personal level must be taken. A notification of a closure of the procedure would remove any uncertainty on the part of the person directly concerned and his/her family about their future.

### Excerpt from the 24<sup>th</sup>/25<sup>th</sup> report of the Ombudsman Board to the State Parliament of Lower Austria (2004-2005)

#### **2.8.3 Bathing ban imposed on a minor season ticket owner for the entire season without legal basis and display of his/her photo visible to bathers; initial refusal to reply to a respective request of the Ombudsman Board – Municipality of Amstetten (VA NÖ/345-G/04, Municipality of Amstetten 914/01)**

Ms. N.N. and Mr. N.N. filed a complaint with the Ombudsman Board in a matter concerning their 14-year old son in which they argued that a bathing ban with respect to the nature swimming pool Amstetten had been imposed on their son on May 12, 2004 by Mr. A.A. on the part of the Amstettner Veranstaltungsbetriebe Ges.m.b.H. for the summer season. The parents pointed out that this ban would also be effective for the leisure centre Ulmerfeld-Hausmening. According to them, their son had a seasonal ticket the enlarged photo of which was displayed visibly to bathers at the entrance to the nature swimming pool.

The complainant's parents felt being treated inequitably by a bathing ban imposed on their son for the entire bathing season with respect to both swimming pools compared with 14-day bans imposed on other children and alleged a serious infringement of fundamental rights through the display of their son's enlarged photo, visible to all visitors, at the entrance to the nature swimming pool Amstetten. The parents contacted Mr. A.A. of Amstettner Veranstaltungsbetriebe Ges.m.b.H. on May 28, 2004 in an attempt to resolve the matter. Since their attempt was unsuccessful, they turned to the Ombudsman Board.

The Ombudsman Board reviewed the case since it came to the conclusion that the imposition of a bathing ban for the entire bathing season with respect to both swimming pools on

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May 12, 2004 was not in conformity with the bathing rules in force by that date. Furthermore, it considered the display of the minor complainant's photo as an infringement of Sect. 78 of the *Urheberrechtsgesetz (UrhG - Copyright Act)*, which safeguards the 'right to one's own picture' and protects the person shown against being exposed to the public by displaying his photo.

The Ombudsman Board requested the mayor of the Municipality of Amstetten to review and make a statement on the complaint until August 27, 2004, in particular to clarify on which legal basis a bathing ban for both swimming pools had been imposed and the photo displayed. Furthermore, it asked the mayor to explain why a bathing ban for a shorter period, as imposed on other children, was not imposed on the complainant in view of the fact that he had a seasonal ticket. In addition, the Ombudsman Board requested the immediate lifting of the bathing bans for both swimming pools and the removal of the photo displayed visibly to third parties at the entrance to the nature swimming pool Amstetten.

The mayor of the Municipality of Amstetten refused by letter dated August 25, 2004 to reply to the Ombudsman Board's request and denied the responsibility of the Municipality of Amstetten with respect to Amstettner Veranstaltungsbetriebe Gesellschaft m.b.H., the sole shareholder of which is the Municipality of Amstetten.

The Ombudsman Board then requested, by letter dated September 3, 2004, the mayor of the Municipality of Amstetten to clarify the ownership of the nature swimming pool Amstetten and the right of the Municipality of Amstetten to give instructions to the management of Amstettner Veranstaltungsbetriebe Gesellschaft m.b.H.; furthermore, to transmit to the Ombudsman Board an abstract of the commercial register with recent and historical data, the articles of association and any amendments to them by shareholders' resolutions. The requested documents were transmitted on September 7, 2004.

The Ombudsman Board recognized the **complaint** in question as **justified**.

I. Neither the bathing rules, published under [www.amstetten.noe.gv.at/Ortsrecht](http://www.amstetten.noe.gv.at/Ortsrecht) nor the bathing rules for the nature swimming pool Amstetten of July 17, 2002 provided a legal basis for the bathing ban imposed on the complainant for the entire bathing season on May 12, 2004 with respect to the leisure centre Ulmerfeld-Hausmending and the nature swimming pool Amstetten. <http://www.amstetten.noe.gv.at/>

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II. Likewise, the complainant's photo, visible to all visitors at the entrance to the swimming pool, was displayed without legal basis in the then valid bathing rules.

The display of a photo of a 14-year old boy for the purpose of his recognition exposing the latter to public criticism as in the case of a 'mug photo' without first obtaining the minor's and/or his parents', as legal representatives, consent infringes the personal rights of the person shown on the photo. The 'right to one's own picture' is safeguarded under Sect. 78 UrhG (*Urheberrechtsgesetz* – Copyright Act) and is designed to protect the person shown against being exposed to the public by publishing his photo or to prevent the use of his photo in a way that may give rise to misinterpretation. The display of a photo leads to exposure and a violation of the complainant's vested interests, since the photo was visible to many visitors of the swimming pool. The vested interests of the 14-year old complainant were overriding the public interest in publication of the photo. By displaying his photo, the complainant was at risk to be recognised in public and become subject to accusations or public criticism, which Sect. 78 UrhG is designed to prevent.

The Ombudsman Board considers the highly visible display of the complainant's photo also as infringement of the constitutional right to respect of private life pursuant to Sect. 1 para. 1 DSG and Sect. 8 para. 1 ECHR, since the infringement is neither provided by law nor represents a measure that is necessary in a democratic society for the maintenance of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. According to the case law of the European Commission of Human Rights and/or the European Court of Human Rights, Art. 8 ECHR protects the right to respect for private life and the personal sphere. A recent ruling of the European Court of Human Rights on video surveillance (ECHR of January 28, 2003, complaint number: 44647/98 in case *Peck vs. United Kingdom*; ÖJZ 2004, MRK 2004/20) dealt with the use of photographs and the question whether taking photographs of somebody represents an intrusion of privacy. The Court distinguished between their limited use and their publication. In that case, the Court considered the publication of a video recording as serious violation of the Right to Respect for Private Life.

Likewise, the Austrian Supreme Court has repeatedly ruled, e.g. in its ruling of 23 July 1997, 7 Ob 150/97b, that Sect. 16 ABGB (*Allgemeines Bürgerliches Gesetzbuch* - Austrian Civil Code), pursuant to which everyone has rights by birth derived by reason and must



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therefore be considered as a person, is not just a programmatic, but a central norm of our legal system. This norm recognises personality as a basic value. From it - as well as from other values protected by our legal system (Art. 8 ECHR, Sect. 1 DSG, Sects. 77 and 78 UrhG a.o.) - it can be derived that everyone has by birth the right to respect for his privacy. The protection provided in the individual case depends on a weighing of all interests at stake (SZ 67/173 with further quotations from case law and legal theory).

**III.** The Ombudsman Board therefore called on the mayor of the Municipality of Amstettner Veranstaltungsbetriebe Gesellschaft m.b.H. pursuant to Sect. 20 GmbHG (*Gesetz über Gesellschaften mit beschränkter Haftung* - Private Limited Company Act), to lift the bathing ban imposed with respect to the leisure centre Ulmerfeld-Hausmenig and the nature swimming pool Amstetten for the respective season; furthermore, to remove the complainant's photo, displayed visibly to all visitors of the swimming pool, and to inform the Ombudsman Board about the implementation of these measures.

**IV.** With respect to the questioning of the Ombudsman Board's responsibility by the Municipality of Amstetten, the Ombudsman Board pointed out to the mayor of the Municipality of Amstetten that the abstract from the commercial register of Amstettner Veranstaltungsbetriebe Gesellschaft m.b.H., commercial register number 80480d of the St. Pölten Regional Court, of September 7, 2004 revealed that the sole shareholder of this private limited company, with a fully paid up share capital contribution, is the Municipality of Amstetten.

Pursuant to the lease of 1983, the Municipality of Amstetten has leased the indoor swimming pool Amstetten with all related facilities as well as the outdoor swimming pool with all related facilities to Amstettner Veranstaltungsbetriebe Gesellschaft m.b.H. for an unlimited period.

It was stated in the articles of association that the company is inspected by the Municipality's inspection bodies.

Since Amstettner Veranstaltungsbetriebe Gesellschaft m.b.H. is subject to the inspection bodies of the Municipality of Amstetten, there is no doubt that the Ombudsman Board is responsible to review the present case.

**V.** The mayor of the Municipality of Amstetten made a statement on December 1, 2004 in which he informed the Ombudsman Board that the bathing ban imposed on the complainant for the entire season was lifted on September 5, 2004 and the photo at the entrance to



the swimming pool, which had been displayed there to inform all cashiers, removed. Thus, there is nothing left that prevents the complainant from visiting the swimming pool, provided he observes the bathing rules.

### **Excerpt from the 27<sup>th</sup> report of the Ombudsman Board to the Vienna State Parliament (2005)**

#### **2.8.4 Permit for living spaces with a distance of only approximately 8 metres from chimneys of a plant's heating facility (VA W/46-BT/05, MPRGIR-V-185/05)**

As tenant in an apartment complex in 1030 Vienna, erected by a housing and settlement cooperative in 2000, Ms. N.N. filed a complaint in January 2005 against malodours and noise caused by the chimney of a heating room on the directly adjacent property.

The Ombudsman Board reviewed the case, obtained statements on the complaint from the City of Vienna and inspected the related construction files. The case was also broadcast on the TV programme 'Ombudsman – Equal Rights for Everyone' on February, 26 and September 10, 2005.

Ms. N.N. has lived in an apartment on the fourth floor of the apartment complex since 2000. A building permit was issued on May 15, 2000, by way of an official notification, for this apartment by the City Administration of the City of Vienna, City Administration Department 37, Building Inspection, Decentralised Office for the third, fourth and fifth districts.

