



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

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

Covering the 2004 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 2004 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*).

Ombudsman Mag. Ewald Stadler
Ombudsman Rosemarie Bauer
Ombudsman Dr. Peter Kostelka

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Volksanwaltschaft
(Office of the Austrian Ombudsman Board)
A-1015 Vienna, Singerstraße 17, P.O.Box 20
Telephone:+43/1/51 505
Telefax:+43/1/51 505/150
E-mail: post@volksanwaltschaft.gv.at
Internet: <http://www.volksanwaltschaft.gv.at>

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

1.1 Development of activities

The AOB was engaged in 16 189 cases in the 2004 calendar year. 10 745 of the grievances concerned the administration sector. Investigative proceedings were instigated in 6 502 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 4 243 cases of grievance (comp. Art. 148a of the Federal Constitution [*Bundes-Verfassungsgesetz*]). *Ex officio* proceedings were launched in 69 cases.

16 189 engagements led to 6 502 investigative proceedings.

	<u>2003</u>	<u>2004</u>
Contacts	15 787	16 189
Administration (Federal & provincial administration)	10 316	10 745
Investigative proceedings	6 561	6 502
Federal administration	4 198	4 107
Provincial & district administration	2 363	2 395

Activities

Federal administration investigative proceedings
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	Year 2003	Year 2004
Federal Chancellor's Office	24	19
Federal Ministry of External Affairs	33	25
Federal Ministry of Education, Science and Culture	170	154
Federal Ministry of Finance	359	282
Federal Ministry of Health and Women's Affairs	364	321
Federal Ministry of Internal Affairs	330	338
Federal Ministry of Justice	938	986
Federal Ministry of National Defence	65	67
Federal Ministry of Agriculture, Forestry, the Environment and Water Management	214	190
Federal Ministry of Social Security, Generations and Consumer Protection	843	783
Federal Ministry of Transport, Innovation and Technology	424	513
Federal Minister of Economics and Labour	420	426

Federal administration total	4 184	4 105
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Provincial and district administration total	2 363	2 397
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File code	Investigative proceedings according to assignment area	2003	2004
	Assignment area of Ombudsman Dr. Peter Kostelka		
BKA	Chancellor	24	19
SV	Federal Minister of Social Security, Generations and Consumer Protection (Social Affairs area)	787	752
SV	Federal Minister of Health and Women's Affairs (health and accident insurance area)	322	292
SV	Federal Minister of Economics and Labour (Labour Exchange Office area)	207	211
JF	Federal Minister of Social Security, Generations and Consumer Protection (families area)	56	31
GU	Federal Minister of Health and Women's Affairs (health area)	42	29
V	Federal Minister of Transport, Innovation and Technology (transport area)	384	478
AA	Federal Minister of External Affairs	33	25
	Provincial and district administration	498	508
	<i>Subtotal Ombudsman Dr. Peter Kostelka:</i>	2 353	2 347
	Assignment area of Ombudsman Rosemarie Bauer		
FI	Federal Minister of Finance	359	282
LF	Federal Minister of Agriculture, Forestry, the Environment and Water Management (agriculture and forestry area)	204	175
U	Federal Minister of Agriculture, Forestry, the Environment and Water Management (environment area)	10	15
WF	Federal Minister of Education, Science and Culture (science area)	89	75
HWG	Flooding Act [<i>Hochwassergesetz</i>]	5	0
VORS	Chairman's scope of competence	1	0
	Provincial and district administration	1 226	1 271
	<i>Subtotal Ombudsman Rosemarie Bauer:</i>	1 894	1 818
	Assignment area of Ombudsman Mag. Ewald Stadler		
WA	Federal Minister of Economics and Labour	213	215
WA	Federal Minister of Transport, Innovation and Technology (Federal roadways, patent affairs and road-tax sticker areas)	40	35
I	Federal Minister of Internal Affairs	330	338
J	Federal Minister of Justice	938	987
LV	Federal Minister of National Defence	65	67
UK	Federal Minister of Education, Science and Culture (education area)	81	79
VORS	Chairman's scope of competence	8	0
	Provincial and district administration	639	616
	<i>Subtotal Ombudsman Mag. Ewald Stadler:</i>	2 314	2 337
Total		6 561	6 502

Activities

1.2 Completed cases

A total of 7 581 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 6 cases. **7 581 investigative proceedings concluded**

Completed cases	2003	2004
Grievance justified / objection	758	877
Grievance unjustified / no objection	3 336	3 626
Grievance impermissible	938	844
Grievance withdrawn	488	589
AOB not competent	1 426	1 425
Not suitable for treatment in terms of business rules and regulations	111	193
Formal declaration of grievance	9	6
Recommendation	10	21
Appeals of ordinance	2	0
Total completions	7 078	7 581

1.3 Contacts with citizens and authorities regarding investigative proceedings in 2004

Contacts with citizens and authorities	2003	2004
Appointment dates	270	251
Visits	2 067	1 984
Information service	8 341	8 831
Written correspondence with complainants	19 683	19 664
of which outgoing letters to complainants	9 297	9 247
incoming letters from complainants	10 386	10 417
Written correspondence with authorities	11 307	11 453
of which to certified executive organs and authorities	5 785	5 975
from certified executive organs and authorities	5 522	5 478

1.4 Information service

Apart from the appointment dates public office hours, 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 8 831 telephone and personal contacts with the information service, 4 243 regarded administration.

The AOB was not competent to deal with the remaining 4 588 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 International Encounters

The Austrian Ombudsman Board hosted the (annual) conference of Ombudsman organizations from German-speaking countries in Vienna from

Activities

June 22-24, 2004. The Austrian Ombudsman Board would like to thank National Council President Professor Andreas Khol for his support as well as the parliamentary directorate for the use of its facilities and the hospitality shown to us.

The Ombudsman Board was represented at the European Ombudsman Institute's conference entitled "Ombudsmen and the Protection of Minorities – The Current Reality" on May 9, 2004 in Budapest and at the 8th Annual Conference of the International Ombudsman Institute (IOI) in Quebec from September 7-10, 2004. At this worldwide conference of parliamentary ombudsmen that occurs every four years, Austrian Ombudsman Dr. Peter Kostelka was elected Vice President of the IOI and Chairman of the European Ombudsman Committee. The European section of the IOI comprises over 60 national and regional Ombudsman organizations.

From October 10-12, 2004, the Turkish Parliament and the Greek Ombudsman organized a European conference as part of the European Council's Eunomia project in order to facilitate discussion of a bill to create a national ombudsman office in Turkey. At the conference, Austrian Ombudsman Dr. Peter Kostelka made a presentation entitled "The Ombudsman and his Staff."

The Ombudsman Board's successful application in conjunction with the Greek Ombudsman to implement the European Union's project "Initial Twinning Support to the Ombudsman of the Republic of Turkey" is especially exciting. After the Turkish Parliament has passed the bill to create an Ombudsman office, which is set to occur in 2005, the Austrian Ombudsman Board will work together with the Greek Ombudsman as its senior partner to support the creation of the ombudsman office in Turkey on behalf of the EU.

The Ombudsman for the German Federal State of Schleswig-Holstein invited Austrian Ombudsman Dr. Peter Kostelka to speak at an event celebrating the 15th Anniversary of the creation of the Schleswig-Holstein ombudsman office from April 23-24 in Kiel.

The Ombudsman Board also intensified its contact with the ombudsman organizations of neighboring countries through a meeting with the Czech Ombudsman from October 4-5, 2004 at which the two ombudsman organizations exchanged experiences and ideas.

1.6 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 2004, 147,000 visitors logged a total of 744,000 hits on the Ombudsman Board's Website.

The following Websites received the most hits:

"The Ombudsmen"	27,754 Visitors
"Function and Responsibilities"	19,382 Visitors
"Office Hours"	16,370 Visitors

The visitors came from the following countries:

Austria	67,520 Hits
USA	44,089 Hits
Germany	10,118 Hits
France	1,429 Hits
Netherlands	872 Hits
Switzerland	712 Hits
Canada	358 Hits

...

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

post@volksanwaltschaft.gv.at

Complaints may be submitted through an online form. 946 visitors submitted a complaint using the online form, while 1,003 sent an e-mail directly to the Ombudsman Board.

Activities

The Ombudsman – Equal Protection for All under the Law

The ORF (Austrian Broadcasting Company) reinstated its series “The Ombudsman – Equal Protection for All under the Law” 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 42 broadcasts in 2004 achieved an average market share of 36.5 percent (compared to 35 percent in 2003) with an average audience of 464,000 viewers (compared to 436,000 viewers in 2003). 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, 2004 – December 31, 2004

Annual Ratings			
Target Group	Average Gross Rating Points in %	Average Gross Rating Points in Thousands	Market Share in %
Adults aged 12+	6.9	464	36.5
Ages 12-19	1.0	7	7.2
Ages 20-29	1.5	15	12.1
Ages 30 – 39	2.2	29	17.4
Ages 40 - 49	4.1	48	26.3
Ages 50-59	9.0	83	37.3
Ages 12 - 49	2.4	98	17.2
Men aged 12+	5.2	169	29.5
Men aged 12 - 49	2.1	44	16.0
Women aged 12+	8.4	295	42.2
Women aged 12 – 49	2.6	54	18.4
Heads of Household Women aged 18 – 59	3.5	168	24.4
ABC1 Group	5.1	87	30.2
Children 3 – 11 years	0.5	4	4.5

Source: Teletest: Austria (all households)

1.7 Convention

The Ombudsmen sent proposals for the further development of the institution to the Convention in March 2005 (27th Report of the Ombudsmen to the National Council and the Federal Council for 2003, p. 15 and p. 326 et. seq.)

In 1977, the Ombudsman Board was only the seventh ombudsman organization in the world created according to the Scandinavian model of a parliamentary body that responds directly to citizens' grievances arising from the administration of public law and affairs. Today, nearly 130 of the United Nations' 190 member states have ombudsman organizations. Constitutional bodies like the Austrian Ombudsman Board, which exist in more than two-thirds of UN member states, count among the basic features of a modern constitutional state, largely due to the turbulent democratic developments in Europe, Asia, South America, and Africa. In fact, ombudsman organizations in these "new democracies" possess broader authority to act on behalf of citizens and a broader influence on their respective societies than the Austrian Ombudsman Board currently does – and for good reason. Therefore, the Austrian Ombudsman Board seeks to gain a modest portion of the rights and authorities possessed by comparable institutions in modern democracies as part of its larger drive to further develop its legal basis in Austrian society. The Austrian Constitutional Convention has discussed the Ombudsman Board's suggestions in detail. However, the convention did not reach a consensus with respect to any of the Ombudsman Board's specific proposals. The Ombudsman Board finds this unfortunate. Given developments in many countries comparable to Austria, the Ombudsman Board will continue to pursue its demands.

2 Fundamental Rights Section

2.1 Introduction

In the past the years, the Fundamental Rights Section has become a permanent component of the **annual reports by the Ombudsman Board to the National and Federal Councils**. In many cases, the Ombudsman Board ensured that complainants received treatment in accordance with their constitutional rights. Alternatively, the Board guaranteed that constitutional rights will be respected in the future by effecting a change in the execution and administration of laws. In general, the Ombudsman Board hopes that its targeted work will contribute to strengthening the awareness of citizens' fundamental rights among the public institutions that execute and administrate the law.

In 2004 as in years past, the array of issues that the Ombudsman Board covered in its report was exclusively the (more or less coincidental) result of complaints submitted to and reviewed by the Ombudsman Board. Only later did the Board categorize and analyze these according to a special grid of fundamental rights. In preparing to compile this year's report, however, we took advantage of an opportunity for critical self-reflection by using our past experiences as the basis for an examination of how the report might be improved in light of our goal of providing the National and Federal Councils a comprehensive overview of the areas in which fundamental rights were violated or inadequately guaranteed.

Following extensive discussions during their meeting on February 11, 2005, the three Ombudsmen agreed to add to the report those cases involving fundamental rights arising from state government that had already been outlined in the respective reports to state parliaments. The Ombudsmen's decision was based on the rationale that the array of procedures it uses to examine violations of fundamental rights could not otherwise be portrayed comprehensively and transparently.

As a result of this approach, the section on fundamental rights contains cases from the state governments of Vienna and Burgenland that the Ombudsman Board already described in its reports to the respective state parliaments in 2005. Accordingly, this report does not cite investigations into violations of fundamental rights that will be reported to respective state parliaments in the coming months. The fundamental rights section of next year's report will cover those cases.

Fundamental Rights Section ---

The Ombudsman Board's primary objective is to sensitize [the public] to the observance [or non-observance] of constitutionally guaranteed rights by the administrative arms of government. Administrative authorities should not view fundamental rights and freedoms as mere tests for constitutionality of "simple" federal laws. Rather, fundamental rights and freedoms should serve as directly applicable norms with greater influence on the execution of laws.

The Ombudsman Board finds it unfortunate that the National Council's Conference of Presidents' narrow interpretation of Article 48 of the Austrian Federal Constitution prevents the Board from submitting the "Fundamental Rights Section" as an independent report and discussing it separately with the members of parliament on the Human Rights Committee.

2.2 The Austrian Constitution's Fundamental Requirements for a Constitutional State (Articles 18 and 129 et. seq of the Austrian Federal Constitution)

2.2.1 "Precautionary" Suspension of Benefits (VA BD/1104-SV/03, BMSG 22210/0002-II/A/2/2004)

As further explained in the section on the Bundesministerium für Soziale Sicherheit, Generationen, und Konsumentenschutz, (BMSG - Federal Ministry for Social Security, and Consumer Protection) the Pensionsversicherungsanstalt (The Austrian Pension Insurance Institution) often suspends or reduces benefits and informs recipients thereof without an explanation of the reasons.

This approach is obviously unconstitutional: As the Ombudsman Board demonstrated in the **26th Report to the National and Federal Councils** (p. 230 et seq.) with regard to the similar problem of suspensions of emergency assistance and family assistance, it is a violation of the constitutional system of legal protection to unilaterally burden a person seeking legal protection with the consequences of a potentially unlawful decision by a governmental authority until his request for legal protection is finally resolved. (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collection of the Austrian Constitutional Court) 14.765/1997, 15.218/1998, 15.511/1999, 16.245/2001 and many others). A suspension of benefits enacted without an explanation that remains in effect until the existence of a circumstance leading to the loss of a claim to benefits has been officially determined does not fulfill the constitutional requirements, because this practice burdens the citizen with the consequences of a potentially unlawful administrative

action until a legally binding ruling has been reached. In addition, we must note that a legal provision that empowers an administrative authority to issue a ruling without explanation would violate the principle of a constitutional state (as explicitly stated in (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg – Collection of the Austrian Constitutional Court 12.184/1989). From this, it follows that a suspension or reduction of benefits may only be enacted through an official ruling that explains the reasons for the action taken.

Furthermore, this practice, to which we already object for the reasons stated above, violates the constitutionally granted right of all citizens to equal protection under the law, because the Pension Insurance Institution has proceeded so erroneously in the execution of the relevant laws that its actions may be equated with lawlessness (cf., for example *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg – Collection of the Austrian Constitutional Court 16.401/2001).

2.2.2 Suspension of Driver's License Unjustified due to the Unreliability of Quick Tests for Narcotics (VA BD/446-V/04)

The Department of Motor Vehicles at the Federal Police Headquarters in Vienna suspended Mr. L's driver's license for a period of one month because the Federal Police in Vienna suspected that he had operated a motor vehicle under the influence of a narcotic. The basis for this action was an official medical examination and the results of a test that detected traces of morphine in Mr. L's urine. In a ruling on November 23, 2004, this decision was reversed, however, because the results of a blood test proved that the administrative offense of which the complainant was accused had "obviously not occurred." The complainant had to make do for about three months without his driver's license, despite the fact that he had not consumed any alcohol or drugs, nor had he committed an administrative offense of any kind. Even the Federal Police Headquarters in Vienna now concedes that this was the case.

As the Ombudsman Board discovered through its review process, the false results of the quick test for narcotics apparently occurred because the complainant had eaten Mohnnudeln (an Austrian specialty containing poppy seeds) on the day he was stopped by police. It should be emphasized that urine tests in general are prone to errors. As explained by Professor Rainer Schmid, a toxicologist at the Allgemeines Krankenhaus Wien (AKH – Vienna General Hospital) on the ORF series "The Ombudsman – Equal Protection for all under the Law," "scientific research has clearly proven that legal products containing poppy seeds can lead to false positives." Therefore, this expert pleads for the use of different tests, such as saliva tests, since these tests "[allow] us to draw more accurate conclusions about which substances are actually in the bloodstream."

In its rulings, the *Verfassungsgerichtshof* (VfGH – Austrian Constitutional Court) has repeatedly reemphasized its fundamental recognition in the 1986 decision contained in the

Fundamental Rights Section

Verfassungssammlung des Österreichischen Verfassungsgerichts (VfSlg – Collection of the Austrian Constitutional Court) 11.196/1986 that the constitutional requirement that legal protection be effective *de facto* prohibits an authority from burdening a person seeking legal protection with the consequences of a potentially unlawful administrative ruling until his petition for legal protection has been resolved. The Constitutional Court has also made it clear that the principal of temporary protection of legal rights applies to all kinds of administrative proceedings.

Based on this fundamental understanding of constitutional law, the Ombudsman Board is of the opinion that Section 39 paragraph 1 of the *Führerscheingesetz* (Driver's License Law), which requires that the operator's behavior clearly indicates that "he is no longer in complete control of his mind or body" in order for an provisional suspension of his license to be permissible, cannot be understood to mean that mere suspicions or suppositions may justify the provisional suspension of a drivers' license. Particularly if the driver in question can make credible statements that cannot be called into question under criminal law regarding circumstances that may have lead to false test results (e.g., the consumption of poppy seeds) it seems necessary to grant the driver the benefit of the doubt rather than to assume drug use, especially since any other interpretation of the law would completely suppress the driver's interest in retaining his drivers' license in an unconstitutional manner that cannot be justified according to the fundamental values of a constitutional state.

In view of the Constitutional Court's recognition in *Verfassungssammlung* (VfSlg. – Collection of the Austrian Constitutional Court) 16.460/2002, it should be taken into consideration that the constitutional principal of the *de facto* effectiveness of legal protection must also apply to the procedure by which driver's licenses are suspended or revoked.

The following test can be derived from the constitutional principals postulated by the Constitutional Court: drug tests that authorize the authorities to suspend or revoke a driver's license in the case of a positive result must be created such that there is an assurance of accuracy, at least as a rule. Only a concrete, imperative, and well-grounded suspicion justifies the revocation or suspension of a driver's license. It is indubitably a violation of the principles of a constitutional state, not to mention impertinent and highly inequitable, when so drastic a measure as the suspension of a driver's license rests on a cursory examination of traffic behaviors and a urine test, the results of which have been scientifically

proven to be unreliable and therefore invalid. The fundamental interest of traffic safety is not served in the least when upstanding citizens' licenses are suspended because they consumed legal poppy products (e.g., Mohnnudeln or salads containing poppy or hemp oil) or took cough syrups containing codeine, even though their fitness to operate a motor vehicle was not at all impaired. If drug tests that use saliva samples do in fact provide more reliable results than the urine test currently in use, as has been stated by competent scientists, then a swift change of test procedures is not only expedient, but also required by constitutional principles.

As long as the authorities continue to use the current urine test, however, we emphatically insist due to the high error rate that the blood tests necessary to confirm the results of urine tests be promptly completed in the laboratory in order to ensure that the duration of a potentially unjustified driver's license suspension is as short as possible. In fact, blood testing technologies currently in use can generate results within 48 hours. It is completely unacceptable that an innocent citizen must wait three months for the authorities to establish that the allegations made against him were unfounded, as occurred in the case described above.

2.2.3 Imposition of an Administrative Penalty in Cases in which the Legal Situation is Unclear is not Constitutional (VA BD/18-BKA/04)

Section 7 paragraph 2 of the Ordinance in the Bundesgesetzblatt (BGBl – Federal Law Gazette II) No. 549/2003 states that a private household “may only be summoned for questioning in up to eight consecutive calendar quarters in ten years.” The question as to whether this provision also applies to events that occurred before the ordinance's entry into force on November 29, 2003 cannot be answered affirmatively or negatively based on the text or through historical, teleological, or systematic interpretation in view of the functional equality of the questioning prescribed by this ordinance and the ordinance in the Bundesgesetzblatt (BGBl. – Federal Law Gazette) No. 334/1967. However, many complainants that have already been questioned many times in the past ten years under the 1967 ordinance have been threatened with an administrative penalty for a refusal to provide information.

In its jurisprudence, the Constitutional Court has consistently held that, in view of the principle of a constitutional state anchored in the Federal Constitution, it is absolutely necessary to separate the individual's freedom from the realm of the impermissible through clear demarcations (cf. *Verfassungssammlung* (VfSlg – Collection of the Constitutional Court) 12.947/1991, which cites further jurisprudence). This is why legislators and public

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administrators must clearly and unmistakably express what they intend to punish. The unjustness of an action or inaction must be clearly demonstrated to the individual in order for him to receive punishment for infringements.

In its more recent jurisprudence, the constitutional court also derives a “Clarity Precept” for norms in criminal law from the constitutional provisions of Article 7, paragraph 1, first sentence of the European Convention on Human Rights (cf. *Verfassungssammlung* (VfSlg – Collection of the Constitutional Court) 11.776/1988 for the foundations as well as 13.012/1992, 13.233/1992 und 14.606/1996 for examples).

Given this jurisprudence, the Ombudsman Board holds the view that imposing penalties on people who had been questioned in connection with the micro-census within the last ten years under the scope of the *Bundesgesetzblatt* (BGBl. – Federal Law Gazette) Ordinance No. 334/1967 for refusing to participate in a new micro-census is not only unreasonable, but also highly dubious in light of the principle of a constitutional state and Article 7 of the European Convention on Human Rights. When the bodies that set norms create an ambiguous legal situation, it should not lead to penalties for those subject to the laws.

In the case that formed the basis for this complaint, the Ombudsman Board’s suggestion to refrain from imposing a fine was followed.

2.2.4 Administrative Order under Trade Law (VA BD/81-WA/04, BH Hollabrunn HLS2-A and HLW2-BA-0318)

The District Commission of Hollabrunn issued an administrative order pursuant to Section 360 of the Gewerbeordnung (GewO – Trade, Commerce, and Industry Regulations Act) on December 5, 2003 in which it directed the complainant, who operated horse stalls including paddocks, storage rooms, an indoor riding arena, and a building for personnel, to comply with the law by obtaining a permit for its business facilities as well as obtaining the necessary trade licenses within 6 months. The Ombudsman Board determined that this administrative order amounts to a deficiency in the administration of the law. The order was improper not just for simple legal reasons, but also because it violated fundamental rights.

In issuing the administrative order, the District Commission of Hollabrunn assumed that the complainant did not conduct any of the subsidiary agricultural or forestry trades excluded from the *Gewerbeordnung* (GewO - Trade, Commerce, and Industry Regulations Act).

Instead, the Commission assumed that the complainant was subject to an authorization requirement pursuant to the *Gewerbeordnung*.

The Ombudsman Board takes the view that the authorities chose an inappropriate legal instrument for the clarification of the question as to whether the complainant was subject to an authorization requirement pursuant to the *Gewerbeordnung* (GewO - Trade, Commerce, and Industry Regulations Act). The correct course of action for the District Commission would have been to launch administrative penalty proceedings pursuant to Section 366, paragraph 1 Z 1 and 2 of the *Gewerbeordnung* (GewO - Trade, Commerce, and Industry Regulations Act). The proceedings should have involved an investigation into whether a trade license and a permit to operate business facilities were actually required. Depending on the authorities' determination, the complainant would have been able to defend himself by legal means.

In contrast to administrative penalty proceedings, an administrative order does not offer the affected party an opportunity to seek legal remedies that would lead to an examination of the official determinations. The issuance of an administrative order prevented the complainant from taking measures to seek legal protection. Only after the Ombudsman Board determined the existence of a grievance did the District Commission launch administrative penalty proceedings.

The issuance of the administrative order exposed the complainant to a dubious situation with regard to the rule of law as well as fundamental rights. The principle of the rule of law demands that legal protections function with a certain minimum of efficiency. Persons seeking legal protection may not be unilaterally burdened with all of the consequences of a potentially illegal administrative decision until their petition for legal protection has been permanently resolved. The central element of a constitutional state rests on the individual's opportunity to effectively pursue his legal protected interests, and this should not depend on the goodwill of the authorities (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 11.196/1986, 14.548/1996 among others).

Furthermore, the authorities encumbered the official decision with illegality through an unthinkable application of the law, which can indicate arbitrariness (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 13.372/1993 among others). In its jurisprudence, the

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Austrian Constitutional Court refers to arbitrariness in cases where the legal situation has been grossly or completely misjudged. This is a violation of the principle of equal protection.

By issuing the administrative order, the authorities also interfered with the freedom to practice a trade or occupation granted by Article 6 of the *Staatsgrundgesetz* (StGG – Basic Law of the State). This law states that a violation of this fundamental right has occurred when an administrative authority issues an order prohibiting a citizen from entering or practicing a particular occupation even though no law authorizes it to issue an order that restricts occupational freedom. A violation has also occurred when the order is based on a legal provision that is unconstitutional or illegal, or when a constitutional law is applied in an unthinkable way to justify the issuance of the order (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 10.413/1985 among others). The interference must affect the freedom to practice a trade or occupation directly in order to constitute a violation; *i.e.* its objective is to restrict the practice of an occupation. An administrative order is not an official written ruling (*Bescheid*), however, the authorities used it to threaten the (partial) closing of the business in this case. Because a failure to comply with the administrative order would result in the closing of the business (through an official written ruling- *Bescheid*), the order amounts to a restriction of fundamental rights that cannot be contested through an appeal.

Excerpt from the 26th Report of the Ombudsman Board to the Viennese Parliament (2004)

2.2.5 Rejection of an Application for Social Assistance without Formal Notification (VA W/20-SOZ/04)

Mr. S.'s complaint was based on the fact that his application for financial assistance was resolved with a mere "memo" from the department 12 of the municipal authorities (Magistratsabteilung 12). The State Government of Vienna dismissed his appeal in an official ruling on December 2, 2003 with the justification that the "memo" was not an official ruling and was therefore not subject to appeal.

With respect to this case, the Ombudsman Board maintains that an action to decline an application for social assistance benefits must occur by means of an official written ruling (*Bescheid*) as long as the desired benefit is not explicitly intended to be granted by means of private sector administration. As the Constitutional Court already declared in *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judg-

ments of the Austrian Constitutional Court) 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. We must not allow administrative acts with significant legal effects to be construed as uncontestable, because otherwise the system of legal protections guaranteed by the constitution would lose its effectiveness (cf. also *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 13.699/1994).

In this case, an official ruling was issued following the Ombudsman Board's intervention, thus rectifying the situation that led to the complaint. However, the Ombudsman Board would still like to use this case to emphasize the importance of responding to applications for social assistance through an official ruling.

2.2.5.1 Violation of the Principal of Legality through the Application of an Ordinance no longer in Force (VA W/454-GES/04)

Although no legal basis for the regulation of rat control in Vienna has existed since April 20, 2002, the authorities continue to apply the expired Rat Control Ordinance in Amtsblatt (Abl. – Official Gazette) No. 19/1998.

When the *Verwaltungsreformgesetz* (Administrative Reform Act) was passed in 2001, the federal law regarding the prevention of communicable diseases and the prevalence of rats was cancelled. As a result, the Rat Control Ordinance in *Amtsblatt* (Abl. – Official Gazette) No. 19/1998, which had been issued under the nowcancelled federal law, became ineffective *ipso jure*. As consistently emphasized in the jurisprudence of the Austrian Constitutional Court, an ordinance issued in execution of another law becomes ineffective when the new statutes do not provide a basis for it in the sense of Article 18, paragraph 2 of the federal constitution (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 12.634/1991 and 16.288/2001).

The application of expired legal provisions can only be described as lawlessness amounting to arbitrariness (e.g. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 16.875/2003).

In its **recommendation**, adopted on December 22, 2004, the Ombudsman Board determined that the continued use of an invalid ordinance, as well as the failure to enact a mu-

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municipal ordinance regarding rat control both amount to grievances in the administration of public affairs. At the same time, the Ombudsman Board **recommended** that the authorities cease to apply the invalid ordinance and immediately take the necessary steps to ensure that rat control can resume in a legal and constitutional manner in Vienna as swiftly as possible.