This decision contains a reference to Sect. 114 para. 4 BauO (*Bauordnung* - Vienna Building Regulations) pursuant to which chimney exits must be built 3 metres higher than the window lintels of nearby living spaces facing the chimney exit in the same building or in other buildings on the same or on an adjacent property or on a property located directly across the street. This may involve changes in the construction of chimneys so that the exit heights comply with the above-mentioned provisions.

At the time the building permit was issued, a chimney of the heating room of a directly adjacent locksmithery was located at less than 8 metres from Ms. N.N.'s living rooms. The chimney had been approved by decision of the City Administration of the City of Vienna, Town Planning Department, City Administration Department 36, of October 17, 1967 and June 20, 1968.

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Ms. N.N.'s **complaint** proved **justified**, because the building authority had failed to take the necessary measures pursuant to Sect. 126 para. 4 of the Vienna Building Regulations without delay in connection with the imminent danger arising for the occupiers from the gas emissions of the chimney of the heating room, which was located at approximately 1.5 metre above the crest of the ground level workshop with a distance of only 8 metres from the nearest living room windows of the apartment complex at issue. Pursuant to the above-mentioned provision, the owner of the lower building must be ordered either to increase the height of the chimney or to build another heating facility if the occupiers of neighbouring buildings are at risk because of fumes.

Although the City Administration Department 37, Decentralised Office for the third and eleventh districts, had been informed by a petition of the housing and settlement cooperative, filed with the City Administration Department 37 on December 23, 2002, about the potential health risks arising from the gas emissions of the heating facility at issue for neighbours living nearby, it involved the City Administration Department 22 - Environmental Protection in the matter only almost two years later, namely in October 2004, and the District Health Department only in November 2004. It issued the required official notification only on May 30, 2005.

Furthermore, the Ombudsman Board pointed out that the building permit for the apartment complex, whose living spaces are located, contrary to Sect. 114 para. 4 of the Vienna Building Regulations, within a distance of 10 metres from the exit of a chimney which is not three metres higher than the window ridge of the living spaces of the apartment complex, was issued by the City Administration of the City of Vienna, City Administration Department 37, Building Inspection, Decentralised Office for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> districts, on May 15, 2000, without ordering at the same time either the owner of the lower house to increase the height of the smoke and exit gas chimneys or the owner of the higher building to reimburse the owner of the lower building for the costs for other heating facilities up to the maximum amount estimated for the increase in height pursuant to Sect. 126 para. 4 of the Vienna Building Regulations. The respective measures were taken only five years later by official notification of the City Administration of the City of Vienna, City Administration Department 37, Decentralised Office for the third and eleventh districts of May 30, 2005, which became final on June 17, 2005.

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The legal opinion of the City Administration Head Office of the City of Vienna delivered to the Ombudsman Board on February 25, 2005 and March 23, 2005, pursuant to which Sect. 114 para. 4 of the Vienna Building Regulations providing a ten-metre distance to be observed between living spaces and chimney exits does not apply to an existing chimney for which a building permit has been issued and which is located within a range of less than 10 metres from living spaces for which no building permit has been issued, is irrelevant.

The legal opinion can also not be justified by the ruling of the Austrian Administrative Supreme Court of February 23, 1999, file number 98/05/0193, which does not contain any comments on Sect. 126 para. 4 of the Vienna Building Regulations and on which the City Administration Head Office of Vienna based its observations vis-à-vis the Ombudsman Board on September 13, 2005. The argument that Sect. 114 para. 4 of the Vienna Building Regulations applies to permits for chimneys, but does not provide any possibility to change existing permits with regard to Sect. 68 AVG (*Allgemeines Verwaltungsverfahrensgesetz* - General Administrative Procedure Act) cannot be found in the text of the above-mentioned ruling of the Austrian Administrative Supreme Court, which dealt with the withholding of a building permit.

In the present case, the decision of the City Administration of the City of Vienna, City Administration Department 37, Decentralised Office for the third and eleventh district, of May 30, 2005 violated the rights under the existing building permits issued by the City Administration of the City of Vienna, Town Planning Department, City Administration Department 36, on October 17, 1967 and June 20, 1968 for the construction of a workshop and a boiler house with chimney on the property. Pursuant to point 6 of the conditions imposed under these permits, the chimney of the building was to be erected along the fire-proof wall of the neighbouring house at least 3 metres above the windows of the living spaces in the front building.

This condition imposed in 1967 is ancillary to the main part of the official notification. Other than the main part of the decision, to which the obligation to fulfil the condition imposed is ancillary, the condition is of mere declarative character. It merely underscores the fact that a legal obligation has been created, but does not itself create law. For that reason, the arguments of the City Administration Head Office of the City of Vienna submitted to the Ombudsman Board, pursuant to which point 6 of the conditions establishes a 'consensus'

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which may only be altered under the conditions laid down in Sect. 68 paras. 1 and 4 AVG 1991, are irrelevant.

Accepting the position adopted by the City Administration Head Office of the City of Vienna with respect to Sect. 114 para. 4 of the Vienna Building Regulations, would lead to the lodging of complaints by occupiers of apartment complexes in similar cases where apartment complexes are built within a range of 10 metres from a chimney if Sect. 126 para. 4 of the Vienna Building Regulations is not complied with.

In this connection, mention should be made also of the ruling of the European Court of Human Rights of November 16, 2004 (Moreno-Gomez vs. Spain on the responsibility for noise caused by third parties) on Art. 8 ECHR which protects the right to respect for the residence. This right protects the occupier or owner of an apartment not only against physical acts like trespass, but also against emissions like noise or malodours. Such act may constitute an infringement of the right to respect for the residence if it prevents the person concerned from enjoying the amenities of their homes. The European Court of Human Rights therefore held that the authorities' failure to take adequate measures, i.e. to fulfil their duty to protect the right to respect for the residence, leads to a violation of Art. 8 ECHR, which imposes on the State also the duty to secure the right to respect for the privacy between private individuals.

An interpretation of the Vienna Building Regulations in conformity with fundamental rights requires an interpretation in the sense that the fundamental rights to life (Art. 2 ECHR) and property (Art. 1 of the Additional Protocol 1 to the ECHR) do not only oblige the State to not interfere with the above-mentioned rights, but to also actively provide for the protection of these fundamental rights. These obligations of protection include without limitation the prevention of threats posed by environmental pollution to human health and property.

Fortunately, a civil agreement between the property owners eliminated the grounds for the complaint. It provided for a replacement of the heating system by environmentally-friendly natural gas. The existing chimney was dismantled. The owner of the locksmithery undertook to replace the heating system in time so that the new heating system went into operation at the beginning of the heating period 2005/2006.

### 2.9 The United Nations Human Rights Pacts

#### 2.9.1 UN Convention on the Rights of the Child

The **UN Convention on the Rights of the Child** was adopted by the United Nations General Assembly on November 20, 1989. In August 1992, Austria ratified the Convention on the Rights of the Child with three reservations on its implementation. The UN Convention has therefore the rank of an ordinary federal law with a reservation on its implementation in Austria. As a consequence, it cannot be applied directly by the Austrian courts and authorities. The child and youth ombudsmen and many NGOs dealing with the matter have claimed the integration of the Convention into the Federal Constitution.

Each signatory of the UN Convention on the Rights of the Child must submit a report on the situation of children's rights to the Committee on the Rights of the Child every five years. The Committee then gives its opinion on the reports submitted. In its last opinion on the report submitted by Austria, the UN Committee on the Rights of the Child criticised, among other things, that Austria has not incorporated the Convention into the Austrian Federal Constitution. Austria was recommended to continue and strengthen its efforts with respect to the incorporation of children's rights into the Constitution both at federal and state level. Upper Austria, Vorarlberg and Salzburg have incorporated the UN Convention on the Rights of the Child into their constitutions.

Since the legal representatives of children are responsible for their care and welfare until they attain their legal age and since children therefore have only limited legal autonomy, fundamental rights, which are guaranteed explicitly to adults by constitutional law, do not automatically apply to children and young people. Instead, the dependence of children on their parents and/or guardians often leads to contradictions between the rights guaranteed by the Constitution to all people and the rights guaranteed by the Convention on the Rights of the Child, which does not have the rank of constitutional law. An incorporation of children's rights into the Constitution would mean that legal acts infringing children's rights could be appealed against before the Austrian Constitutional Court. The performance of a 'children impact assessment' could prevent laws and regulations from being enacted in the future. Last but not least, the Convention on the Rights of the Child would function as a general guide and interpretation maxim for the entire legislation and the execution of laws.

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In Austria it is widely accepted that children in our society need special protection. This should not only be an often-quoted catchword, but be actually legally implemented.

The following cases are examples of issues that have not been dealt with yet by legislation and in case law. There seems to be an urgent need to legally regulate these issues and to include children's rights in the Constitution.

### **2.9.2 Anonymous birth – The Ombudsman Board proposes adoption and unification of relevant legislation (VA OÖ/279-SOZ/05, VA OÖ/449-SOZ/06) (Art. 7 of the CRC and Art. 8 ECHR)**

*Due to her extremely difficult situation, Ms. N.N. decided to give birth to her child anonymously at the hospital. The child was then given up for adoption. A few months later, she turned to the youth welfare agency declaring that she would be ready to care for her child herself.*

*In another case, a man turned to the Ombudsman Board assuming that his former partner would make use of the 'anonymous birth' option with respect to their child. He was looking for a possibility to establish his paternity of the child to safeguard his rights as a father.*

Due to the repeal of Sect. 197 StGB (*Strafgesetzbuch* – Criminal Code which penalizes the abandonment of minors (Federal Law Gazette I number 19/2001) a decree was issued allowing pregnant women in emergencies to deliver their children anonymously in specific public hospitals (Decree of the Austrian Ministry of Justice of July 27, 2001 on incubators and the 'anonymous birth' option, JMZ 4600/42-I 1/2001). The 'anonymous birth' option and the establishment of incubators is designed to protect new-born children whose mothers would otherwise bear their children without a doctor's help endangering their lives and the lives and health of their children or abandon them after birth (see report of the Committee on the Judiciary 404 BlgNR (*Beilagen zu den Stenographischen Protokollen des Nationalrats* - the collection of exhibits to the protocols of the Austrian National Council) 21<sup>st</sup> legislative period).

Pursuant to the above-mentioned decree the 'anonymous birth' option is admissible in emergencies which might pose a serious threat to the health or life of the mother and/or her child (e.g. in hopeless situations). The youth welfare agency has to conduct, if possible, a private conversation with the mother-to-be, who is not obliged to disclose her identity, and to inform her, among other things, about consultative institutions. In individual provinces of Austria, the youth welfare agency is expressly obliged under provincial legislation to inform women about the consequences of an anonymous birth of their children and to provide for

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any identification required later upon the mother's request (see e.g. Sect. 21 para. 1 lit. a *NÖ Krankenanstaltengesetz* (Federal Hospitals Act of Lower Austria)).

If a child is born anonymously or found in an incubator, the youth welfare agency is responsible to care for that child like for a foundling. The youth welfare agency is entitled to give the child up for adoption (for incognito adoption see ruling of the Austrian Supreme Court of August 10, 2006, file number 2 Ob129/06v). The above-mentioned decree of the Austrian Ministry of Justice determines the approach to be adopted in the case of an anonymous birth only in a very general and basic manner. It is left to the provinces to regulate the details.

The Ombudsman Board's research revealed that the present issue, whether a mother who has first made use of the 'anonymous birth' option due to an acute emergency, should be granted a period for reflection within which she can still opt for her child and how long such period should be, is dealt with differently from province to province. Upper Austrian legislation, for example, provides a 14-day period; Lower Austrian legislation an 8-week period. Viennese legislation seems to grant no period for reflection at all. This is unsatisfactory and cannot be objectively justified.

The 'anonymous birth' option raises a number of sensitive and difficult questions which were also discussed within a parliamentary committee of inquiry on September 22, 2000 (III-65 of the collection of exhibits to the protocols of the Austrian National Council, 21<sup>st</sup> legislative period). The protection of the child's and the mother's life and health must be weighed against the child's right to know its parents.

On the one hand, the right to respect for private and family life pursuant to Art. 8 ECHR also includes the child's right to know its parents. Also Art. 7 para. 1 of the UN Convention on the Rights of the Child (Federal Law Gazette number 7/1993) protects the right of children to know their parents' identity, as far as possible. On the other hand, the mother's and the child's life and health must be protected during pregnancy and during the birth process. The 'anonymous birth' option in public hospitals is designed to prevent births without medical intervention which endanger the mother's and the child's life and health. Furthermore, this raises questions regarding the protection of further persons concerned, such as the natural father or the adoptive parents.

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Against this background, the State is obliged to provide for regulations which take adequate account of these diverging interests and create an appropriate balance between the rights at issue (see the ruling of the European Court of Human Rights, in which the Court considered the French model of the 'anonymous birth' option as compatible with Art. 8 ECHR, ruling of the European Court of Human Rights of February 13, 2003, *Odièvre vs. France* = EuGRZ 2003, p. 584).

In the Ombudsman Board's view, it is extremely serious if such complex issues, which touch fundamental rights, are regulated merely by way of decrees issued by the Austrian Ministry of Justice and dealt with differently in each province (see *Verschraegen* in *ÖJZ* 2004, p. 1). Such a basic issue as that of anonymous birth should be harmonized between all provinces and regulated by a public legal act which provides legal claims for the persons concerned. The Ombudsman Office therefore encourages the creation of a clear legislative base for the 'anonymous birth' option.

In the present case, the Ombudsman Board did not recognize the complaint as justified, because the complainant had been informed about the consequences of an anonymous birth and been granted sufficient time to revise her decision and to not abandon the child.

In her statement dated April 7, 2006, the Minister of Justice set out that she shared the general concerns ventilated by the Ombudsman Board in its review and announced to promote the unification of the relevant legislation and to examine the need for legislative measures.

The Ombudsman Board welcomes this announcement and hopes that the issue will soon be regulated by law. As another case in connection with an anonymous birth shows, a number of central issues have yet to be decided politically. In that case (VA NÖ/449-SOZ/06), a father-to-be assuming that his former partner would make or has made use of the 'anonymous birth' option with respect to their child turned to the Ombudsman Board for help in connection with the establishment of his paternity and the protection of his rights as a father. There is no legislation on that specific issue.



### **2.9.3 Respect for the religious background of children in the case of adoption or foster care (VA W/780-SOZ/05) (Art. 20 CRC)**

*Ms. N.N. converted to Islam a few years ago; therefore, also her three-year old son became a Muslim. Due to the difficult situation and illness of the mother, he was placed in foster care with a Catholic family when he was six years old. Before that, he had been taken care of in crisis intervention centres on several occasions.*

*The Public Health Office asked Ms. N.N. whether she would agree to her son's conversion to Catholicism. Her son is fully integrated in the village community and wants to actively participate in the Roman-Catholic ceremonies. He said clearly that he wanted to be baptised. Ms. N.N. explained to the Public Health Office that she could not give her consent, in particular because such consent would lead to her expulsion from the Islamic Religious Community. Since it was the minor's express wish to be baptised pursuant to Roman-Catholic rite and to not wait until he has completed his fourteenth year of age, when no consent on the part of the parents is required, the youth welfare agency decided to turn to the competent court on this sensitive issue and filed a respective petition.*

*Despite continued concerns of the child's mother, the Ombudsman Board, after considering all aspects, did not recognise the complaint as justified, but turned to the City Administration Head Office with the question to what extent the religious background of children is taken into account when selecting foster or adoptive parents.*

The City Administration Head Office informed the Ombudsman Board in its statement of February 28, 2006 that efforts are made to take the religious, ethnic, cultural and linguistic background of children duly into account. Since, in most cases only Austrian families take on tasks as adoptive or foster parents who mostly belong to the Catholic or Protestant denomination or have no denomination, there is a lack of families with the same religious, ethnic, cultural and linguistic background. However, the authorities have been instructed to ensure that the selected adoptive and foster parents are unbiased to the different cultures and denominations and that they show the children placed in their care the family background of their original families without prejudice.

Art. 20 of the UN Convention on the Rights of the Child provides the obligation to take the desired continuity in the child's education as well as the ethnic, religious, cultural and linguistic background of the child duly into account when selecting a foster or adoptive family.

Knowledge of one's own background including the protection of one's religious background and identity is an elementary need of every human being. This must be taken into account also when selecting a foster or adoptive family. It is clear that the various interests in issue have to be balanced and fulfilled as far as possible: on the one hand, the interests of the natural parents and the child in protection of their religious background, on the other hand the child's interest in being integrated into the community of his foster or adoptive family.

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Therefore, a family with the same denomination will be preferred in the selection process of a foster or adoptive family, where possible. Where this is not possible, it must be ensured that also in a foster or adoptive family belonging to another denomination the religious background of a child is adequately taken into account

### 3 Action to combat discrimination

#### 3.1 Discrimination on the ground of sex

##### **Excerpt from the 23<sup>rd</sup>/24<sup>th</sup>/25<sup>th</sup> report of the Ombudsman Board to the State Parliament of Styria (2003-2005)**

##### **3.1.1 First three candidates on the list are women - fourth candidate on the list is a man and gets the job (VA ST/116-LAD/02)**

*In November 2001, the Municipality of Aibl invited applications for the post of a town clerk. Ms. N.N.'s application for that post was ranked first. However, the fourth-ranked Mr. X obtained the position.*

The Ombudsman Board reviewed the case and determined that the Municipality of Aibl had been employing four men and one woman at the time the vacancy had been advertised so that pursuant to Sect. 34 of the *Landes-Gleichbehandlungsgesetz* (Styrian Act on Equal Treatment for Men and Women in the Public Service) a woman would have had to be appointed. This fact had been known to the members of the municipal council. Although there had been no objective reasons for considering Mr. X.X. as better qualified for municipal service than the complainant, the municipal council decided to appoint him. In doing so, the municipal council violated the prohibition of discrimination laid down in Sect. 3 para. 1 sub-para. 1 and the obligation to promote women's careers in the public service laid down in Sect. 34 para 1 of the Act on Equal Treatment for Men and Women in the Public Service of Styria.

It appears to the Ombudsman Board that the municipal council assumed to be entitled to disregard the results of the admission procedure and the provisions of the Styrian Act on Equal Treatment for Men and Women in the Public Service. Instead of correctly applying this Act, the municipal council has decided arbitrarily and simply ignored binding legislation. By this approach, which may be equated with lawlessness, the complainant's constitutionally granted right to equality before the law was infringed.

Although these grievances had been established by the Equal Opportunities Commission of the province of Styria and by the Styrian State government, the Municipality of Aibl failed to offer acceptable financial compensation to the complainant pursuant to Sect. 10 of the Styrian Act on Equal Treatment for Men and Women in the Public Service so that she had

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to take legal action. The lawyers representing the Municipality of Aibl in the proceedings before the Landesgericht für Zivilrechtssachen Graz (Regional Civil Court Graz) even made the comparably low amount of €4,000.00 offered as damages conditional on the withdrawal of the complaint lodged with the Ombudsman Board. This attempt to 'redeem' a right of complaint granted by the Constitution is unique in the more than 25-year history of the Ombudsman Board. According to the Ombudsman Board, such approach, which was rightly rejected by the complainant, is simply unacceptable in a democratic state based on the rule of law and must therefore be fully rejected.