The authorities complied with our **recommendation** by agreeing in writing to take the steps necessary to create a legal basis for effective rat control promptly.

2.2.5.2 Frontage owners ordered to purchase and subsequently cede street property already owned by the city of Vienna (VA W/220-LGS/04, MPRGIR-V-924/04)

The married couple N.N. submitted the following complaint: The department 69 of the municipal authorities (Magistrate) Magistratsabteilung 69) instructed the complainants to purchase a 102 m² area of the street (K-gasse) bordering a building they owned for a price of € 12,240.00 and subsequently cede it to the public good without compensation. The property in question already belonged to the city of Vienna. If the sale and purchase contract was not concluded by January 31, 2004, the property owners would not receive a building permit and the price for the section of street to be purchased and ceded would be reappraised (i.e., raised).

The Ombudsman Board obtained two statements from the municipal authorities, reviewed the administrative act in question, and inspected the site. Based on this investigation, it ascertained the following scenario:

The couple N.N. had purchased the property bordering K-Gasse through a contract dated December 17, 2002 in order to build a single family home. Prior to the purchase, the couple learned in a preliminary discussion with the municipal authorities in magistrate department 17 that the obligation to construct a sidewalk remained unresolved.

In the applicable zoning and construction maps dated September 21, 2001 (Plan Document 7374), the complainant's property is identified as a building site for residences, and K-Gasse is identified as a 10 meter wide public traffic area. The city of Vienna acquired the K-Gasse, including the portion in front of the complainant's property, through a purchase contract dated March 26, 2002 at a price of €102.08/m² but did not cede it to the public good. At a site inspection, the Ombudsman Board determined that K-Gasse had obviously been built decades ago and had never been improved.

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In response to the complainants' application, magistrate department 37 informed them of the conditions to require to receive a building permit in an official ruling dated May 22, 2003. According to the ruling, the area in question was to be purchased and ceded to public property. Magistrate department 69 notified them in a letter dated August 13, 2003 that the value of the property, which had not been divided into lots, was € 120.00/m². If a purchase contract was not closed by January 31, 2004, the value of the land would be reappraised.

On September 17, 2003, the complainants petitioned Magistrate department 64 to have the land divided into parcels; in a letter dated October 8, 2003, they sought a building permit from Magistrate department 37. The plan to divide the lots did not propose a change to the borders of the construction site. In a letter dated December 15, 2003, magistrate department 69 sent the complainants an "unbinding draft of the contract" and requested that they sign it and return it to magistrate department 69 as a "binding offer."

According to the "Terms of the Contract", the complainants were obligated to cede the 102 m² area to public property without payment. In addition, they were obligated to pay the city of Vienna € 12,240.00 in "compensation" plus closing costs. The terms also stated explicitly that the object of the contract was already built (as a street) and remains in the physical possession of the city of Vienna. However, the parties never consummated the contract because the complainants did not undersign the terms. The leadership of the magistrate confirmed this in its statements dated May 26 and July 20, 2004. Despite this, magistrate department 37 issued a construction permit to the complainant through an official ruling dated January 26, 2004.

In its meeting on September 24, 2004 the Ombudsman Board determined that the following amounted to **grievances** in the administration of public affairs in the sense of Article 148a, paragraph 1 of the Austrian Federal Constitution and Section 139a paragraph 1 of the Vienna City Charter:

1. The obligation to purchase and cede to public property the area in the K-Gasse that belonged to the city of Vienna, which was communicated in the notice regarding the conditions to be fulfilled in order to receive a building permit.

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2. Magistrate department 69's demand that the complainants cede the area purchased from the city of Vienna at a price of € 102,08/m² to the public good (from the terms of the contract dated November 28, 2003)
3. the city of Vienna's failure to ascribe the area located in a public traffic zone to public property

Therefore, the Ombudsman Board made a **recommendation** pursuant to Article 148c of the Federal Constitution. The *Gemeinderat* (City Council) of Vienna should ensure the following:

1. Magistrate department 37 should amend the conditions for a construction permit pursuant to Section 68, paragraph 2 of the *Allgemeines Verwaltungsverfahrensgesetz* (AVG – General Act on Administrative Procedure) by removing the obligation to purchase and cede the property in question to public property.
2. Magistrate department 69 should retract its demand that the complainants enter a contract to purchase the property
3. The City of Vienna should assign the area to public property itself.

The Ombudsman Board reached this conclusion for the following reasons:

The Constitutional Court has held that expropriations for traffic purposes are only necessary when the respective property owner has refused an appropriate offer by the party seeking to acquire the property (October 13, 1993 (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 13.579). As a milder means of resolution, a contractual agreement should precede a mandated expropriation, despite the fact that the law does not require negotiation. It is in no way a breach of the legal order for the city of Vienna to acquire property located in public traffic zones through purchase contracts under private law.

However, the Ombudsman Board has repeatedly criticized the longstanding administrative practice by which property owners with frontage abutting Vienna city property in public traffic zones are forced to purchase the property and subsequently cede it to public property without payment (cf. **Activity Reports to the State Parliament of Vienna from 1998** p. 99 et seq., **2000** p. 76 et seq., **2001** p. 56 et seq., **2002** p. 59 et seq. and **2003** p. 66 et seq., p. 77 et seq.; cf. also Hauer's criticism in *Fragen der Grundabtretung und der*

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Entschädigung (Issues of Property Cession and Compensation) 2000 p. 339 et seq.) If the frontage owners are forced to purchase the area on the public street from the city and then immediately cede it to public property, the city can dictate the terms of the contract, especially the price. Persons who wish to construct buildings on their property and are therefore particularly dependent on a swift resolution of the contract can be easily pressured into entering contracts with unfavorable conditions (cf. Section 879 paragraph 1 and paragraph 2 Z 4 of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB – Austrian Civil Code). If no agreement is reached, then the frontage owners' only remaining option is to file an application with the Magistrate for expropriation of the City of Vienna (!) pursuant to Section 39 paragraph 5. The Ombudsman Board is of the opinion that frontage owners cannot be expected to take such an approach due to the duration of expropriation proceedings.

Although a contractual agreement under private law should precede mandatory expropriation as a milder means of resolution (cf. October 13, 1993 *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 13.579), this practice links the management of the process under private law with compulsory expropriation in an impermissible manner. By taking state action (e.g., the rejection of applications for division of lots or the issuance [or refusal] of building permits through official rulings) the public authorities can exert pressure on property owners to enter into contracts that serve the authorities' interests (cf. October 13, 1999 (*Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 15.625). It matters whether the property to be ceded belongs to the City or a private individual because, unlike private individuals, the city's administrative organs have the power to take coercive government action. Public authorities have this power at their disposal even when they conduct business under private law (cf. Kleewein, *Vertragsraumordnung* (Land Use Planning by Means of Contracts) (2003) p. 146 et seq.)

The exertion of pressure on the frontage owner can be clearly observed in the case at hand: The City of Vienna, which had acquired the partial area in question through a purchase contract dated March 26, 2002 at a price of € 102.08/m², wants to sell it to a frontage owner at the higher price of € 120.00/m². Because the frontage owners are threatened by a ban on construction if it does not comply with its obligation to cede the property, they are forced to purchase the property and accept the conditions named by the city. In

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this case, magistrate department 69 announced that it would set a new price if the frontage owners failed to promptly sign the contract.

The leadership of the magistrate seeks to derive a justification for demanding the building land price for land in public traffic zones from the definition of the building line in Section 5, paragraph 6, letter a (building line = borders of the public traffic zones located on building land shared with all remaining properties in the adjacent building land). However, the public traffic zones cannot be developed with buildings, and Section 57, paragraph 3 states that the amount of the compensation depends on the time, location, and condition of the land as well as the use to which any person might reasonably put it. The *Liegenschaftsbewertungsgesetz* (LGB – Real Estate Valuation Law) also states that the market price that could be obtained for the sale of real estate in fair and customary business dealings should serve as the standard for valuation (Section 2 of the LGB, cf. also sections 305 and 306 of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB – Austrian Civil Code)). The land in question was used as a traffic-bearing street before it was zoned as such and had already been identified as a traffic zone by the city of Vienna at the time of its purchase. The payment of a fictional building-land price which can never be realized would lead to the unjustified enrichment of the city.

Furthermore, it is unfathomable that the purchase price would have increased from €102.08/m² to €120,00/m² – nearly 20 percent – in less than two years. This valuation scheme gives the impression that the city wished to profit by way of the transaction it sought to execute under private law, even though it is obligated to serve the common welfare by providing for basic requirements.

The parceling of the property was not necessary, because the building line (*i.e.*, the border shared with the public traffic zone) coincides with the front border of the construction site, such that there would have been no change to the existing construction site borders and neither an entry nor a removal to or from the Land Register is required. Parceling is only necessary if one assumes that the construction site would not have had an access point to the public street due to the partial area in front of it that belonged to the city of Vienna. It is true that a person may be required to cede land that he does not own to public property, because the land to be ceded may also belong to a third party (cf. Section 9, paragraph 4, letter b and Section 39, paragraph 5). Persons who must cede land belonging to a third party to public property must also apply for a division of parcels. (cf. *Verwal-*

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tungsgerichtshof (VwGH – Superior Administrative Court) November 11, 1990 90/05/0128 and Geuder/Hauer, *Wiener Bauvorschriften* (City of Vienna Building Code)⁴ Section 39, footnote 8.) In the case at hand, however, the poorly constructed street between the building lines already belongs to the City of Vienna.

If one views city the same as a private person in this case, it is as if the property were passed from one hand into the other. The city sells its own private property to the frontage owner in order to acquire it back through cession to public property (cf. Section 22 paragraph 1 of the *Grundbuchgesetz* (GBG) Land Register Law). Thus, there is no change in the ownership structure. Instead of such a circuitous transaction, which is incomprehensible for the affected citizens (cf. also Hauer, *Grundabtretung* (Land Cession) 360, 160 et seq.), all that is required is to assign the parcel in question to public property and issue an official notice that it is for common use. Thus, the Land Register will clearly show that the parcel is public property (cf. Section 94 paragraph 1 Z 3 *Grundbuchgesetz* (GBG – Land Register Act) in connection with Section 1 paragraph 2 *Allgemeines Grundbuchanlegungsgesetz* (AGAG – General Land Register Compilation Act) and OGH March 31, 2003 *Evidenzblatt der Rechtsmittelentscheidung* (EvBL – Austrian Journal of Jurisprudence) 2003/134). In the Ombudsman Board's opinion, it cannot be tolerated that the City of Vienna purchased land in a public traffic zone without ceding it to public use but instead sold it to the frontage owner in order to fulfill its obligation to cede the land.

In actuality, the City's actions go far beyond the financing of traffic improvements according to the conditions set by public authorities under private law. Sections 50, 51 and 55 of the Vienna *Besoldungsordnung* (Pay Regulations) state that the authorities shall require frontage owners to make contributions to the costs of acquiring and constructing roads. This requirement is to be communicated and enacted by means of official written rulings. These are compulsory government regulations which are not to be circumvented by means of reverting to a resolution of the situation under private law (arguments: "shall be set by means of an official written ruling" and "shall be prescribed by means of an official written ruling"). The question as to whether a specific task is to be executed through governmental or non-governmental administration should be decided according to the relevant legal provisions. If the lawmakers indicated that a legal person [such as a government authority] must act as a government body [under public law], then that legal person is not free to choose between actions governed by public and private law. If a [government body] chooses to administrate a matter under private law in order to evade its obli-

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gations under public law as set forth in statutes, the action amounts to an abuse of its legal form and is therefore tantamount to a breach of the rule of law. Pursuant to Section 879 paragraph 1 of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB – Austrian Civil Code), this infringement makes any agreement reached under private law null and void (cf. *Oberste Gerichtshof* (OGH – Austrian Supreme Court of Justice) February 23, 1995 in *Recht der Wirtschaft* (RdW – Austrian Journal of Economic Law) 1995, 216 und July 10, 1991 *Sammlung der Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen* (SZ – Collected Decisions of the Austrian Supreme Court of Justice in Matters of Civil and Judicial Administration) 64/92). Therefore, the order [to pay contributions for the acquisition and construction of public traffic zones] must come in the form of an official written ruling.

However, the current legal situation is unsatisfactory, because the Vienna *Besoldungsordnung* (Payment Regulations) does not create or regulate an obligation on the part of the city to construct public traffic zones in a particular way within a specified period of time if the city has already levied contributions from the frontage owners. (cf. Hauer's analysis in this regard in *Grundabtretung* (Land Cession) 365 and *Verwaltungsgerichtshof* (VwGH – Austrian Administrative Court) January 1, 1985, 82/05/0139 in *Baurechtssammlung* (BauSlg – Construction Law Collection) 366.) In contrast, for example, Section 38 paragraph 8 of the *Besoldungsordnung* (Pay Regulations) of the state of *Niederösterreich* (Lower Austria) obligates the municipality to construct a dust-free paved roadway for new public traffic zones in building land for 70 percent or 50 percent (for construction on one and two sides of the street, respectively) of the segment between the point where [the new road] connects to the existing road network and the most distant construction site. The Ombudsman Board is of the opinion that the City of Vienna should use the frontage owners' contributions to the costs of acquiring and building public traffic zones for their intended purpose and promptly build the roads to provide access to the building land. Further, the Ombudsman Board holds that the city should do so even in the absence of an explicit statutory obligation.

If the city of Vienna identifies land as a traffic zone in the development plan and then acquires it, the Ombudsman Board argues that it is also obligated to transfer the land to public property, open it to public use, and construct a road on it. Since no statute provides for the unnecessary intermediate step of acquiring and subsequently ceding such property, the city should enter it into the Land Register as a public good at its own expense. The

city can offset the cost of acquiring and constructing the road by levying contributions from frontage owners. These contributions should be prescribed through a written official ruling, so that the frontage owners can seek legal remedies to contest the justification for and amount of the contributions.