The Ombudsman therefore **established** that the violation of Sects. 3 para. 1 subpara. 1 and 34 para 1 of the Styrian Act on Equal Treatment for Men and Women in the Public Service by the Municipality of Aibl and the claim to make an out-of-court arrangement conditional upon the withdrawal of the complaint lodged with the Ombudsman Board by Ms. L. amount to a **grievance** in the public administrative system. At the same time, the State government of Styria or its member being competent pursuant to the rules of procedure has been recommended to ensure that Ms. L. is awarded adequate damages without delay pursuant to Sect. 10 of the Act on Equal Treatment for Men and Women in the Public Service of the province of Styria and to ensure by supervisory action that the Act on Equal Treatment for Men and Women in the Public Service of the province of Styria is complied with by the municipalities when employing new staff.

The Ombudsman Board hopes that on the basis of this **recommendation** heightened importance will be attached in the future to compliance with the Act on Equal Treatment for Men and Women in the Public Service of the province of Styria, in particular at municipality level, so that the objectives of this Act can actually be fully achieved.

The fact that the case was broadcast in the ORF (Austrian Broadcasting Company) programme 'Equal Rights for Everyone' and the open criticism expressed by the Ombudsman Board, which evoked considerable debate in the media, should at the same time encourage all women to fight against work-related discrimination even if it is difficult for individual persons to publicly resist staffing decisions of local government. Although legislation does not provide any obligation to recruit applicants discriminated on account of sex, the obligation to pay damages should effectively compensate them for any discrimination suffered in this respect.

After the case had been broadcast, the Municipality of Aibl made a new offer which the complainant accepted. The Municipality of Aibl paid € 4,000 to Ms. X.X. and agreed to also bear the lawyers' fees and the costs of proceedings. The complainant accepted the offer and established a social aid fund with this amount designed to help local families in need.

### 3.1.2 Congratulations only to male Olympic athletes? (VA BD/8-BKA/06)

*Mr. N.N. filed a complaint with the Ombudsman Board regarding an advertisement of the Federal Government in the print media in which it congratulated 'the successful red-white-red Olympioniken' for their golden, silver and bronze medals'. In the absence of any information, the complainant considered this advertisement in daily newspapers as hidden advertising paid from the national budget.*

The Ombudsman Board started reviewing the case relating to the Federal Chancellor's Office on March 31, 2006 and referred once more to the recommendation of the Public Audit Office according to which binding guidelines for the public relations of the Federal Government and its members should be established (see **27<sup>th</sup> Report of the Ombudsman Board to the National Council and the Federal Council**, page 27).

In practical terms, the Ombudsman Board pointed out also the need for a gender-sensitive use of language for every form of information provided by the government. The term *Olympionike* used in the advertisement at issue linguistically clearly refers to male participants in Olympic Games; therefore, male and female linguists **recommend** to use the term *Olympionikin*, *Olympionikinnen* for female athletes. Apart from the name and the 4-year intervals, such sporting events have nothing in common with the competitions staged in ancient Olympia in which exclusively men were allowed to participate.

Language and society are in permanent interaction. On the one hand, language reflects reality, social standards and values. On the other hand, language also creates reality, because the ideologies and ideals conveyed by it affect the thinking and actions of people.

Point 10 'Linguistic Equality of Men and Women' of the 'Legistic Guidelines 1990', issued by the Federal Chancellery, provides the following: *'Any differentiation between men and women not based on objective grounds shall be avoided in legislation. Formulations shall be used which apply to both men and women.'*

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The generic masculine is still perceived as neutral and universal, unfortunately also by public authorities. As times change, also social changes must be taken into account. Today many women hold posts which have been held by men only for decades. Nevertheless, masculine terms are still being used for these posts, either in writing or orally. This increases women's need to make themselves visible and heard through language.

The *Bundesministerin für Soziale Sicherheit, Generationen und Konsumentenschutz* (Federal Minister of Social Security, Generations and Consumer Protection) called on the members of the Federal Government in a speech made before the Council of Ministers (GZ 147.310/5-SG III/3/2001) to give a sign and initiate and implement gender-sensitive formulations in laws, ordinances, regulations, forms etc. in all departments. There is nothing to add to that: In a society that is committed to equality between men and women both sexes must be reflected also in language. Equal rights for both sexes are taken for granted today. Language should reflect that and avoid obsolete values, clichés and (conscious/unconscious) discrimination. Women want no longer be merely included in masculine formulations, but be reflected in language.

In his statement of May 18, 2006, Austria's Federal Chancellor set out, inter alia, the following: *'The term ,Olympionike' as used in the advertisements at issue naturally included both the male and female athletes and was used in a gender-neutral manner merely for reasons of fluidity of language'*.

The sport department of the Federal Chancellery has been unimpressed by the criticism voiced by the Ombudsman Board. For example, it could be read on the homepage of the Federal Chancellery on 12.6.2006 that 'the 'Olympioniken' were honoured by the Federal President and the Federal Chancellor'; a few lines further in the text one learns that double Olympic champion Michaela Dorfmeister and multiple Paralympics champion Sabine Gasteiger thanked the Federal President and the Federal Chancellor for the awards they had received themselves 'on behalf of all honoured *Olympioniken*'.

### 3.2 Discrimination on account of nationality or ethnicity

#### 3.2.1 Discriminatory Limitation of Family Allowance for Non-Austrian Parents (VA BD/35-JF/05, VA BD/31-JF/06)

*Two non-Austrian couples filed a complaint with the Ombudsman Board in which they stated that, unlike Austrian citizens, they had been granted family allowance only for a short period of time. In the first case, the father is an Austrian citizen, the mother a Colombian citizen, the couple married 6 years ago and has lived in Austria since then; also their son was born in Austria. In the second case, the mother and the father originated from South Tyrol and are therefore citizens of the European Union who have lived, completed their university studies and worked in Austria. Both children were born in Austria. In both cases, the family allowance was granted only for short periods - from a few months up to three years - without explanation. Austrian citizens, however, receive family allowance on a regular basis and without limitation until the child's eighteenth birthday.*

*According to the complainants' view - which was not contested by the Federal Ministry - they were requested to submit documents from the competent tax authority several times, on the ground that the complainants are not Austrian citizens and the authority therefore entitled to request the submission of relevant documents, whenever necessary. Quote: 'There is no law that prevents us from doing that.'*

In 1972, Austria ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD). This Convention commits Austria and its authorities 'to prohibit and to eliminate all forms of racial discrimination and to provide for effective remedies against acts of racial discrimination'.

The European Convention on Human Rights and Fundamental Freedoms, enjoying constitutional rank in Austria, prohibits discrimination on the basis of 'race' or national origin.

The *BVG betreffend das Verbot rassischer Diskriminierung* (Federal Constitutional Law Concerning the Prohibition of Racial Discrimination) prohibits all kinds of 'racial' discrimination. Pursuant to the recent case law of the Austrian Constitutional Court this Law prohibits legislation and execution to make differentiations between foreigners on no objective grounds. A difference in treatment of foreigners is only admissible if it is based on objective grounds and not arbitrary (Berka, Art. 7 B-VG (Federal Constitutional Law) in Rill/Schäffer (editors), Bundesverfassungsrecht Kommentar, marginal number 24 with further reference to the case law).

Art. 12 of the EC Treaty prohibits any discrimination of EU citizens on the ground of nationality. With regard to welfare law, Art. 3 of Regulation (EEC) number 1408/71 provides that persons resident in the territory of one of the Member States to whom this Regulation ap-

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plies are subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State. This prohibition of discrimination applies in particular to family benefits.

In the course of the investigation procedure of the Ombudsman Board, the competent *Bundesministerin für Soziale Sicherheit, Generationen und Konsumentenschutz* (Federal Minister of Social Security, Generations and Consumer Protection) justified the several short periods for which family allowance was granted in one case as follows: *'With respect to the circumstances of the case (entry of the child's mother in August 1999, birth of the child in April 2000), links of the child's mother with the original family broken due to the big distance between Austria and Colombia, adjustment to a totally different cultural environment) it could not be excluded beforehand that Ms ... - albeit not definitely - leaves the country and returns to her family.'*

In the Ombudsman Board's view, this explanation can by no means justify the limitation of the claim to family allowance, since it is based on mere speculations which do not justify a difference in treatment between foreign and Austrian recipients of family allowance. There are and there were no circumstances indicating that the family would leave Austria and the conditions for the receipt of family allowance be lifted. The second complaint concerned parents who were both Italian citizens and therefore also citizens of the European Union and who had been living in Austria without interruption for 19 and 15 years, respectively. Their residence is clearly 'consolidated' and does not justify any difference in treatment compared with Austrian recipients of family allowance.

Only if there are objective grounds which indicate that it is much more likely that the conditions for receiving family allowance are lifted – e.g. in the case of a temporary residence permit for Austria – a limitation would be objectively justified. Discretionary or too tight review periods set by the competent authority in respect of family allowances must therefore be considered as arbitrary; they infringe the right to equal treatment of foreign recipients of family allowance under Austrian constitutional and, in the case of citizens of the European Union, also under European Community law.

In its meeting of October 13, 2006, the Ombudsman Board therefore agreed by unanimity that the limitations of the claims to family allowance represent **grievances** in the administration of public affairs in both cases. The uncontested statement of the competent secretary of the tax authority that there is no law prohibiting the authority to require non-Austrian



recipients of family allowance to submit supporting documents on a regular basis represents another **grievance**.

In order to remedy that grievance, the Ombudsman Board **recommended** the authority to ensure by issuing instructions that the review periods for all family allowance procedures are determined in an appropriate manner to prevent any unjustified difference in treatment between Austrian citizens and citizens of the European Union on the one and third-country citizens on the other hand. In a case where family allowance was granted on a limited basis, the Ombudsman Board recommended that the authority give objective reasons for its decision.

Furthermore, it was recommended to improve information for foreign petitioners in cases where additional documents have to be submitted and to prompt staff of the tax authority - benefit agency to refrain from statements that might be considered as discrimination on account of nationality.

In this connection, the Federal Ministry informed the Ombudsman Board that in both cases the tax authorities would be instructed to set limitations as in comparable cases involving only Austrian citizens.

Furthermore, the Federal Minister informed the Ombudsman Board that the tax authorities had been instructed, on the basis of the new legal situation in force since the beginning of 2006, to grant the right to family allowance to holders of a residence card (*NAG-Karte*), which documents the legal residence of foreign nationals, for the time of validity of that residence card and to limit the claim to family allowance accordingly.

### **3.2.2 Family benefits for children of third-country nationals dependent on duration of proceedings before the authority – remedied by Amending Act, Federal Law Gazette I number 168/2006 (VA BD/951-SV/06)**

*Ms. N.N., staff member of an advisory centre of the Caritas, applied to the Ombudsman Board in August 2006, because the child care benefit for children, born in Austria, of third-country women holding valid residence permits had not been granted automatically from the birth of the child, but only from the time at which a valid residence permit had been issued for the newborn. The family allowances had not been paid out retroactively from the birth of the children. The same problem arises in connection with the payment of the family allowance.*

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With this problem, which caused a great deal of upset and was therefore the focus of public debate, the Ombudsman Board turned to the Bundesministerin für Soziale Sicherheit, Generationen und Konsumentenschutz (Federal Minister of Social Security, Generations and Consumer Protection).

Sect. 2 para. 1 subpara. 5 of the *Kinderbetreuungsgeldgesetz* (KBGG - Austrian Law on Childcare Allowance) provides, inter alia, that the respective parent and the child legally reside in Austria pursuant to Sects. 8 and 9 NAG (*Niederlassungs- und Aufenthaltsgesetz* - Austrian Settlement and Residence Act) and that, pursuant to the wording of the legal bases (Sect. 20 para. 2 in connection with Sect. 21 paras. 2 and 4 NAG), the residence is legal not earlier than from the date of issuance of the residence permit. Apparently, the legislator (NAG) has knowingly taken the risk that a child born in Austria, whose mother is a third-country national with a valid residence permit, is firstly, i.e. until the issuance of the respective residence permit, born in 'illegality'. According to the Ombudsman Board, this does, however, not mean that it was necessary to apply the judgments and evaluations under aliens' legislation automatically to the sphere of childcare allowance. In the light of the 'principle of social application of the law' and pursuant to the purpose of the benefits claimed, Sect. 2 para. 1 subpara. 5 of the Austrian Law on Childcare Allowance could have been interpreted as meaning that childcare allowance for foreign children born in Austria may be granted retroactively from their birth. This was, however, expressly excluded by the decree GZ BMSG-524410/0059-V/3/2006.

Meanwhile, this formally admissible, but extremely unsatisfactory application of the law has been remedied by a legislative amendment. The Austrian Law on Childcare Allowance and the *Familienlastenausgleichsgesetz* 1967 (Austrian Family Relief Act) have been amended by Federal Law Gazette 168 I 2006, which has come into force with retroactive effect from July 1, 2006. This amendment provides that children of foreigners born after a residence permit pursuant to the Austrian Settlement and Residence Act has been granted to their parents or children of asylum seekers are entitled to family allowance and childcare allowance subsequent to maternity allowance if the children's right of residence is finally proved. Thus, delays in the issuance of residence cards will not result in a definitive loss of claims to family benefits in the future.

### 3.2.3 Efficient prosecution of discriminatory job and housing advertisements? (VA W/356-LAD/06)

ZARA (*ZARA is a team of professionals specialized in assisting people individually in the process of resolving racist experiences; note of the translator*) has filed more than one hundred complaints with respect to discriminatory job and housing advertisements in Austrian daily newspapers or on Internet portals with the competent Municipal District Offices and sharply criticised advertisements of media enterprises and potential employers. Example: 'Salesperson for shoe salon wanted. Only Austrian.' OR: 'Only Austrian citizens'. ZARA turned to the Ombudsman Board with the request to review the advertisements.

Both Sect. 24 *Gleichbehandlungsgesetz* (Austrian Federal Equal Treatment Act) and Art. IX para. 1 subpara. 3 EGVG (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen* - Act on the Introduction of the Administrative Procedure Act) provide that discriminatory job and/or housing advertisements are to be penalized by the district administrative authorities.

Pursuant to Sect. 24 *Gleichbehandlungsgesetz* (Austrian Federal Equal Treatment Act), Federal Law Gazette number 66/2004, employers and/or employment agencies who advertise jobs in a discriminatory way are liable to pay fines of up to € 360,- to be imposed by the district administrative authorities upon request of the job applicant or the Ombudsperson for Equal Opportunities. The competent authority informed ZARA that complaints lodged on the basis of this provision cannot be processed.

The Ombudsman reviewed the case and came to the conclusion that ZARA had no right to apply for sanctions resulting from discriminatory job advertisements under the Federal Equal Treatment Act. The federal legislature has described exhaustibly the number of persons and bodies entitled to apply for a review of discriminatory acts and has thus also determined that petitions of third parties based on Sect. 24 of the Federal Equal Treatment Act are irrelevant. However, the Municipal District Offices have to examine *ex officio* alleged violations of the prohibition of discrimination pursuant to Art. IX para. 1 subpara. 3 EGVG (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen* - Act on the Introduction of the Administrative Procedure Act). The Ombudsman Board has therefore **ex officio** initiated a investigation procedure in which it examined the discriminatory acts at issue.

Pursuant to Art. IX para. 1 subpara. 3 EGVG 'persons who unjustifiably discriminate against persons or restricting their access to public places or services on the grounds of their race, colour, national or ethnic origin, religion or belief or disability are liable to pay fines of up to ATS 15,000 to be imposed by the district administrative authorities.

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According to the information available to the Ombudsman Board so far, 122 complaints with respect to alleged violations of Art. IX para. 1 subpara. 3 EGVG were filed between January 2, 2005 and mid-September 2006. Five cases were concluded, without possibility of appeal, by the imposition of fines by October 2006. In one case, no fine was imposed. A few other pending cases were referred to other Municipal District Offices for jurisdiction reasons. 107 cases were closed; the Ombudsman Board will clarify by inspection of the relevant administrative records, which were transmitted on January 17, 2007, whether this is justified or justifiable.

With respect to the mere warning provided as the mildest sanction in the Federal Equal Treatment Act, the Ombudsman Board expressed doubts as to the effective execution of this provision. There is no nation-wide database or review possibility in Austria providing information about whether a warning has been addressed to an employer or an enterprise before. It also seems doubtful whether a mere warning is in conformity with the obligation to impose dissuasive and effective sanctions provided in Art. 6 para. 2 of Directive 76/207 EEC, as amended by Directive 2002/73/EC (see *Sturm*, Richtlinienumsetzung im neuen Gleichbehandlungsgesetz und Gleichbehandlungskommissions- / Gleichbehandlungs-anwaltschaftsgesetz, RdA 2004, pp. 574 et seq., FN 30).

### 3.3 Discrimination on the ground of illness or disability

#### 3.3.1 Prohibition to use public transport in the case of compulsorily notifiable disease – Amending Act notified (VA BD/30-GU/05)

*In its 29<sup>th</sup> Report to the National Council and the Federal Council the Ombudsman Board reported about its official review of the prohibition to use public transport in the case of compulsorily notifiable disease and pointed out that legislative action is required in this connection. Not only the Vienna Public Transport Department and the 'Verkehrsbund Ost Region' (a union of all Viennese and peripheral public lines that controls the rates and time tables) generally exclude persons suffering from a compulsorily notifiable contagious disease from transportation - irrespective of whether there is a danger for other users of the transport services offered.*

In the course of its **official** review, the Ombudsman Board compared and systematically reviewed the relevant legal bases for the transportation of persons. Furthermore, it obtained a medical opinion to clarify which diseases bear an actual risk of contagion in public transport vehicles. On the basis of these investigations, the Ombudsman Board concluded that only open pulmonary tuberculosis bears a direct risk of contagion for other persons in pub-

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lic transport vehicles. In the case of all other existing and compulsorily notifiable infectious diseases there is no direct risk potential in means of public transport, taxis, leased cars etc. The Ombudsman Board is therefore of the opinion that an exclusion of all these persons from carriage in public service vehicles on the basis of legal provisions and/or transport conditions constitutes a discrimination on the basis of a disease. The Ombudsman Office addressed the competent Federal Minister for Transport, Innovation and Technology and recommended an amendment of the transport conditions.

Meanwhile, the Federal Minister for Transport, Innovation and Technology has announced that Sect. 3 of the *Kraftfahrliniengesetz-Durchführungsverordnung* (Implementing Regulation to the Federal Law on the Scheduled Transportation of Persons with Motor Vehicles) will be amended as meaning that a person may be excluded from transportation only if pursuant to federal legislation (*Epidemiegesetz 1950* - Law on Epidemic Diseases of 1950 including regulations) there is a risk of contagion.

Furthermore, the Ombudsman Board informed the transport undertakings participating in the public transport association about its efforts and requested them to apply for an amendment of any deviating transport conditions within the meaning of the above-mentioned regulation.

At the same time, also 'Wiener Linien' (Vienna Public Transport Department) declared that it would be appropriate to bring the wording of their transport conditions into line with the suggestions of the Ombudsman Board. They promised the Ombudsman Board to bring up this issue also within the 'Verkehrsbund Ost Region' (a union of all Viennese and peripheral public lines that controls the rates and time tables). As at this report's press date, no results of these initiatives have been yet available to the Ombudsman Board.