The magistrate's leadership did issue statements dated November 10, 2005 and January 12, 2005 to the Ombudsman Board, both of which rejected our recommendation. However, the issuance of these statements did not fulfill the duty to respond as set forth in Article 148c of the Federal Constitution and Section 6 of the 1982 VAG- since the **recommendation** was directed at the *Gemeinderat* (Municipal Council), which did not submit a corresponding resolution to the Ombudsman Board. The **interpretation** argued by the magistrate's leadership that the **recommendation** was "invalid" because the *Bauoberbehörde* (Superior Construction Authority) (Article 111 of the Federal Constitution) is responsible for point 1 and the magistrate (Section 105, paragraph 3, letter e of the Vienna City Charter) is responsible for points 2 and 3 is faulty, because the Section 83 of the Viennese City Charter endows the *Gemeinderat* (Municipal Council) with "supreme supervisory authority" (cf. Ponzer/Cech, *Die Verfassung der Bundeshauptstadt Wien* (The City Charter of Vienna, the Austrian Federal Capital) (2000) 130 et seq.).

In the meantime, the Ombudsman Board received the draft of a bill that would amend the *Besoldungsordnung* (Payment Regulations) for Vienna such that the obligation to cede another person's property to the public good can be substituted with a monetary payment.

2.3 The Right to a Fair Trial (Article 6 of the European Convention on Human Rights)

2.3.1 Trials of Excessive Duration

The Ombudsman Board has already indicated in the Fundamental Rights Section of the **27th Report to the National and Federal Councils** (p. 263 et seq.) that a large portion of the complaints that the Ombudsman Board deems justified arise from delays of trials. The Ombudsman Board also explained in the aforementioned report that the limits on the permissible duration of administrative proceedings can be derived from the constitutional principle of the rule of law as well as Article 6 of the European Convention on Human Rights, although only with respect to proceedings to resolve claims under civil and criminal law.

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During the year covered by this report, the Ombudsman Board once again determined that the failure of courts and administrative organs to resolve petitions in an appropriate amount of time threaten to erode the rule of law posed by continues. This presents very serious problem in the legal organization of the state. The following selected cases illustrate this conclusion:

2.3.2 Six-year proceedings to grant an orphan's pension (VA BD/1001-SV/04, BMSG-143124/0002-IV/5/2004)

Mr. T's application for a half-orphan's pension, received by the Bundessozialamt (Federal Social Welfare Office) of the state of Steiermark on March 18, 1998 was declined in an official ruling dated June 21, 1999. Mr. T's subsequent appeal was dismissed through an official ruling of the arbitration commission of the Bundesamt für Soziales und Behindertenwesen (Federal Office for Social Affairs and the Disabled) dated November 4, 1999. After the Verwaltungsgerichtshof (VwGH – Administrative Court) cancelled the ruling due to the illegality of its content, Mr. T's appeal was partially recognized in an official ruling by the Bundesberufungskommission für Soziale Entschädigung und Behindertenangelegenheiten (Federal Appeals Commission for Welfare and the Disabled) dated June 24, 2004. The ruling granted the complainant a retroactive orphan's pension for a narrower period of time. This ruling was served to the complainant on September 22, 2004 – more than six years after he filed his initial application.

Given the jurisprudence of the Verfassungsgerichtshof (VfGH – Austrian Constitutional Court), which holds that the concept of a written official ruling serves to preserve the rule of law in the public administrative system (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 11.590/1987), there is no doubt that constitutional law limits the permissible duration of appeals proceedings. This is particularly true in light of the fact that the principle of the rule of law demands the *de facto* effectiveness of legal protections (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 11.196/1986). Given that constitutional law does not tolerate (any) case in which persons seeking legal protections must shoulder the burden of all the consequences of a potentially illegal official decision until their petition for legal protections is finally resolved, it is even more intolerable for the resolution of a materially justified petition to take an inappropriately long time.

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

2.3.3 Highest water authority delinquent on many occasions (VA BD/100-LF/04, 18-LF/05, BMLFUW LE.4.2.7/0014-I/3/2004)

N.N. filed a complaint with the Ombudsman Board that cited several incidences of delinquency on the part of the highest water authority in handling his petitions. First, he claimed the water authority was delinquent in its duty to reach a decision regarding his petition for a transfer of competency (Devolutionsantrag) with regard to his application for a water rights permit. Second, the highest water authority failed to cancel an ineffective official ruling issued by the Landeshauptmann (Governor) of the state of Oberösterreich (Upper Austria) after the competency in the matter had already been transferred to the highest water authority. Because the Governor was not competent to issue the ruling, Article 68 of the Allgemeines Verwaltungsgesetz (Administrative Act) required the highest water authority to cancel the ruling. Finally, the water authority failed to treat an inquiry by N.N. with appropriate diligence and did not answer him.

The Ombudsman Board ascertained the following scenario after obtaining a statement from the authorities:

On April 23, 1996, the complainant filed an application with the Governor of Oberösterreich for a permit to operate a hydroelectric power facility at the mouth of the Weidingerbach which empties into the Magerbach (underwater canal for a power plant). At the time, the Governor was the competent authority to issue such a permit.

Although the authority obtained various expert opinions and took various actions, it did not issue an official written ruling for years.

The complainant then filed a petition for the transfer of competency (*Devolutionsantrag*) dated April 23, 2001, concerning which the highest water authority has still not reached a decision. Instead, the Governor of Oberösterreich denied the complainant's application for a permit under water law in an official ruling dated May 7, 2001 – after the petition for a transfer of competency had been received by the competent authority.

Because the latter official ruling was issued after the receipt of the petition to transfer competency to the highest water authority, the Governor was no longer competent to pronounce a ruling at the time of its decision.

Still, the highest water authority failed to cancel the Governor's ruling dated May 7, 2001 due to its nullity as required by Section 68 of the *Allgemeines Verwaltungsgesetz* (AVG – Administrative Act).

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In his petition dated April 23, 1996, the complainant filed an application for a permit to operate a small hydroelectric plant at the mouth of the Sipbach into the Traun in the municipality of Ansfelden.

After conducting several investigations, the water authority rejected the complainant's application in an official ruling dated January 11, 2002.

The Governor of Oberösterreich, acting as the appellate water authority, rejected the complainant's subsequent appeal, filed January 17, 2002, in an official ruling dated January 17, 2002. The complainant did not file a further appeal with the highest court against this final official ruling.

Instead, he filed petition dated August 23, 2002 with the *Bundesministerium für Land- und Forstwirtschaft, Umwelt, und Wasserwirtschaft* (Federal Ministry for Agriculture, Forestry, the Environment, and water Resources Management). The petition letter bore the title "*Devolutionsantrag*" (petition to transfer competency). The highest water authority has yet to answer the complainant's letter.

The Ombudsman Board has made the following determinations in this matter:

Pursuant to Section 73, paragraph 1 of the *Allgemeines Verwaltungsgesetz* (AVG – Administrative Act), the authorities are required to respond to a petition without unnecessary delay and issue an official written ruling within 6 months of receiving it. This means that each party to an administrative procedure has a subjective legal claim to receive an official ruling if a petition or appeal is unresolved.

The highest water authority has not reached a decision regarding the complainant's petition to transfer competency to date. The authority also failed to take appropriate action with regard to the Governor of Oberösterreich's official ruling, despite the fact that competency in the matter had been transferred to it by way of the complainant's petition.

The highest water authority cited an excessive workload as the reason for its inaction. It did not offer further explanation. Given the absence of further explanation and the considerable amount of time that has passed, this reason cannot justify the delay.

Regarding the failure to answer the complainant's letter dated August 23, 2004, it should be noted that, although it does not give rise to a legal claim in the sense of Section 73, paragraph 1 of the *Allgemeines Verwaltungsgesetz* (Administrative Act), it would have

been expedient (and citizen-friendly) to enlighten the complainant about the circumstances of his case and his legal situation in case he mistakenly believed that he had pursued a legal remedy.

Therefore, the entire substance of Mr. N.N.'s **complaint** was **justified**.

The water authority explicitly promised the Ombudsman Board that it would discuss all of the complainant's matters during 2004. The Ombudsman Board has requested that it serve the official notices in due course.

2.3.4 Pond operated without consensus (VA BD/131-LF/03, Amt der Bgld LReg LAD-ÖA-V926/0-2004, BMLF 13.812/36-I3/2003)

N.N. turned to the Ombudsman Board because he objected to the Governor (Landeshauptmann) of the state of Burgenland's delay in resolving an appellate procedure concerning neighboring pond, which had been operated without consensus for years. The Governor was the competent authority in this procedure to enforce public water laws.

After obtaining various official statements, the Ombudsman Board ascertained the following scenario:

An official ruling from the Governor dated September 15, 1999 granted X.X.'s petition for a transfer of competency (new proceedings) in a procedure concerning the establishment of a pond on his property while dismissing his petition for a retroactive permit to operate the pond.

X.X.'s appeal was rejected by an official ruling of the *Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (Federal Ministry of Agriculture, Forestry, the Environment, and Water Resource Management) dated June 18, 2001.

This ruling has become final and cannot be appealed.

The District Office (*Bezirkshauptmannschaft*) issued an order for the enforcement of water laws pursuant to Section 138, paragraph 1, letter a of the *Wasserrechtsgesetz* (WRG – Water Act) of 1959 against X.X. In response, X.X. filed an appeal.

This appeal has still not been decided to this day.

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The water authority justified the several-year duration of the procedure by noting that the appeal proceedings against the order to eliminate the pond were postponed by way of an official action dated October 19, 2001 until a final legal decision had been reached regarding (the first) motion for new proceedings.

Although the postponement ruling later became superfluous following the official ruling reached regarding the motion for new proceedings dated December 4, 2001, the Ombudsman Board determined that the postponement decision was issued illegally at the outset. The reason given for the postponement – that the decisive question as to whether the [pond] facilities should receive a permit was unresolved (before the legally final resolution of the new proceedings) and should be clarified as a preliminary question – was not adequate.

The issuance of an order for the enforcement of water laws or conducting and continuing proceedings of this type is permissible even while related permit proceedings are pending is permissible and necessary according to the principle of legality.

This applies even more to a case in which proceedings to enforce water laws are to be considered in a new hearing, even if a subsequent application for a permit under water laws has already been legally rejected.

It is of no import whether a motion for a new hearing has been filed and new hearings are *pending*, because the only issue to be determined in the new hearings is whether the grounds cited in the motion for revision hearings are sufficient to grant the motion; legal questions such as the permit-worthiness of the facilities are not the object of the new hearings. Rather, such issues are to be (re)considered and decided in the reopened proceedings, should they occur. Hereafter, they may represent a preliminary question which would provide grounds for a postponement of the water law enforcement proceedings.

The mere fact that a motion was filed for new proceedings does not cancel the effect of the legally binding decision to refuse a permit.

Therefore, the authorities were mistaken when they assumed, prior to the legally binding conclusion of the new hearings, that the question of the permit-worthiness of the facilities, which was being considered in ongoing water law enforcement proceedings, was unresolved.

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Further, this means that the postponement of pending proceedings to enforce water laws pursuant to Section 38 of the *Allgemeines Verwaltungsgesetz* (Administrative Act) on the grounds that the preliminary question of the permit-worthiness of the facilities can be decided in the new proceedings is permissible only after the motion for new permit proceedings under water law has been granted.

Because the postponement was impermissible according to Section 38 of the *Allgemeines Verwaltungsgesetz* (Administrative Act) and therefore illegal, the duration of this segment of the proceedings was not adequate to justify the delay in resolving the appeal proceedings concerning the water law enforcement order.

As an additional reason for the lengthy duration of the proceedings, the authority cited the fact that it had to temporarily transfer the pertinent files to the *Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (Federal Ministry for Agriculture, Forestry, the Environment and Water Resource Management) for evaluation in an additional (the second) motion for new proceedings.

This argument is also unconvincing as a justification for the proceedings' duration of several years, because it is the ruling authority's responsibility to ensure that files transferred to another authority are returned promptly.

The Ombudsman Board also abided by its view that the second motion for a new hearing bears no influence on the appeal proceedings regarding the water law enforcement order, at least until its legally binding conclusion. In fact, even after its conclusion, the revision hearing would only have had an impact on the appeal proceedings if the motion for new proceedings had been granted.

Furthermore, the authority itself stated that the relevant files had been returned on September 17, 2003 following the conclusion of the proceedings regarding the motion for a new hearing by the *Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (Federal Ministry for Agriculture, Forestry, the Environment and Water Resource Management).

The authority's remarks that various measurements needed to confirm determinations about the facts of the case could not be collected until April and May due to weather are also inadequate to justify the duration of the proceedings. The remarks concerning the

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change in the legal situation arising from the amendment to the *Wasserrechtsgesetz* (Water Act) in 2003 are similarly inadequate.

Thus, the Ombudsman Board had to **object** to the water authority's delays of several years in resolving the appeal proceedings in question, and it recognized the **complaint** as **justified**.

The Ombudsman Board urged the authority to fulfill its obligation to reach a decision pursuant to Section 73 of the *Allgemeines Verwaltungsgesetz* (Administrative Act) and issue an official written ruling.

2.3.5 Court Trials (VA BD/705-J/03, 838-J/03)

Article 6 paragraph 1 of the European Convention on Human Rights guarantees the following: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." This right forms the basis of many complaints filed with the Ombudsman Board about courts of all instances. The following outlines two exemplary cases:

In September 2003, N.N. filed a complaint in proceedings of the Labor and Social Welfare Court of Vienna that have been pending since July 15, 1998. Through its review, the Ombudsman Board determined that in 1998 the Court summoned expert witnesses from a total of five fields, who submitted reports by February 1, 1999. On April 14, 1999 and June 30, 1999, sessions took place at which the court resolved to conduct tests designed to provoke panic attacks at the *Allgemeines Krankenhaus* (General Hospital) in Vienna as well as obtain new orthopedic evidence.

Not until March 2, 2000 was new evidence submitted regarding the complainant's inpatient stay at an orthopedic hospital. It does not appear that the court issued any query or letter of demand during this long period of time. Yet another year passed before the Court submitted its first query regarding the tests designed to provoke panic attacks on April 30, 2001. On June 30, 2001, the Court received an explanation of the tests and the connected costs. Three months later, on October 5, 2001, the Court received the defendant's consent to participate in the tests designed to verify the incidence of panic attacks. On December 19, 2001, following a two-month standstill in the proceedings, the court summoned another expert, whose report was not demanded until May 14, 2002. After the court issued a second query regarding the report on June 13, 2002, the expert witness

revealed via telephone that he could not act impartially in the matter. On July 8, 2002, a different judge assumed the case. Only after the new Judge assumed the case did the trial proceed without delay. The trial was concluded on December 16, 2003 (after the Ombudsman Board had already launched its investigation). The judgment was delivered to the parties on December 30, 2003.

In the case at hand, in which a court trial lasted five and one-half years from the filing of charges on July 15, 1998 to the delivery of the judgment on December 30, 2003, multiple unjustified delays and standstills plagued the first four years of the trial until the introduction of a new judge. Even though numerous reports were obtained from expert witnesses, the Ombudsman Board believes that the judge presiding over the first 4 years of the trial should bear the primary culpability for the lengthy duration of the proceedings. The court explained these delays by citing the judge's health problems, which eventually lead to his early retirement. However, the competent authorities failed to take measures to supervise the judge's official conduct or took them too late, after the standstills in the trial had lasted several months or years. It should be noted here that in many of the complaints regarding the lengthy duration of court trials that the Ombudsman Board reviews, significant standstills are often observed when the presiding judge's retirement is imminent. The Ombudsman Board observed breaches of the duty of care due to multiple unjustified delays in this trial of the Labor and Social Welfare Court, which amount to a **grievance** in judiciary administration.

N.N. filed a complaint in 2003 regarding the lengthy duration of a trial pending since September 29, 1998 in the District Court (*Bezirksgericht*) of Salzburg in which he was the defendant. The last negotiations took place on March 17, 2003. He has been waiting for a judgment since that time. The Ombudsman Board's review procedure ascertained the following scenario:

On September 29, 1998, the complainant's wife at the time filed a claim for maintenance against him along with a petition for a temporary injunction. The first appeal procedure was concluded with a resolution by the State Court (*Landesgericht*) of Salzburg on April 21, 1999. Following a change of judges, a session took place on July 16, 1999 at which the questioning of witnesses was set for October 11, 1999. This action was then postponed until January 14, 2000. Following the questioning of witnesses, two additional expert witnesses were summoned. After another appeal procedure, the court received the

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expert witnesses' reports on November 14, 2000. Not until 9 months later, following a second change of judges, were the oral discussions of the expert witness's reports repeated [for the benefit of the new judge]. Thereafter the proceedings ceased for nearly 4 months. On December 14, 2001, an additional expert witness was summoned. However, the court did not commission this expert witness's report concerning the plaintiff until June 19, 2002, five months after submitting an advance to cover the expert's expenses on August 1, 2002. As a result of the plaintiff's [poor] health and admission into a state psychiatric clinic, she did not appear for the expert's examination. Therefore, the examination took place on October 28, 2002. The expert witness submitted his report to the court on November 19, 2002 and it was discussed in the session on February 12, 2003. This discussion was extended to March 17, 2003 to facilitate the hearing of further evidence. At that session, the discussion of the expert witness's report reached a conclusion. At this point, the trial had lasted 4 years.

The hearings of the expert witness' report were not transcribed until June 23, 2003. The transcripts were delivered to the parties on June 25, 2003. The court did not pass a judgment until November 28, 2003, over 8 months after the close of hearings and a few days after the Ombudsman Board's review procedure was launched. The judgment was not served to the parties until December 2, 2003 (five years and two months after the charges were filed).

In his statement to the Ombudsman Board, the Federal Minister of Justice justified the delays described above by citing the pregnancies of two judges in the District Court (*Bezirksgericht*) of Salzburg, which lead to several changes of judges on account of long sick leaves. The Federal Minister of Justice also cited the tense situation in the court reporter's office of the Salzburg District Court (*Bezirksgericht*) and State Court (*Landesgericht*), which were overburdened due to other large pending trials, which lead to delays in providing transcriptions. However, the Ombudsman Board is of the opinion that it would have behooved the authorities that supervise the courts, which must have been aware of the circumstances described above, to take appropriate measures immediately (not after an intervention by the Ombudsman Board) to ensure the orderly conduct of business and prevent delays. On account of the repeated breaches of the duty of care due to the unjustified delays in this trial in the Salzburg District Court (*Bezirksgericht*), the Ombudsman Board **determined a grievance** in the judiciary administration.

In the meantime, the authority that supervises the courts responded to the Ombudsman Board's intervention by carefully monitoring the relevant department of the District Court (*Bezirksgericht*) of Salzburg and taking measures necessary to ensure the orderly conduct of business. Finally, the Federal Minister of Justice assured the Ombudsman Board that presiding director of the court would continue to closely monitor the conduct of further business in this department of the court (VA BD-838-J/03).

2.3.6 Delay of a claim for compensation due to uncertainty about which authority is competent in the matter (VA BD/41-WA/03, BMVIT 14.500/0002-I/CS3/2005, Tiroler Landeshauptmann LH-VE-11/7)

In the official ruling dated July 22, 1934, the Governor of Tyrol ordered the expropriation of several parcels of land to accommodate the building of a road, the Gerlosstraße, in accordance with the provisions of the Landesstraßengesetz (State Roads Act) in effect at the time. Because Bf believed that this decision had not satisfied all of his legal predecessor's rights, he filed an application in January 2001 to view the official expropriation ruling. The Tyrolean State Government informally sent Bf a copy of the ruling. Bf, however, assumed that the ruling had been formally served to him and filed an appeal against the expropriation ruling, asserting that timber rights had not been properly compensated. Thereafter, the appeal lay in the hands of the Bundesministerium für Verkehr, Innovation und Technologie (Federal Ministry of Transportation, Innovation, and Technology) from February 2001 until March 2002. Referring to the Bundesstraßen-Übertragungsgesetz (Federal Roads Transfer Act), which entered into force on April 1, 2002, the Ministry transferred the unresolved appeal to the Tyrolean state government after over a year. After two additional years had passed, the Tyrolean state government came to the realization that the Bundesministerium für Verkehr, Innovation und Technologie (Federal Ministry for Transportation, Innovation, and Technology) was in fact the competent authority to decide the matter and returned the case files. Four years later the Ministry has still not reached a decision.

In the Ombudsman Board's view, claims for compensation should be subsumed under the concept of "civil rights." The jurisprudence of the Constitutional Court does differentiate between core and marginal areas within civil law, but claims for compensation arising from expropriation belongs to the core area of "civil rights" (cf. *Verfassungssammlung des Österreichischen Verfassungsgericht* (VfSlg – sd Collected Judgments of the Austrian Constitutional Court) 11.760, among others). Further, the European Court of Human Rights interprets the concept of claims and obligations under civil law more broadly than the Austrian Constitutional Court. For this reason, the [Austrian Constitutional Court's] jurisprudence leaves no doubt that a "civil right" exists [in compensation claims arising from expropriation].

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Of course, we must judge the appropriateness of a court proceeding's duration according to the circumstances of the individual case. In particular, we must consider the legal and factual complexity of the case, the behavior of the parties to the proceedings, and the significance of the proceedings to the interested parties. However, it is clear that the authorities in this case could not reach an agreement regarding which of them was competent to decide the matter in four years' time. The Bundesministerium für *Verkehr, Innovation, und Technologie* (Federal Ministry for Transportation, Innovation, and Technology) did not deal with the appeal for over one year on account of the pending *Bundesstraßen-Übertragungsgesetz* (Federal Roads Transfer Act), and the Tyrolean state government required an additional two years to determine that the federal ministry was in fact the competent authority. The duration of the proceedings is hardly appropriate in the sense of Article 6 of the European Convention on Human Rights for the simple reason that an investigation into the matter itself never even took place.

In addition to Article 6 paragraph 1 of the European Convention on Human Rights, we should cite Article 83, paragraph 2 of the constitution, which guarantees the right to a judge whose office is established by law. According to the jurisprudence of the Constitutional Court, the right to a judge has been violated if an authority claims a competency not provided for by statutes or illegally shirks its competency and refuses to decide a case. (cf. *Verfassungssammlung des Österreichischen Verfassungsgericht* (VfSlg – sd Collected Judgments of the Austrian Constitutional Court) 889, 14.590) In this case, the authorities involved could not manage to issue an official ruling, which meant that the complainant could not even pursue legal remedies for a potentially incorrect decision.

Excerpt from the 26th Report of the Ombudsman Board to the Viennese State Parliament (Landtag) (2004)

2.3.7 Excessive duration of appeal proceedings before the Viennese *Dienstrechtssenat* (Civil Service Law Senate) (VA W/107-LAD/04)

A resolution of the personnel commission of the municipal council dated April 30, 1998 consigned Mrs. O into retirement. Subsequently, official proceedings were launched to determine whether her case met the conditions set by Section 9 of the Pensionsordnung (Retirement Ordinance) of 1995. This provision governs the possibility of extending a civil service career with part-time work or a reduced workload (ruhegenussfähige Dienstzeit). Official rulings issued by the civil service authority of first instance and the appeal senate dated December 24, 1998 and September 9, 1999 respectively (the latter was issued

more than sixteen months after Mrs. O was consigned to retirement) stated that an extension of service could not be imposed. Since this ruling was cancelled by the Verwaltungsgerichtshof (Administrative Court), however, the competent senate in the continued administrative proceedings now had to reach a decision regarding an appeal. More than a year passed until a final decision was reached in the session on August 30, 2004 – exactly six years and four months after Mrs. O originally retired.

Although one must concede that the extremely long duration of the proceedings criticized in the complaint as incongruous with the rule of law was partially a result of the duration of the Administrative Court proceedings, we **object** to the excessive duration of these proceedings before the Viennese state authorities (a total of nearly two years). Furthermore, the Administrative Court would not have had to cancel the ruling if the appellate authority had acted in accordance with the statutes in the first instance.

Excerpt from the 22nd and 23rd Report of the Ombudsman Board to the State Parliament (Landtag) of Burgenland (2003-2004).

2.3.8 Burgenland Grundverkehrsgesetz (Real Property Transactions Act) contravenes the European Court of Justice and the European Convention on Human Rights – The Ombudsman Board’s suggestions have not been implemented. (VA B/79-AGR/03, B/87-AGR/03, B/127-AGR/03, Amt d. Bgld LReg LAD-ÖA-V906/5-2004)

Several complainants turned to the Ombudsman Board with the assertion that provisions of the Burgenland Grundverkehrsgesetz (Real Property Transactions Act) of 1995 stand in contradiction to a judgment by the European Court of Justice and Article 6 of the European Convention on Human Rights.

The central and recurring point of the complaints is that Section 4, paragraph 2 clause 1 of the Burgenland Grundverkehrsgesetz (Real Property Transactions Act) of 1995 only provides for an acquisition of title by persons residing on real property with agricultural and forestry use if the acquirer can make a credible statement that he plans to manage the land himself as site for agriculture or forestry in addition to meeting other requirements. Paragraph three defines in concrete terms what is meant by “owner management” of the agricultural or forestry activities.

Citing the European Court of Justice’s “Ospelt” decision dated September 23, 2003 (C-452/01) and the fact that Sections 4a and 5 of the Vorarlberg Grundverkehrsgesetz (Real Property Transactions Act) in the version from the *Landesgesetzesblatt* (State Law Ga-

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zette) No 28/2004, which entered into force on June 1, 2004, the Ombudsman Board inquired of the Burgenland Governor's office whether similar amendments to the statutes had been considered or perhaps already undertaken. The "Ospelt" decision maintained that the Treaty of the European Union does not prevent making the acquisition of agricultural properties dependant on the previous issuance of a permit. However, it does prohibit refusing the permit because the acquirer does not plan to operate the agricultural site himself or reside at the site.

Furthermore, the Ombudsman Board requested that the Burgenland Governor's office disclose whether or not amendments to Section 31 of the *Grundverkehrsgesetz* (Real Property Transactions Act) of 1995 were planned or had already been undertaken, especially given that Section 31 states, in contravention of the European Convention on Human Rights, that the meetings of the Real Property Transactions Commission are closed to the public.

In this connection, the Ombudsman Board also cited the jurisprudence of the Constitutional Court (*e.g.*, December 13, 2001 Collected Judgments of the Austrian Supreme Court in Civil Matters B227/99, according to which the failure to conduct a public hearing in proceedings before the state Commission on Real Property Transactions was found to constitute a breach of the constitutionally-guaranteed right to an oral hearing before an impartial Tribunal). It is the Ombudsman Board's view that participation in the hearings must at least be possible by way of an explicit application to participate.

The statement subsequently submitted by the state government of Burgenland maintains that it plans to begin preparing an amendment of the *Grundverkehrsgesetz* (Real Property Transactions Act) of 1995 in autumn 2004. The planned changes include aligning Section 4, paragraph 2, clause 1 with the Ospelt decision of the European Court of Justice and amending Section 31 (regarding closed meetings). The state government claims that it was not possible to amend the statutes any earlier on account of other urgent legislative matters (*e.g.*, a law regarding genetic engineering).

However, the Ombudsman Board must note with criticism that the announced legislative measures have still not been implemented as of the writing of this report in February 2005.

2.4 Prohibition of Degrading Treatment (Article 3 of the European Convention on Human Rights)

Excerpt from the 26th Report of the Ombudsman Board to the Viennese Parliament (2004)

2.4.1 Refusal to provide a necessary medical treatment for several months

Three-year-old Melvin V. suffers from a disease known as mucopolysaccharidosis (MPS Type 1) that is incurable according to the current state of medical science. Most afflicted children die within the first seven to ten years of life. The parents, who were deeply saddened by the tragic blow fate had dealt them, learned in March 2004 that a new type of enzyme therapy could slow the advance of the disease and improve the young boy's quality of life. To their horror, the parents discovered that the Wiener Gebietskrankenkasse (Vienna Area Health Insurance) would not cover the cost of treatment, and the Allgemeines Krankenhaus (Vienna General Hospital) would not admit the child for an inpatient infusion treatment. What followed was a six-month tug of war over who would bear the costs, during which Melvin's disease advanced and desperation, helplessness, rage, and fear for the child's life became part of the long-suffering parents' daily routine. For six months, the family knew that poison was inundating their son's organs, including the liver, spleen, heart, skin, and brain, and that no other treatment existed. Finally, Mödling Thermenklinik declared that it would conduct the enzyme therapy prescribed for Melvin.