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### 3.3.2 Sign language interpreter for deaf people as requirement for a fair trial (VA BD/1100-SV/06)

*Ms. N.N. is a social worker who turned to the Ombudsman Board with the following problem: Her client, Mr. N.N., is a disabled person who was dismissed by his employer. The employer had filed an application for approval of the planned dismissal with the Bundessozialamt (Federal Social Welfare Office), Vienna Office, pursuant to Sect. 8 Behinderteneinstellungsgesetz (Federal Act on Hiring Disabled Persons). In these proceedings the employee has party status under the relevant legislation. In the proceedings before the Commission on Persons with Disabilities, her client had been granted permission to be accompanied by a staff member/'labour trainer' of WITAF (Wiener Taubstummen-Fürsorge-Verband - a Viennese welfare association that provides help to deaf people), but had not been given adequate opportunity to present his view through the assistance of a sign language interpreter.*

In its statement to the Ombudsman Board, the *Bundessozialamt* (Federal Social Welfare Office), Vienna Office, pointed out that according to constant administrative practice the disabled has to be provided with the services of a sign language interpreter in oral hearings about his extended employment protection pursuant to Sect. 8 *Behinderteneinstellungsgesetz* (Federal Act on Hiring Disabled Persons). In the proceedings at issue, the invited interpreter cancelled his appointment at short notice due to illness. The oral hearing was conducted in the presence of Mr. N.N., his companion in life, his 'labour trainer' which acts as contact person in the case of problems and conflicts at work and her colleague trained in sign language. The chair of the hearing was aware of the unsatisfactory situation, decided, however, against the adjournment of the hearing – seemingly in the employee's interest – and for the immediate conduct of settlement talks.

The review conducted by the Ombudsman Board was used as a reason in talks between the *Bundessozialamt* (Federal Social Welfare Office) and WITAF as responsible 'labour training' institution to make a clear distinction of the service at issue and labour proceedings pursuant to Sect. 8 *Behinderteneinstellungsgesetz* (Federal Act on Hiring Disabled Persons). In the future, it must be ensured that deaf persons will be provided with the services of a qualified sign language interpreter. In the case of cancellations at short notice, the respective hearing must be adjourned.

A basic element in every fair trial is the active participation and the opportunity of persons concerned, who are not the object but subject of the proceedings, to state their case. The 'right to good administration' pursuant to Article 41 of the Charter of Fundamental Rights of the European Union therefore includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. It would not comply

with the principle of a 'fair trial' to not provide persons who do not understand the language of the proceedings with the services of an interpreter (see *Hauer/ Leukauf*, Handbuch des österreichischen Verwaltungsverfahrens, 2003, p. 430).

Accordingly, Sect. 39 AVG (*Allgemeines Verwaltungsverfahrensgesetz* - General Administrative Procedure Act) provides that a party or a person to be heard who does not understand German, is deaf-mute, deaf or mute shall be provided with the services of an interpreter, where necessary. The tasks of a 'labour trainer' should be clearly distinguished from those of a qualified interpreter. Therefore, qualified sign language interpreters must be appointed in proceedings which directly affect the rights of deaf or hard of hearing people.

### 3.3.3 Barrier-free access to open-air metro (VA BD/99-V/06)

*Pursuant to Art. 7 para. 1 B-VG (Bundesverfassungsgesetz - Austrian Federal Constitution) the Republic of Austria commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life. A number of measures must be taken to ensure the effectiveness of the respective constitutional provisions. For many people the use of public transport is an important sphere of their everyday lives. The Bundes-Behindertengleichstellungsgesetz (Federal Act on Equal Treatment of Disabled Persons) contains the obligation to make all trains barrier-free accessible until 2016.*

*The open-air metro in the Vienna metropolitan area has become an essential factor for the mobility of many people. Unfortunately, only some open-air metro stations provide an easy train access for people with disabilities. Many open-air metro stations on the main route in Vienna, like Traisengasse, Südbahnhof, Südtiroler Platz und Matzleinsdorferplatz, do not provide barrier-free access for people with disabilities. The same applies to important stations like Gänserndorf or Korneuburg in the wider metropolitan area of Vienna.*

The Ombudsman Board therefore referred the problem **ex officio** to ÖBB (Österreichische Bundesbahnen - Austrian Federal Railways) which confirmed in their statement of March 10, 2006 that the Vienna open-air metro network plays an important role in public transport and that attempts were made to provide barrier-free access to trains for people with a health disability in all main stations of the open-air metro network in Vienna and in provincial and district capitals. ÖBB (Österreichische Bundesbahnen - Austrian Federal Railways) hope that the participating provinces and municipalities will make adequate contributions to finance the project. ÖBB (Österreichische Bundesbahnen - Austrian Federal Railways) announced that the stations specifically mentioned by the Ombudsman Board will be integrated in conversion concepts within the Vienna Central Station project. Also the stations in the district capitals Gänserndorf and Korneuburg will be provided with barrier-free access to trains after the necessary funds have been provided.



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On December 7, 2006, ÖBB (*Österreichische Bundesbahnen* - Austrian Federal Railways) submitted a phased plan to be drawn up pursuant to Sect. 19 para. 10 Bundes-Behindertengleichstellungsgesetz (Federal Act on Equal Treatment of Disabled Persons), which determines the barrier-free design of the infrastructure and sets clear targets. As a second step, barriers, which people who are reduced in their mobility are still facing, will be removed in local and long-distance transport, intercity buses operated by Postbus AG, in stations and on the homepage of ÖBB in 3-year steps until 2015.

The newly adopted Bundes-Behindertengleichstellungsgesetz (Federal Act on Equal Treatment of Disabled Persons) contains the obligation to make all trains barrier-free accessible until 2016. Against this background and in view of the right of people with a disability of health to equally and independently participate in all spheres of life, as laid down by Art. 7 para. 1 B-VG (*Bundesverfassungsgesetz* - Austrian Federal Constitution), which is formulated as a '*Staatszielbestimmung*' (a provision defining the pertinent aims of the State), the Ombudsman Board calls for a fast implementation of barrier-free access and participation in public transport for people with disabilities.

### **3.3.4 Ticket-vending machines of ÖBB (Austrian Federal Railways) – Modernisation at the expense of older and disabled persons (VA BD/29-V/06)**

*In many train stations in Austria, tickets can only be bought from ticket-vending machines before the journey. Mr. N.N.'s vision is substantially impaired. He has great difficulties in buying tickets from ticket-vending machines. He cannot buy tickets unassisted. If no other passenger helps him/her, he/she is forced to travel without a valid ticket and to pay the higher fare. Mr. N.N. and many other old people turned with this problem also to the Ombudsman Board.*

The technical environment of today goes beyond the capabilities of elderly people. In addition, ticket-vending machines are sometimes not equally accessible for everyone (e.g. people whose vision is impaired, wheelchair users, people with learning disabilities etc.). The Ombudsman Board turned to ÖBB (Austrian Federal Railways) to achieve an improvement also for persons who are having difficulties to cope with modernisation. The Ombudsman Board rightly considers that for economic reasons it is inappropriate to use staff in all ÖBB stations who are responsible for the advance sale of tickets. Therefore the Ombudsman Board agreed with the proposal of the *Kriegsopfer- und Behindertenverband* (Association of War Victims and Disabled Persons) to expand existing distribution channels and to sell



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tickets e.g. also via tobacconists or lottery collectors, as it is being done partly by the sale of 'Streifenkarten' (tickets for multiple journeys) of 'Wiener Linien' (Vienna Public Transport Department).

In its statement to this proposal, ÖBB (Austrian Federal Railways) informed the Ombudsman Board that the proposal could not be put into practice, because the ticket-vending machines would already offer a high level of user friendliness. It also pointed out that training in the use of these machines would be offered by ÖBB staff. The Ombudsman was given the assurance that no additional fare would be charged if unaccompanied people with a disability of health buy their tickets from the conductor.

The statement issued by ÖBB is unsatisfactory for us. Therefore, the Ombudsman Board will continue its work with respect to customer-friendly and user-friendly ticket-vending machines also for people with disabilities or reduced abilities.

### **3.3.5 Trains for people with special needs (VA BD/249-V/06)**

*Mr. N.N. suffers from incontinence and hepatitis C and has to travel from Styria to the Allgemeines Krankenhaus Wien (AKH – Vienna General Hospital) very often. For this purpose, he often takes an Austrian Federal Railways train to get there. Most trains have compartments for passengers with disabilities. However, they can be fully looked into from outside and only very few have curtains. Due to his incontinence, the complainant must often change special trousers and/or special padding in the compartment, since the train toilets offer too little space. It would ease the situation considerably if at least curtains could be installed in compartments for disabled passengers, since the current situation is unbearable for him and other passengers.*

ÖBB (Austrian Federal Railways) informed the Ombudsman Board in its statement that it was not possible to adjust compartments for disabled persons to the needs of persons suffering from incontinence by fitting hygiene facilities. Curtains would have to be removed from all compartment coaches for hygienic reasons. Between Vienna and Graz trains would operate which had wheelchair carriages with sufficiently large toilets. For the time being, ÖBB (Austrian Federal Railways) operate a total of 32 barrier-free and/or user-friendly wheelchair carriages on all routes. The stations Graz Hauptbahnhof and Wien Südbahnhof were equipped with barrier-free toilets; the increase of their offers for people with disabilities or diseases was very much in progress.

Sometimes, they seem to lack creativity to fulfil simple requests, e.g. by installing easily to fix and easily removable curtains.

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### **3.3.6 No fare reduction for invalidity pensioners (VA BD/277-V/06, 581-SV/06)**

*Several pensioners turned to the Ombudsman Board, since they received invalidity pensions or old-age pensions, but were not entitled to reductions when using public transport.*

The Ombudsman Board has advocated the introduction of public transport fare reductions of public transport for people receiving pensions due to reduced working capacity for a long time, since persons who are forced to give up their profession for health reasons are in most cases financially worse off, despite receiving pension benefits, than old-age pensioners who are entitled to fare reductions (see last **report of the Ombudsman Board to the National Council and the Federal Council in 2005**, p. 362).

The non-granting of fare reductions to invalidity pensioners is even less understandable if they had been granted a fare reduction pursuant to Sect. 48 para 5 BBG (*Bundesbehindertengesetz* - Federal Act on Incapacitated Persons) before they received the invalidity pension and lost it after their retirement. Sect. 48 para. 5 BBG provides a fare reduction for protected disabled people within the meaning of the BEinstG (*Behinderteneinstellungsgesetz* - Federal Act on Hiring Disabled Persons) from a degree of disability of at least 70%. By receiving an invalidity pension the pensioner loses his protection pursuant to the BEinstG and therefore also his entitlement to a fare reduction pursuant to Sect. 48 para. 5 of that Act.

According to the Bundesministerin für Soziale Sicherheit, Generationen und Konsumentenschutz (Federal Minister of Social Security, Generations and Consumer Protection) the competent ministries are currently negotiating the financial coverage for fare reductions for disability or invalidity pensioners. The outcome of these negotiations is not foreseeable for the Ombudsman Board.

### **3.3.7 Fragmented procedures for people with disabilities**

The Ombudsman Board has pointed out for many years that fragmented procedures pose a difficulty for people with disabilities and their relatives (see the **29<sup>th</sup> Report of the Ombudsman Board to the National Council and the Federal Council** in 2005, p. 366).

Also in that reporting year, the Ombudsman Board was faced with many complaints of persons concerned. It provided help in connection with purchases or adaptations (see Case

Section, Chapter on People with Disabilities and Austrian laws on protection for special victims, p. 212, point 10.1.3, German version).

### 3.4 Discrimination on the ground of age

#### 3.4.1 **Nobody responsible for alleged discrimination on the ground of age against a bank official working in a hived-off undertaking? (VA BD/356-V/06)**

*Ms. N.N. is 57 years old and has been working as a bank official for BAWAG-PSK for 38 years. The complainant was informed by her superior one day that she would be transferred from the following week onwards to a 'staff development pool' and therefore not perform fixed duties at a specific place, but work as a 'reserve pool employee' at different places, depending on the respective requirements and in the case of capacity bottlenecks. BAWAG-PSK stated that the measure was justified, because headquarters staff had to be cut. The complainant was chosen, because she was the oldest staff member in her working area. Later, she heard that three other colleagues, who were the oldest staff members of their working areas, were chosen to be redeployed to that pool. Neither her superior nor the works council had been informed about that measure.*

*As the complainant did not want to agree to her transfer, she was faced with the alternative of accepting the measure or agreeing to a reduction of her weekly working hours and pay to 60% and of retiring as soon as possible. After the employer's initial refusal, she was provided with the documents she had requested in this connection. They included, among others, an 'application for a reduction in weekly working hours' and a draft of the decision granting the application.*

*Since the employer requested a reply from the complainant within a few days, she immediately turned to several members of the Federal Equal Treatment Commission, which is responsible for the public service, and to the Anwaltschaft Gleichbehandlung-Bund für Bundesbeamte (Ombudsman for Equal Treatment of Federal Officials) in the Federal Ministry of Finance. All these bodies, however, declined a treatment of her complaint on the grounds that they were not responsible for public employees working for hived-off undertakings. The complainant then turned to the Anwältin für Gleichbehandlung in der Arbeitswelt (Ombudsman for Equal Treatment in the World of Work), responsible for the private sector of commerce and industry, who also declined a treatment of her complaint on the same grounds, but then took action for the complainant without finally resolving the responsibility issue.*

In most cases of alleged discrimination, the competent bodies must take immediate action.

This also applies to the present case: The reduction in weekly working hours announced by the employer and rejected by the complainant and/or the envisaged transfer to a pool was to be implemented with immediate effect. The *Bundes-Gleichbehandlungsgesetz* (Federal Act on Equal Treatment in the Public Service) provides a range of contact points for these cases: Equal opportunities advisors act as first contact points in the individual sectors. Their

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tasks include the treatment of requests, complaints or notices. They are, in particular, entitled to immediately and directly lodge disciplinary notices with the competent civil service authority (Sect. 27 para. 4 of the Federal Act on Equal Treatment in the Public Service).

The Federal Equal Opportunities Commission of the *Bundesministerium für Gesundheit und Frauen* (Federal Ministry of Health and Women) and the other institutions established pursuant to the *Bundes-Gleichbehandlungsgesetz* (Federal Act on Equal Treatment in the Public Service) are responsible for protecting federal officials against discrimination. The complainant is a staff member of the *Österreichisches Postsparkassenamt* which is supervised by the Federal Ministry of Finance. In its statement to the Ombudsman Board, the competent department of the *Bundesministerium für Gesundheit und Frauen* (Federal Ministry of Health and Women) did not contest that Ms. N.N. had actually spoken to members of the competent Federal Equal Treatment Commission, but also stressed that no action had been taken, because no formal application had been filed. Furthermore, the following information was given about the general approach in the case problems of jurisdiction. *'If a problem of jurisdiction arises between the Equal Opportunities Commission for the Federal Public Service and the private sector – e.g. in the case of hived-off undertakings with respect to the different personnel structures – the senate discusses and decides on the jurisdiction pursuant to the respective Outsourcing Act.'* Unfortunately, the Outsourcing Act at issue is silent about the applicability of the *Bundes-Gleichbehandlungsgesetz* (Federal Act on Equal Treatment in the Public Service).

In the Ombudsman Board's view, this explanation is far from satisfactory. The provision of prompt advice and help must not fail because of questions of jurisdiction. In the present case, the complainant is an official who was assigned for service to a hived-off undertaking. She was employed under public law by the Austrian government also after the hiving-off of Postsparkasse. As a result, the equal opportunities institutions would have had jurisdiction over her case.

The Ombudsman Board stepped into the breach for the complainant, reviewed the case and came to the conclusion that the approach of the *Postsparkassenamt* as her employer had been illegal, because material procedural rules, which must be complied with in the case of transfer, had been ignored:

In each case of transfer in the interests of the service, officials must be enabled to raise objections within two weeks (Sect. 38 BDG - *Beamten dienstgesetz* - Civil Service Act).

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Since the complainant was not only employed under public law, but also assigned to a hived-off undertaking ('split employment'), she was protected against her transfer under both public service regulations and the works constitution. The latter preserves older employees against a deterioration of their situations. Sect. 105 para. 3 ArbVG (*Arbeitsverfassungsgesetz* - Labour Constitution Act) provides that older employees must be granted special protection in view of the fact that their employment has been uninterrupted and lasted for many years and that their age is expected to make their reintegration in the labour market difficult. Furthermore, transfers which result in a deterioration in the working conditions, require the approval of the works council (Sect. 101 ArbVG - *Arbeitsverfassungsgesetz* - Labour Constitution Act), which had not been obtained in advance.

In general, neither BAWAG-PSK, to which the officials of Postsparkasse were assigned for service, nor the Postsparkassenamt, which functions as civil service authority and personnel office for the outsourced officials, is entitled to discriminate people on the ground of age. Sect. 17 of the *Gleichbehandlungsgesetz* (Federal Equal Treatment Act, which applies to the private sector), Federal Law Gazette I number 66/2004, provides nobody must be discriminated, directly or indirectly, on the ground of age in connection with his/her employment. Sect. 13 *Bundes-Gleichbehandlungsgesetz* (Federal Act on Equal Treatment of Disabled Persons), Federal Law Gazette number 100/1993, as amended by Federal Law Gazette I number 65/2004, provides the same for the public service.

In the ORF (Austrian Broadcasting Company) programme 'The Ombudsman – Equal Protection for All under the Law' of December 2, 2006, the situation of Ms. N.N. was presented and discussed with a representative of the Equal Opportunities Commission, which is responsible for the private sector. The other invited representatives of the Federal Ministry of Finance or the Federal Equal Treatment Commission, which is responsible for the public service, did not take part in that discussion. On the eve of the programme, BAWAG-PSK rejected the claim of discrimination on account of age in writing. Shortly before that, however, BAWAG-PSK had informed the complainant that the envisaged measure would not be implemented and had offered her a transfer to another department. The complainant finally agreed to that measure.

Finally, we would like to point out the following in connection with this case: Under the EU discrimination directives the Member States are obliged to establish independent bodies for the protection of persons who have been subject to discrimination, which deal with com-

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plaints, review cases, give **recommendations**, carry out research on discrimination and perform proactive public relations work. The directives expressly provide that these bodies may be part of an independent institution that is responsible for the protection of human rights or the rights of individuals (e.g. Art. 13 of the EU Directive on Racism at national level; see also the **29<sup>th</sup> Report of the Ombudsman Board to the National Council and the Federal Council**, page 307). With the adoption of the 'Paris Principles' - Principles relating to the status of national institutions (GV-Res.48/134, 1993) in 1993, the United Nations established quality standards for independent, autonomous, non-judicial human rights bodies. The criterion of independence, however, does not apply to the institutions established by the Austrian laws on equality.

Both the equal opportunities commissions for the public service and the private sectors and the ombudspersons for equal opportunities are established within the Bundesministerium für Gesundheit und Frauen (Federal Ministry of Health and Women), which pays the personnel and operating expenses from its budget. This case shows how important the provision of prompt and qualified advice to persons concerned is. At present, there is only one ombudsperson responsible for the protection against discrimination in the private sector (protection against discrimination on the basis of sex excepted) in all federal government institutions. Also only one ombudsperson has been made responsible for discrimination on the ground of ethnicity, in social protection, in the residential and education sector and in other sectors in all federal government institutions. At present, both share one employee. This lack of personnel shows that there is still a long way to go to establish efficient and effective protection against discrimination.