Article 3 of the European Convention on Human Rights prohibits degrading treatment of anyone. Although suspected breaches of this constitutional norm often arise in connection with interventions by executive organs, the constitution does not distinguish such cases from any others. It is unequivocally clear that the requirements flowing from this constitutional provision are paramount for any state action and can therefore claim unrestricted validity.

The Ombudsman Board does not entertain the slightest doubt that the refusal for over half a year to provide a moribund child with the only therapy that could ease his suffering or perhaps lengthen his life – in the absence of any medical grounds for the refusal of treatment – amounts to “degrading treatment” in the sense of this constitutional provision. The treatment is degrading on account of the psychological consequences it had for the parents as well as the [disregard] shown for the welfare of the child. The emotional suffering inflicted on the parents in this case is unfathomable; after more than half a year, they learned that the only therapy which might save their child's life was not undertaken because the issue of the costs could not be (immediately) resolved with the *Wiener Gebietskrankenkasse* (Vienna Area Health Insurance).

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With regard to this case, it should not be overlooked that Article 13, clause 1 of the European Social Charter obligates the Republic of Austria to grant everyone the medical treatment necessitated by his condition in case of sickness. In connection with the objective listed under Part 1, clause 11, which affords everyone “the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”, the provisions of the Social Charter offer ample grounds to demonstrate that international law would have demanded an immediate begin of enzyme therapy treatment.

Without prejudice to the solution eventually arrived at in this case, the Ombudsman Board demanded that the *Allgemeines Krankenhaus* (Vienna General Hospital) treat the next child afflicted by this rare disease in Vienna, so that the [child's parents] must not beg their way into another hospital that will administer the treatment. On the television program “Ombudsman – Equal Protection for all under the Law”, the medical director of the *Allgemeines Krankenhaus* (Vienna General Hospital) assured that he would see to it that this demand was fulfilled.

2.5 The Principle of Equality (Article 7 of the Federal Constitution, Article 2 of the *Staatsgrundgesetz* (Basic Law of the State))

2.5.1 A. Legislation

2.5.1.1 Unequal treatment of foreigners with regard to the right to practice medicine

*Pursuant to the Section 4 paragraph 5 first sentence of the *Ärztengesetz* (Medical Doctors Act) (version from the *Bundesgesetzblatt* (Federal Law Gazette) No. 140/2003) the requirement of Austrian citizenship or, alternatively, citizenship of another state in the European Economic Area (EEA) in order to practice medicine as a *Turnusarzt* (medical resident) does not apply to persons who are not citizens of a state that is party to the Treaty on the EEA if they are the spouse of a citizen of a EEA member state who is active as a wage or salary earner, or self-employed in Austria under the EEA rules providing for the free movement of labor. For example, a Japanese citizen who is the wife of a Polish citizen employed in Austria is entitled to practice medicine as an employee of a medical institution [i.e. not in private practice] following validation of her medical studies and a review to ensure that her post-degree training [e.g., residency] was equivalent to that required in Austria. However, Section 4 paragraph 8 of the *Ärztengesetz* (Medical Doctors Act) does not explicitly state whether the Japanese wife of an Austrian citizen who met the conditions outlined above would also be entitled to medical training in Austria. At first glance, in any case, Section 4 paragraph 8 of the *Ärztengesetz* (Medical Doctors Act) does not seem*

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to apply to the latter case, because an Austrian Citizen does not practice his occupation "under the provisions for the unrestricted movement of labor" - at least not in the strictest sense.

The Constitutional Court has consistently ruled that measures that place Austrian citizens at a disadvantage with respect to foreign citizens should be evaluated using the principle of equality. Therefore, such measures require an objective justification (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. Collected Judgments of the Austrian Constitutional Court) 13.084/1992, 14.863/1997, 14.963/1997; Constitutional Court March 1, 2004 and G 110/03 and December 15, 2004 G 79-81/04). No other standard can apply when a legal statute places the spouse of an Austrian citizen at a disadvantage relative to the spouse of a foreign citizen. The Constitutional Court has ruled that Article 1, paragraph 1 of the Federal Constitution's provision regarding the execution of the International Convention on the Elimination of All Forms of Racial Discrimination, reinforces and expands upon Article 7 of the Constitution to ensure the equal treatment of foreign citizens. Unequal treatment is only permissible if a reasonable cause exists and the inequality is not disproportionate (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 14.191/1995. In a structurally comparable case, the Constitutional Court struck down a law that led to the unequal treatment of the children of Austrians and EEA citizens as unconstitutional because it violated the aforementioned constitutional provision.

Because no objective reason for the unequal treatment can be derived from community law or any other source, the cited jurisprudence of the Constitutional Court establishes that it is clearly unconstitutional when the spouses of non-Austrian citizens of the European Union who work in Austria under free labor laws are entitled to practice medicine as the employees of Austrian medical institutions while the spouses of Austrian citizens are not. Thus, Section 4 paragraph 8 of the *Ärztegesetz* (Medical Doctors Act) proves to be unconstitutional.

However, the Constitutional Court has held that when laws are rendered unconstitutional by gap that the legislators obviously failed to anticipate, the gap may be closed by drawing analogical conclusions in an interpretation of the law that is congruous with the constitution (cf. for example *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 16.350/2001 which includes citations of further jurisprudence). With regard to the question of whether such a

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constitutionally accurate interpretation is permissible in the present case, one must also consider that the reference in the text of the law to “self-employment” on the part of the spouse of an Austrian or European Economic Area citizen is an indication that the legislators intended to enact a legal provision that would avoid the demonstrated violation of the principle of equality. Therefore, the Ombudsman Board argues for the permissibility of a constitutionally accurate interpretation of Section 4 paragraph 8 of the *Ärztegesetz* (Medical Doctors Act) to the effect that the spouses of Austrian citizens are entitled to practice medicine as the employee of an Austrian medical institution under the same conditions as the spouses of citizens of other EU-zone states.

However, this constitutionally accurate interpretation is not currently applied in the execution of the law. The *Bundesministerium für Gesundheit und Frauen* (Federal Ministry for Health and Women’s Affairs) subscribes to the view that the statutes in question are not subject to such an interpretation. Notwithstanding the fact that the Ministry’s viewpoint is unfounded on account of the fact that it fails to consider the implications of constitutional law for the problem, the Ombudsman Board proposes that the next revision of the *Ärztegesetz* (Medical Doctors Act) should include an amendment that explicitly requires the constitutionally prescribed equal treatment described above. The Ministry has already promised its support for a corresponding draft of the law to the Ombudsman Board.

2.5.1.2 Degrees from technical colleges should be better evaluated (VA BD/362-FI/03, BMF V-AP9/04(1))

In accordance with Clause 1.12 of Annex 1 of the Bundesdienstgesetz (Federal Civil Service Act) of 1979, civil servants must possess a university education commensurate with their prospective position in order to receive an appointment to Civil Service Level A1. The education requirement can be fulfilled through the acquisition of a Diploma (Diplom – a university degree that corresponds roughly to a Master’s degree in the Anglo-American educational system) pursuant to Section 66 paragraph 1 in connection with Annex 1 of the Universitätsstudienengesetz (UniStG – University Studies Act). The completion of a course of study at a technical college fulfills only the requirement for a Reifeprüfung (university entrance / high school graduation exam) pursuant to Clause 2.11, paragraph 2 of Annex 1 of the Bundesdienstgesetz (BDG – Federal Civil Service Act). For this reason, the Bundesministerium für Finanzen (Federal Ministry of Finance) considered a finance official who completed a part-time program entitled “Leadership of Small to Mid-sized Companies” at a technical college while he continued to work ineligible for appointment to the A1 level of service, because his education did not meet the requirements prescribed by the Bundesdienstgesetz (BDG Federal Civil Service Act.)

Given the content of Article 7 of the Federal Constitution and Articles 6 and 18 of the *Staatsgrundgesetz* (Basic Law of the State), the Ombudsman Board considers these requirements for appointment to the civil service problematic from a constitutional point of view. The Constitutional Court holds that the constitution requires lawmakers to give due consideration to objectively equivalent educational credentials. The categorical non-recognition of technical college degrees as worthy for A1 service also seems problematic to the Ombudsman Board because Clause 1.13 of Annex 1 of the *Bundesdienstgesetz* (Federal Civil Service Act) states that the successful completion of a continuing education course offered by the *Bundeskanzleramt* (Federal Chancellery) may serve as a substitute to fulfill the requirement for a university degree in law, social sciences, or economics.

Furthermore, the cited provisions place contracted civil servants at a disadvantage relative to tenured civil servants without just cause. No corresponding provision exists for civil servants working on a contract basis.

Although this problem has been well-known for some time, the Federal Chancellery has refused to recognize the complainant's technical college degree due to the demands of groups within the public service with respect to compensation policy. This purely budgetary argument cannot take precedence over the legal concerns.

Due to the inflexibility of the laws which affected the complainant in this case, the Ombudsman Board urges a revision of the aforementioned provisions to allow for the objective consideration of certain technical degrees as a fulfillment of the requirements for an appointment to Civil Service level A1.

2.5.2 B. Execution of the Law

2.5.2.1 Reduction of social assistance benefits (VA BD/40-GU/02; similar to VA BD/24-GU/02)

In its 26th Report to the National and Federal Councils (p. 212 et seq.), the Ombudsman Board outlined the case of Mrs. O and evaluated it with regard to the protection of her fundamental rights. For reasons beyond her control, a Widow's Pension that she had received or more than 13 years was reduced by two-thirds.

Following lengthy negotiations, both complaints were resolved when the complainants accepted a settlement from the insurance representative of the Tyrolean Medical Associa-

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tion (*Ärztammer*). However, the amount of the settlement was far lower than would have been necessary to compensate the complainants for the violation of their fundamental rights as determined by the Ombudsman Board. Furthermore, the treatment that the complainants received from the Tyrolean Medical Association in the handling of their case bordered on degrading.

2.5.2.2 Rejection of applications for exemption from the TV and Radio receiver fee on unsubstantiated grounds (VA BD/123-V/04; 305-V/04)

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

The Constitutional Court has consistently ruled that an official written ruling founded on unsubstantiated claims is deficient to an extent that violates constitutionally guaranteed rights. (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 16.334/2001, 16.439/2002 and 16.607/2002). Such an official action violates the constitutionally guaranteed right of all citizens to stand equal before the law.

In the case from which the complaint arose, the authority rejected the complainant's claim because it did not fulfill the legal requirements for an exemption, but it did not make clear to the complainants what factual determinations formed the basis for the decision. This is just the sort of bogus justification for an official ruling that the Constitutional Court sees 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 communicating the rationale for its rulings to align it with the statutory requirements of Sections 58 paragraph 6 and Section 60 of the *Allgemeines Verwaltungsgesetz* (General Administrative Act) of 1991 and ensure the constitutionally granted right of all citizens to stand equal before the law in accordance with the jurisprudence of the Constitutional Court.

The *Bundesministerium für Finanzen* (Federal Ministry of Finance) assured the Ombudsman Board that it would implement this **recommendation**. As of this report's press date, the necessary changes to the *Gebühren Info Service* (TV and Radio Fee Information Service) data processing system were in progress.

2.5.2.3 Constitutional law requires a review to determine the applicability of Section 21 paragraph 1 of the *Verwaltungsstrafgesetz* (VStG – Code of Administrative Offenses) of 1991 following the revocation of a driver's license (VA BD/381-V/03, BMVIT 14.500/0060-I/CS3/2004)

Mr. H justified his operation of a motor vehicle on a public road despite the fact that his license had been revoked with the explanation that his spouse needed to be taken to a hospital as quickly as possible due to a medical emergency. Although Mrs. H did in fact undergo an examination in an emergency room, the authorities neglected to further evaluate Mr. H's justification.

The Ombudsman Board does not dispute that the operation of a motor vehicle without a valid license counts among the most objectionable transgressions against public traffic law.

However, it must be noted that the Constitutional Court has ruled that the legally imposed exclusion of the applicability of Section 21 paragraph 1 of the *Verwaltungsstrafgesetz* (VStG – Code of Administrative Offenses) in connection with administrative offenses against Section 99, paragraph 1, letter a of the *Straßenverkehrsverordnung* (Road Traffic Ordinance) (operating a motor vehicle while under the influence of alcohol) violates the principle of equality (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts* (VfSlg. – Collected Judgments of the Austrian Constitutional Court) 15.772/2000). If the Constitutional Court holds that cases exist in which Section 21 paragraph 1 of the *Verwaltungsstrafgesetz* (VStG – Code of Administrative Offenses) of 1991 even applies to the operation of a motor vehicle under the influence of alcohol, then the same must apply to the operation of a motor vehicle without a valid license. Thus, if an accused person submits that he only committed the administrative offense in order to protect the life or health of a third party, then the Ombudsman Board views an evaluation of the soundness of this defense by the competent authorities as essential to any constitutionally and legally valid approach. In any case, such a claim should not be dismissed out of hand as an evasive defense. The Constitutional Court has consistently held that Section 21 paragraph 1 of the *Verwaltungsstrafgesetz* (Code of Administrative Offenses) is always applicable when the

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perpetrator's behavior is considerably less objectionable than the severity of the punishment would suggest, which may occur due to mitigating circumstances such an emergency situation (eg., *Verwaltungsgerichtshof* (VwGH – Administrative Court) January 31, 1990 ZI. 89/03/0084; and May 27, 1992, ZI. 92/02/0176).

The *Bundesministerium für Verkehr, Innovation und Technologie* (Federal Ministry of Traffic, Innovation, and Technology) has indicated its agreement with the Ombudsman Board's analysis and requested that the District Government (*Bezirkshauptmannschaft*) of St. Pölten proceed accordingly in the future.

2.5.2.4 Civil Service Authority frustrates attempts at early retirement (VA BD/51-FI/04, BMF V-AP43/04)

N.N. reported to the Ombudsman Board that he had filed an application with the Civil Service Authority on May 12, 2003 for retirement pursuant to Section 22g of the Bundesbediensteten-Sozialplangesetz (BB-SozPG – Federal Civil Service Social Compensation Plan Act).

According to this provision, a civil servant may retire upon completion of his 55th year of life by submitting a written application to depart from civil service as long as no “important official reason” exists to prevent it.

According to Section 24 paragraph three of the aforementioned law, this provision to allow early retirement was to expire on December 31, 2003.

The directorate of the state finance ministry for Vienna, Niederösterreich (Lower Austria) and Burgenland rejected the complainant's application in administrative proceedings of first instance that had lasted over six months. This ruling was issued on November 26, 2003.

The complainant's appeal, dated December 5, 2003 was dismissed by the Federal Finance Minister in a ruling dated May 13, 2004.

In its ruling, the Finance Ministry cited as grounds for the dismissal the fact that Section 22g of the aforementioned law had expired at the time of its decision. The appellate authority claimed that, because it had to apply the current legal situation at time of its decision, a retirement was no longer possible.

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The ruling on the appeal did not include a consideration of the arguments in the case, especially the appellant's arguments as to why no significant official reasons prevented him from retiring.

The complainant then filed a complaint regarding the excessive duration of the proceedings with respect to his petitions. This **complaint** was **justified**.

Section 73 paragraph 1 of the *Allgemeines Verwaltungsverfahrensgesetz* (Administrative Trial Act), which applies to proceedings under civil service law, states that rulings with respect to petitions and appeals shall be issued "without unnecessary delay and at most six months following their receipt by the authorities" unless administrative regulations stipulate otherwise.

The first authority undisputedly exceeded this maximum time allotment of six months.

However, the Ombudsman Board also could not fathom why a ruling could not be issued more swiftly on the appeal, especially given that the decision eventually issued did not contain any evaluation of the substance of the appellant's arguments, but instead focused on a "formal" aspect - the expiration of the relevant provision of *Bundesbediensteten-Sozialplangesetz* (BB-SozPG – Federal Civil Service Social Compensation Plan Act).

The circumstances that the Federal Finance Minister cited to explain the duration of the proceedings, namely the large number of similar petitions relative to the personnel resources as well as "*the Ministry's efforts to guarantee all petitioners equal treatment*" are attributable to the authority itself and are therefore inadequate to justify the excessive duration of the proceedings.

In a similar case, the constitutional court ruled that, in its capacity as an appellate authority, the Federal Finance Ministry was required to issue a substantive decision regarding early retirement even though the relevant provision had expired on December 31, 2003 (October 16, 2004, GZ B611/04)

The Constitutional Court based its ruling on the principal of equality. According to the court, "*whether the authorities can issue a decision regarding early retirement should not depend on various coincidences, particularly manipulative circumstances beyond the petitioner's control.*" If the content of Section 24 paragraph 3 of the *Bundesbediensteten-Sozialplangesetz* (BB-SozPG – Federal Civil Service Social Compensation Plan Act)

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amounted to such a coincidence or manipulative circumstance, then the court holds that it would “run contrary to the demand for objectivity that can be derived from the principle of equality”.

However, there is nothing to prevent the authority from deciding cases in which a petition for early retirement was submitted on time but not resolved by December 31, 2003 based on their merits. This course of action would remedy the appearance of unconstitutionality.

Because the complainant’s retirement (no longer early) followed shortly after this ruling was made public, it was not necessary to examine its implications for his case.

2.6 Prohibition of forced self-incrimination (Article 90, paragraph 2, Federal Constitution)

2.6.1 Driver Information (VA BD/126-V/04)

During the year covered by this report, the Ombudsman Board became involved in a case in which an administrative penalty was imposed on an automobile dealer for a violation of Section 103, paragraph 2 of the Kraftfahrzeuggesetz (Motor Vehicle Act) of 1967. The penalty was imposed because it was discovered during a trial for an administrative offense that a customer had provided him with an incorrect address before a test-drive.

According to Section 103, paragraph 2 of the Kraftfahrzeuggesetz (Motor Vehicle Act) of 1967, the authorities can demand information regarding who drove an automobile with a particular license plate at a certain time. The information that must be provided includes both the name and address of the operator. In 1986, a provision was inserted into the final paragraph of this statute that states that the authority of officials to demand such information precedes any right to refuse information. This provision seems to assure the constitutionality of Section 103, paragraph 2 of the Kraftfahrzeuggesetz (Motor Vehicle Act) of 1967, even though it breaks a hole in Article 90, paragraph 2 of the Constitution. (cf. *Verfassungssammlung des Österreichischen Verfassungsgerichts (VfSlg. Collected Judgments of the Austrian Constitutional Court) 11.829/1988*).

As a consequence of this legal situation, an automobile dealer, who is hardly in a position to verify the accuracy of an address provided him to by a customer before a test drive, is exposed to the risk of a penalty if the address turns out to be inaccurate (or even falsified) and the driver commits an administrative offense with the vehicle.

Because this situation is deeply unsatisfactory, at least with regard to constitutional law, the Ombudsman Board holds the view that an amendment of Section 103, paragraph 2 of the *Kraftfahrzeuggesetz* (Motor Vehicle Act) is worth considering; an administrative penalty should not be imposed if the owner has taken all reasonable steps to obtain an accurate address for the person to whose use he has entrusted his car.

2.7 Freedom of Property (Article 5 of the *Staatsgrundgesetz* StGG Basic Law of the State; Article 1 of the European Convention on Human Rights)

2.7.1 Drainage of wastewater on another person's property without compensation – Recommendation (VA BD/129-LF/04, Amt der OÖ LReg Wa-301640/57-2004-Gra/Lei)

N.N. complained to the Ombudsman Board that the Greater Eferding Pollution Control Association (Reinhalungsverband Großraum Eferding) had diverted wastewater through an open ditch across her property. She had not provided consent for the wastewater drainage, nor did she receive any compensation. In its defense, the Pollution Control Association invoked a permit issued by the Governor (Landeshauptmann) of Oberösterreich on March 27, 1998. The permit procedure that formed the basis for the case had bypassed the complainant. Thus, she could not defend her property against this encroachment.

The Ombudsman Board's review determined the following:

On July 30, 1981, the Greater Eferding Pollution Control Association had filed an application for a permit to construct an association operated sewer system for the communities of Fraham and Scharten. This project was referred to as the "Project for the Disposal of Wastewater from Fraham." Among other features, an overflow discharge channel was planned. This channel was intended to discharge rainwater overflows into the Innbach during strong storms.

During the following months, the Pollution Control Association changed the projected layout of the Fraham sewer between the underpass of the Planbach north of Fraham and the discharge channel on Schartenerstraße. The path of the Schartenerstraße overflow discharge channel was also changed to flow over N.N.'s property.

The Governor's office, acting as the competent water authority, arranged oral hearings regarding the project for September 22, 1982. X.X. and Y.Y. were summoned as the own-

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ers of parcel 875/2 and M.M. was summoned as the owner of parcels 906/3 and 904/4 at the time.

The parties participated in the hearing and granted their basic consent to the use of their land as planned in project. The project provided for a **closed** drainage channel in the **western** area of N.N.'s property. On her own, N.N. made a series of demands, including the demand that "only surface runoff shall run through the ditch, which shall remain open, and no sewage shall be discharged through it."

In a ruling dated September 27, 1982, the Governor of Oberösterreich issued the Greater Eferding Pollution Control Association a permit under water laws.

Construction was scheduled for completion on December 31, 1990. Section II of the official decision stated that the permit-holder had been granted an easement. An obligation to consent to the easement was imposed on those affected by it. A decision regarding compensation was reserved for a separate ruling pursuant to Section 117 of the *Wasserrechtsgesetz* (Water Act) in connection with Section 59 of the *Allgemeines Verwaltungsgesetz* (AVG – Administrative Act).

In 1985/1995 and 1991/1992, the Greater Eferding Pollution Control Association offered N.N. compensation, but N.N. did not accept the offers.

In a letter dated April 2, 1993, the Greater Eferding Pollution Control Association informed the state government of Oberösterreich that the "Project for the Disposal of Wastewater from Fraham" had been completed on September 15, 1992. A completion report was submitted on December 19, 1994.

The report revealed that last section of the overflow discharge channel for Schartnerstraße had not been completed. The overflow discharge channel for Fraham was also not constructed. In both cases, the Association had (only) constructed an emergency overflow discharge to divert rainwater overflow from Schartenerstraße into an open drainage ditch that empties into the Innbach. An explanatory letter from the Greater Eferding Pollution Control Association dated March 13, 1996 states the following: "*The drainage ditch flows through private property from the Schartener Landesstraße (State Road) to the Innbach.*"

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Thereafter follows a list of the affected properties, including information about the property owners, parcel numbers, and real property numbers (*Einlagezahlen*). The list includes N.N. along with the properties she owns.

The letter dated March 13, 1996 closes with a petition for an inspection by the water authorities and the issuance of retroactive permits for the listed changes to the plan. The letter explicitly petitioned for the issuance of a permit to allow the “[provisional] Unterhillinglah emergency discharge, which flows via a drainage ditch to the Innbach” to be authorized as a lasting component of the sewer system.

On February 5, 1998, following the submittal of further documents, the Governor of Oberösterreich announced oral hearings regarding the Greater Eferding Pollution Control Association’s petition for an inspection of the facilities by water authorities and an amendment to the permit to accommodate the changes to the original plans for overflow discharge.

Neither the complainant nor the other owners of affected properties were notified of these hearings.

A representative of the Water District of Grieskirchen submitted the following statement during the hearings: “The Schartnerstraße overflow discharge channel empties into a ditch along the property line, bordered by garden walls on either side, which then flows into a natural depression that leads to the Innbach. This situation is not in accordance with the permit; the closed overflow discharge pipe provided for by the permit was not constructed.” This statement closes with a remark indicating that the Grieskirchen Water District had no objections to a retroactive permit for the discharge channel as constructed.

Section 1 of an official ruling by the Governor of Oberösterreich dated March 27, 1998 states that the wastewater disposal system was essentially constructed in accordance with the permit issued by the Governor on September 27, 1982. Section II grants the Greater Eferding Pollution Control Association a permit for the discharge of overflow water subject to ancillary stipulations. This permit was issued in amendment of the Governor’s ruling on September 27, 1982 (Wa-3762/2-1982/Sch). Section III states the following under the heading “Voluntarily Granted Easements”:

“An easement for the construction, operation, and necessary maintenance of the sewer facilities authorized under Section II of this ruling (pipes and ancillary facilities) shall be

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granted in favor of the holder of this permit and to the detriment of the properties affected by the operation and construction of the facilities in accordance with the permit in the sense of the provisions of Section 63, letter b of the *Wasserrechtsgesetz* (WRG – Water Act) of 1959. The easement shall enter into force concurrently with the rest of this ruling (Section II of the ruling).” Sections 72, 99, and 111 paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) of 1959 are cited as the legal basis for this ruling.

The explanation of the grounds for the ruling states the following:

“This section of the ruling is based on the cited statutes and the result of an investigation. The investigation found, especially as a result of a site inspection, that the construction and existence of the sewer facilities authorized in Section II of this ruling have only a minimal impact on other properties in the sense of Section 111 paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) of 1959. This determination was permissible because all of the other conditions required by this law for an easement were fulfilled – in particular, the affected property owners did not object to the claim on their property. However, this determination only applies to those properties whose use was not secured through expropriation or an agreement with the property holders.”

In a letter dated August 14, 2003, the water authority informed N.N. that water was being diverted across her property without a proper permit.

In order to clarify the situation, the water authority scheduled a site inspection for October 7, 2003. At the site inspection, the authorities learned that the permit procedure had circumvented the property owners. It was also obvious that street and surface runoff was flowing into the sewers operated by the Greater Eferding Pollution Control Association and being diverted through the complainant’s property into the Innbach without proper authorization.

As a result of the inspection, various orders were issued to enforce water laws. Accompanied by an official letter dated October 7, 2003, the property owners received copies of the Governor of Oberösterreich’s ruling from March 27, 1998, including a transcript of the proceedings.

X.X. and N.N., a married couple, file appeals against this ruling. The *Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (Federal Ministry of Agriculture, Forestry, the Environment, and Water Resource Management) rejected the appeals

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on March 9, 2004 and July 5, 2004, citing Section 107, paragraph 2 of the *Wasserrechtsgesetz* (WRG – Water Act). On August 5, 2004, the same ministry rejected an additional appeal that N.N. filed on June 28, 2004 on the grounds that it was belated pursuant to Section 66 of the *Allgemeines Verwaltungsgesetz* (AVG – Administrative Act) of 1991.

The Ombudsman Board maintains the following:

I. The authoritative statute for the resolution of this case is Section 111, paragraph 4 of the *Wasserrechtsgesetz* (Water Law). The jurisprudence of the *Oberste Gerichtshof* (Austrian Supreme Court) contains the following remarkably clear statement:

In decision 13/94, the court states that “the legal fiction of Section 111 paragraph 4 does allow for the assumption that an easement exists, but only when the conditions stipulated by this provision are fulfilled: A so-called “minor easement” (*kleine Dienstbarkeit*) can only be assumed to exist if the proper conditions are fulfilled and the standard of “minimal impact” is not exceeded.

1. In view of this legal provision, initial consideration must be given to whether the sewer system had a “minimal impact” on the complainant’s property. In fact, the authority itself may very well have come to doubt the correctness of its decision, as indicated by the note recorded on October 7, 2003 which reads as follows: “closer examination reveals that this form of wastewater drainage without consent from the property owner may well amount to a grievance.”
2. Further, there is the fact that none of the affected property owners were in opposition at the hearing on March 23, 1998. However, those parties who were unable to participate in the proceedings because the authority failed to notify them of it were bereft of the opportunity to object to the claim upon their land. The *Wasserrechtsgesetz* (Water Act) version from 1990 dated April 3, 1990 16.453/03-I B/91 explicitly emphasizes the significance of a personal summons.

In contradiction to the assumptions made by the authority in its ruling, the conditions necessary for an easement were not met. It must have been an alienating experience for the property owners to learn that they had “not raised an objection to the claim upon their lands”, since they could not object to the claim on the property on account of the fact that they were unaware of the project.

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3. The agency is also mistaken when it asserts in its statement to the Ombudsman Board that “Section 63 and Section 111 paragraph 4 o the *Wasserrechtsgesetz* (WRG – Water Act) of 1959 does require an easement for the construction of water ‘facilities’, but the complainant’s property was not affected by the construction of facilities.” The text of Section 111 paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) does not require this restriction. Rather, an examination of that statute in conjunction with Section 63, letter b of the *Wasserrechtsgesetz* (WRG – Water Act) proves the opposite: Easements may be granted not only for the construction and maintenance of water projects, but also for their operation. (argument: “or”).