The creation of the possibility in the Constitution to integrate the management of 'lawyers of the public', as e.g. the Equal Opportunities Advisors, into the Ombudsman Board, as provided in the Government programme for the XXIII. legislative period, is therefore to be welcomed.

### **3.4.2 Expensive bus ride within a school excursion (VA BD/97-V/05)**

*Mr. N.N. is a teacher in a gymnasium (secondary school). Within a school excursion with 15-year old pupils, each pupil had to pay the full fare of € 6.60 for a bus ride of less than 20 km, since no reduction was possible. As opposed to rail travel (Vorteilscard), no general reduction is granted to young people over 15 for rides on buses of the Austrian Federal Railways. Pupils and/or young people over 15 must pay the full adult fare on all routes, except from and to the school, on which school commuting by public transport is free.*



The Ombudsman Board has turned with this problem to both the competent *Bundesministerin für soziale Sicherheit, Generationen und Konsumentenschutz* (Federal Minister of Social Security, Generations and Consumer Protection) and to the management of the Austrian Federal Railways and managed to ensure in a first step that these issues are discussed in the negotiations with the transport companies. The outcome of these negotiations is uncertain.

### 3.5 Discrimination on the ground of social status

#### **3.5.1 Yellow paper-based healthcare voucher instead of e-card (electronic health card) for social assistance recipients – Amending Act establishes a basis for the elimination of discrimination (VA W/681-SOZ/05)**

*Mr. N. N. is currently a social assistance recipient. As social assistance recipient he is not provided with an e-card as all other benefit recipients, but a specific paper-based healthcare voucher with which he can go to the doctor's if he becomes sick. Mr. N. N. feels humiliated by having to present this garish yellow healthcare voucher at the doctor's, thereby unnecessarily showing that he is a social assistance recipient.*

The fifty-sixth amendment to the ASVG (*Allgemeines Sozialversicherungsgesetz* - General Social Insurance Act) (Federal Law Gazette I 172/1999) created the legal bases for the introduction of the e-card, which was introduced throughout Austria in 2005. The idea of the e-card was to simplify administration by electronic engineering and facilitate access to medical services for patients. The persons insured do not have to produce a paper-based healthcare voucher anymore when they go to the doctor's office. Such certificates had to be ordered from many insurers only in the event of illness. The e-card replaces the paper-based healthcare vouchers issued by the insurers.

Social assistance recipients are, however, excluded from the e-card system. They do not receive an e-card, which they can produce when at the doctor's, but, in the event of illness, a paper-based healthcare voucher which they have to produce at the doctor's office. This makes access to medical services more difficult for persons concerned in the following respects: On the one hand, they have to apply for healthcare vouchers to the social benefits agency as 'suplicants'. On the other hand, they are forced by the production of the garish yellow paper-based healthcare voucher to disclose to the public that they are social assistance recipients. As the case of Ms. N.N. shows, this is perceived as humiliating and dis-

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crimatory by people concerned and may have the effect that people do not go to the doctor's, because they do not want to disclose their financial situation.

Also the President of the Austrian Medical Association, Dr. Reiner Brettenthaler, speaks of 'social harm' inflicted upon social assistance recipients in the medical sector. This 'insensitive' approach tends to make access to medical services more difficult for a large group of approximately 20000 persons, who, in addition, have increased medical needs, as experience has shown. As a result, there is a risk that people are afraid of being looked down on because of their social status. It might, however, also be that shame and the fear of entering the doctor's office could keep them from going to the doctor's, which would run counter to the idea of solidarity (see press release of August 29, 2005 of the President of the Austrian Medical Association, Dr. Reiner Brettenthaler, on the homepage of the Austrian Medical Association).

Pursuant to Art. 14 ECHR the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as, in particular, social origin, property or other status. Likewise, Art. 21 of the Charter of Fundamental Rights prohibits, inter alia, discrimination on the ground of social origin.

In the opinion of the Ombudsman Board, there is no objective reason why social assistance recipients (and recipients of emergency assistance) are treated differently from other benefit recipients and why these persons are exposed to a humiliating situation and forced to disclose personal information. Also the different ways of funding the medical expenses provide no justification for this different treatment. The refusal to provide e-cards to social assistance recipients and recipients of emergency assistance therefore represents a discrimination on the ground of social status.

The Ombudsman Board therefore suggested to immediately abolish the yellow health insurance vouchers for social assistance recipients and to provide e-cards to this group of individuals like to all other benefit recipients.

In its opinion dated January 27, 2006, the Vienna City Administration Head Office informed the Ombudsman Board that negotiations were being conducted with the Main Association of Austrian Social Insurers and that a positive outcome of these negotiations was of great importance also to the City Administration of Vienna.



With the sixty-sixth amendment to the ASVG (*Allgemeines Sozialversicherungsgesetz* - General Social Insurance Act) (Federal Law Gazette I number 131/2006), which came into force on July 1, 2006, the possibility was created to provide e-cards also to all social assistance recipients. Thus, the foundation for the removal of discrimination in the above context was laid and it is to be hoped that this will happen as soon as possible.

### **Excerpt from the 24<sup>th</sup>/25<sup>th</sup> report of the Ombudsman Board to the State Parliament of Lower Austria (2004-2005)**

#### **3.5.2 Telephone connection a luxury? (VA NÖ/278-SOZ/05)**

*Mr. B. turned to the Ombudsman Board in connection with different problems relating to his income support and care benefit. While a few problems were resolved promptly and his application for an increase in care allowance (level 4) granted, the competent member of the State government took a negative view in connection with the costs for the establishment of a telephone connection. Finally, a free telephone connection was established, as his landlord agreed to a 'free' deal offered by Telekom Austria.*

The Ombudsman Board points out in connection with this complaint that citizens needing care are entitled to reimbursement of the costs for establishing a telephone connection pursuant to the provisions of the State constitution and the *Sozialhilfegesetz* (Social Assistance Act) of Lower Austria – in particular by reference to the European Social Charter. The signatories to the European Social Charter, which has been ratified also by Austria, have undertaken to take action to promote a reasonable standard of accommodation. Lower Austria has to provide for adequate social conditions for the Lower Austrian population in its territory pursuant to Art. 4 lit. 2 of the State constitution of Lower Austria.

In 2001, FEANTSA (Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abri), which is supported by the Director-General for employment and social affairs at the European Commission, published a policy document and pointed out that the social protection system of each Member State should ensure that every family or individual is able to afford permanent accommodation commensurate with their needs. *The allowance should suffice to cover the actual rental and all related costs as well as the necessary incidental expenses, including electricity, water, heating and telephone connection.*

Accordingly, Sect. 1 of the *Sozialhilfegesetz* (Social Assistance Act) of Lower Austria provides that social assistance should enable those people to lead a decent life who need the help of the community. Beyond the provision of a mere livelihood, persons needing help are

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to be supported in their integration into social life. It is common ground that in modern times this includes a telephone connection. Against the background of the legal provisions to be complied with, this can by no means be classified as a luxury that cannot be financed by social assistance.

### 4 EC-Treaty

#### 4.1 Discrimination on the ground of residence

##### Excerpt from the 24<sup>th</sup>/25<sup>th</sup> report of the Ombudsman Board to the State Parliament of Lower Austria (2004-2005)

##### 4.1.1 **Discriminatory entrance fees charged to non-resident visitors of a beach in the Municipality of Klosterneuburg (VA NÖ/178-G/04, State government of Lower Austria LAD1-BI-52/045-2004, Municipality of Klosterneuburg GAIII-BG046426, BKA-671.828/0010-V/A/8/2004)**

N.N. turned to the Ombudsman Board filing a complaint that the Municipality of Klosterneuburg as operator of a bathing beach in Klosterneuburg was charging illegal and discriminatory fees, because much higher fees were charged for season tickets to 'non-local residents' than to 'local residents'.

This would not only violate the principle of equal treatment applicable in the private sector administration, but also be at variance with the case law of the Court of Justice of the European Community on the discrimination of non-local residents compared with local residents.

The Ombudsman Board requested the State government of Lower Austria as well as the Federal Chancellor to give their opinion on the current issue, hereby referring to the judgment of the Court of Justice of the European Community of January 16, 2003, file number C-388/01.

In this judgment, which concerned the Italian Republic, the Court found that a Member State allowing advantageous rates for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralised State authorities only in favour of nationals and persons resident within the territory of those authorities running the cultural sites in question who are aged over 60 or 65 years, and by excluding from such advantages tourists who are nationals of other Member States and non-residents who fulfil the same objective age requirements, a Member States fails to fulfil its obligations under Articles 12 EC and 49 EC.

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The Federal Chancellery confirmed in its statement that according to this judgment the Community principle of equal treatment prohibits not only direct discrimination on the ground of nationality, but also all indirect forms of discrimination based on other grounds but capable of producing the same result.

Pursuant to this case law, both provisions at statutory or regulatory level relating to nationality and practical measures such as terms and conditions of a public undertaking providing a residence requirement violate this Community prohibition of discrimination.

The Ombudsman further noted that the European Court of Justice had not recognised in the said judgment mere economic arguments as justification for a different rate treatment, such as the argument that these advantages had been granted to local residents in consideration for the payment of taxes as contribution to the administration of the locations referred to above.

On these grounds, the arguments set out in the statement which the mayor of the Municipality of Klosterneuburg addressed to the Lower Austrian State government and pursuant to which the 'old tradition' of granting lower rates to local residents of Klosterneuburg can be based on the taxes paid by them to the Municipality to cover the annual deficit of the bathing beach, are irrelevant. On the basis of the case law stated above, the mayor announced to propose a new entrance fee scheme to the municipal council for approval with respect to the bathing season 2005, which was in conformity with the principle of equal treatment and the case law of the Court of Justice of the European Communities and which was finally approved by the municipal council on 8 April 2005.