II. In its decision dated July 11, 1996 96/07/0063, the *Verwaltungsgerichtshof* (Administrative Court) pronounced that “Section 111 paragraph 4 becomes applicable as soon as the conditions contained therein are fulfilled and the water permit is issued. An official ruling is not required for this statute to take effect.”

In reference to its previous jurisprudence, the court states that “It is permissible to include a pronouncement that the legal consequences of this statute shall apply in the permit notice, however the pronouncement shall only have a declarative character.” Such a pronouncement would only inhere a normative character if the ruling under water law clearly provided for easements to be recognized pursuant to Section 111, paragraph 4. In that case, an enforcement injunction can be issued if necessary. Otherwise, a separate ruling must be issued.

1. Regardless of the fact that the conditions prescribed by Section 111, paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) went partly unexamined and partly misunderstood, it must be asked whether Section III of the Governor Oberösterreich’s ruling possesses any legally significant substance. This depends on whether the easements to be recognized as granted pursuant to Section 111, paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) were stipulated with sufficient clarity, because “a pronouncement pursuant to Section 111, paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) only inheres a normative character under this condition.” (*Verwaltungsgerichtshof* (Administrative Court) *Zeitschrift für Verwaltung, Judikaturbeilage* (ZfVB – Journal of Administration, Jurisprudence Supplement) 1997/2202 with further citations).

2. The *Verwaltungsgerichtshof* (Administrative Court) views the requirement for specificity of a contractual obligations related to larger projects, such as a sewer system, in a

delicate balance between legal certainty and administrative efficiency. According to the court, the concept of legal certainty demands a detailed description of the easement to be recognized as granted in the language of the ruling itself. However, in 96/07/0086, the court holds that such a demand appears “virtually un-fulfilable.”

A detailed verbal description of the precise layout of all the easements to be recognized as granted pursuant to Section 111, paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act) would not only unreasonably hamper the preparation of the pronouncement on the permit ruling; it would also diminish the readability and understandability of the pronouncement for all its addressees in a way that compromises legal certainty.

For this reason, the Administrative Court has repeatedly ruled that it is permissible for the pronouncement of an official ruling to make reference to documents or plans not included in the ruling. The descriptions and statements contained in such documents are to be integrated into the normative substance of the ruling. Thus, they are elevated to the level of the right-determining or right-creating content of the ruling. (reemphasized in 94/05/0333 *Zeitschrift für Verwaltung, Judikaturbeilage* (ZfVB – Journal of Administration, Jurisprudence Supplement) 1999/881).

3. The court applies this requirement to the specificity of easements to be recognized as granted pursuant to Section 111, paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act). According to 96/07/0086, the pronouncement of a ruling need not describe the easements in detail in order to become effective as a normative determination pursuant to Section 111, paragraph 4 of the *Wasserrechtsgesetz* (WRG – Water Act).

However, it is not sufficient for the ruling’s pronouncement regarding easements to merely refer to the findings of the official surveyor for hydraulic engineering as reported in the explanation of the grounds for the ruling. – Especially if the findings do not contain any specific details that could be subject to an immediate enforcement order.

4. If one applies this standard to the current case, then it becomes clear that Section III of the ruling dated March 27, 1998 does not have a right-determining effect separately or in connection with the corresponding section of the explanation of grounds for the ruling. The latter consists only of a blanket reference to “the results of the investigation.” It

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does not specify which properties were affected nor to what extent obligations to consent were recognized.

III. In conclusion, we argue the following:

1. Section III of the ruling dated March 27, 1998 does not have any normative effect. It does not obligate the property owners to consent, nor does it bestow any rights on the Greater Eferding Pollution Control Association. Section II does permit the Association to divert water from the wastewater disposal (sewer) system of Greater Eferding. However, the Greater Eferding Pollution Control Association has no title to divert the wastewater into the open ditch. For this reason, it would have been advisable to prohibit the discharge of water via the open ditch with immediate effect.
2. If the Pollution Control Association insists on continuing to divert water through the open ditch, however, then it must seek an amicable settlement in the sense of Section 60, paragraph 2 of the *Wasserrechtsgesetz* (Water Act).
3. It would behoove the leadership of the Greater Eferding Pollution Control Association to offer the land owners appropriate compensation for the encroachment on their property that they were forced to tolerate since the permit became legally enforceable in the sense of Section 26, paragraph 3 of the *Wasserrechtsgesetz* (Water Act) Only thusly can federal intervention due to official liability be avoided.

Excerpt from the 22nd/23rd Report of the Ombudsman Board to the State Parliament of Burgenland (2003-2004).

2.7.2 Repositioning a sewer line (VA B/62-BT/02, Amt d. Bgld LReg LAD-ÖA-V851/11-2003)

N.N. filed a complaint that the Burgenland state government had still not resolved her appeal against the ruling of the Mattersburg district authority on January 5, 2000, which had obligated her to consent to the existence and maintenance of her neighbor's sewer line on her property.

The Ombudsman Board's review led to the following conclusion:

Based on two rulings by the Mayor of the town of Sieggraben, the owners of the property abutting the complaint's to the south connected their property, including a domicile, to the public sewer in 1982. Based on a surveyor's report obtained in 1999, it was determined

that sections of the sewer line from the house had been laid on the long, 8 meter-wide property belonging to the complainant. Still, the District Authorities (*Bezirkshauptmannschaft*) granted a petition by N.N.'s neighbor and obligated her to consent to the existence and maintenance of the sewer running across her property.

N.N. filed a complaint via her legal representative, asserting that it would have been technically possible to lay the sewer on her neighbor's property, and that the cost of doing so was reasonable and appropriate. In view of the significance of the fundamental right of property, the authority should have come to the conclusion that this encroachment on another person's property was impermissible.

Not until the Ombudsman Board's review was already underway did the Burgenland State Government grant the complainant's appeal and release her from the obligation to consent in a ruling dated September 8, 2003.

The Ombudsman Board maintains the following:

If connecting a house sewer line to the public sewers is not possible (or disproportionately expensive to achieve) without encroaching on another person's property, then the owner of the affected land is obligated to consent to the construction, existence, and maintenance of the line on their property in exchange for compensation pursuant to Section 7 of the Burgenland *Kanalanschlussgesetz* (Sewer Connection Act) of 1989 (paragraph 1). If these conditions are met, then the district authorities are to officially pronounce the obligation to consent when the party obligated to connect to the sewer files a petition. If there are several possible ways of connecting to the sewer system via another person's property, then the solution that best protects the rights of others shall be chosen (paragraph 2).

A claim on another person's land is only permissible when laying the house sewer on the house owner's property is either not possible or only possible at a disproportionate additional cost. According to the text of the statute, the principal of protecting other property owners' rights only applies to the selection of one from among many solutions for connecting to the sewer system by encroaching another person's property.

Due to the constitutionally protected fundamental right of property (Article 5 of the Staatsgrundgesetz, (Basic Law of the State) Article 1 of the 1st Supplemental Protocol of the European Convention on Human Rights), a claim on another person's property is only

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permissible if the interference with their property rights is in the public interest, appropriate, necessary, and reasonable (cf. the jurisprudence cited by Mayer in his notes under Section III, No. 2 –4, Federal Constitution³ Article 5, *Staatsgrundgesetz* (StGG Basic Law of the State)). Significant interferences are to be compensated with appropriate payment (Section 365 of the *Allgemeines Bürgerliches Gesetzbuch* (Austrian Civil Code)). The proportionality of the additional costs of laying the sewer on the house owner's property can only be judged if the amount of the compensation to be paid for an encroachment on another person's property is known. The test for proportionality requires a comparison of the costs of laying the sewer on the owner's property versus another's property and the establishment of a relationship between the two costs.

In this case, it required seven (!) statements by the official surveyor in order to say with any clarity how high the costs of laying the sewer on the owner's land would be. Since the authority generally acts in an official capacity and must observe expediency, swiftness, simplicity, and cost-effectiveness as guiding principles (Section 39 of the *Allgemeines Verwaltungsgesetz* – (AVG – Administrative Code), it should have asked the surveyor concrete questions immediately at the outset of its supplemental investigation and bound him to swiftly provide an estimate of the costs.

However, the appeal authority deserves reproach above all due to the fact that it did not appoint an independent private surveyor to investigate the cost of laying the sewer on another person's property, citing the peculiarity of the case (Section 52, paragraph 2 of the *Allgemeines Verwaltungsgesetz* (AVG – Administrative Code) until the proceedings had lasted more than three years. Granted, the authority only needs to determine the amount of compensation if the landowner is obligated to consent to the sewer line on his property (*i.e.*, when laying the sewer on the homeowner's property is impossible or disproportionately expensive). However, the question of proportionality can only be answered when the cost of laying the sewer on another person's land is known.

Thus, the appellate authority should have investigated not only the costs of laying the sewer on the homeowner's land, but also the costs of laying it on the adjacent property owner's land at the outset of the proceedings. This step was necessary to determine whether an encroachment on another person's property was permissible. Since the authority did not realize this in due time, it significantly exceeded the maximum time allowed for a decision as stipulated by Section 73, paragraph 1 of the *Allgemeines Verwaltungs-*

gesetz (AVG – Administrative Code). For this reason, the **complaint** was **justified**. However, the issuance of the appeal ruling on September 8, 2003 eliminated the grounds for the complaint, so that no further action was required of the Ombudsman Board.

2.8 Freedom to Practice a Trade or Occupation (Article 6 of the *Staatsgrundgesetz* (Basic Law of the State))

2.8.1 Deprivation of Authorization to Transport School Children (VA BD/101-V/04, BMVIT-14.500/01383-I/CS3/2004)

A person authorized to transport school children, who has been deprived of the right to operate his/her own private motor vehicle, shall forfeit the right to transport school children for five years, in accordance with Section 16 paragraph 5 line 2 of the Work Rules for Non-line-operation-related Passenger Traffic (Betriebsordnung (Work Rules) 1994) ipso jure.

The Austrian Constitutional Court acts on the assumption, based on established case law, (e.g. *Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes* (Collection of the Findings and most important Decisions of the Supreme Court for Constitutional Cases) 12.677/1991, 14.611/1996, 15.509/1999, 16.740/2002 and 16.927/2003), that the legislature is authorized, in accordance with Article 6 of the Constitution, to regulate the exercise of professions in that professions be allowed or disallowed according to specific provisions, insofar as the legal regulation which restricts the freedom to practice a trade or occupation is necessary to a public interest, necessary for its [intended] purpose, adequate and realistically justifiable. The provision-maker who creates regulations that limit the freedom to practice a trade or occupation is also restricted to these guidelines.

The legal position created through Section 16 Paragraph 5 line 2 of the *Betriebsordnung* (Work Rules) 1994 brings about a serious encroachment on the freedom to practice a trade or occupation because it causes every loss of the authorization to operate a motor vehicle (even only temporarily) to lead compulsorily to the loss of the authorization to transport school children for five years. Because such a deprivation can, from an economic perspective, destroy a person, such a by-law provision as the one currently in discussion would be, (in accordance with the principle of commensurability) commensurate only if it represents the mildest means necessary to reach the goal, in the public's interest, of avoiding the endangerment of school children, and at the same time would not improv-

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erly infringe on the constitutionally protected rights of the affected license-holder (compare the exemplary constitutional testing procedure *Öhlinger*, constitutional law [2003] Rz 715 et seq.). It is however not apparent that the protection of school children from reckless drivers necessarily requires that any loss of driving privileges be made a reason for the deprivation of the authorization to transport school children for five years without exception.

The inflexibility of the provision of Section 16 paragraph 5 line 2 of the *Betriebsordnung* Work Rules 1994, which does not tolerate any consideration, and therefore also no contemplation of the constitutionally protected position of the license-holder, does not represent the mildest possible means of protecting school children from reckless drivers. The by-law provision in question is therefore not necessary for [its] intended purpose and is therefore, in light of the freedom to practice a trade or occupation, unconstitutional.

The Austrian Ombudsman Board has requested the *Bundesministerium für Verkehr, Innovation und Technologie* (Austrian Federal Ministry of Transportation, Innovation and Technology) to take the required steps to create a legal situation in conformance with the constitution without delay. After a long delay, in December 2004 an amendment for the appraisal [of the by-law in question] was sent. This amendment consists of a constitutionally correct request for changes to the legal situation so that the authorization to transport school children may be taken away by the authorities for a period of time appropriate to each individual case.

2.8.2 Dismissal of an Application for the Issuance of a Taxi Permit (VA BD/299-V/04, BMVIT-14.500/0065-I/CS3/2004)

The complainant's application for the issuing of a taxi permit was refused by the transportation office of the Head Office of the Federal Police in Vienna with a decision on 08/13/2004, because the required trustworthiness under reference to section 6 paragraph 1 line 3 of the Work Rules was abnegated due to a list of five ordinance violations.

According to the case law of the *Verwaltungsgerichtshof* (VwGH Administrative Court) (e.g. VwGH 10/28/1998, ZI. 98/03/0132) the content of the regulation of Section 6 paragraph 1 line 3 Work Rules 1994 is to be limited in conformance with the constitution so that an observation time of five years for determination of [driver] reliability is adopted. Other past deficiencies that would, at the time of application, indicate unreliability, are, with regard to good conduct in the meantime, not to be considered in this determination.

According to the legal conception of the VwGH, (VwGH Administrative Court) an evaluation of the conduct of the applicant during a five year period is to be undertaken to determine whether trustworthiness exists at the time of decision about the issuing of the desired taxi driver's permit or not. The legal conception determined by Section 6 paragraph 1 line 3 Work Rules, which is fundamental to the decision that is the object of this complaint, [namely] that provable trustworthiness must exist in the five years preceding the issue of a permit, has been expressly qualified as not applicable by the VwGH (Higher Austrian Administrative Court) (compare also VwGH 16.10.2002, ZI. 99/03/0147). More relevant is whether untrustworthiness caused by an action of the applicant during the five years preceding the point in time of the denial of the application continues at the point in time relevant to the predictive decision to be made.

In light of this established case law, the Ombudsman Board is of the opinion that the mere recording of five ordinance violations does not alone suffice to make out the lack of trustworthiness of the applicant in the sense of Section 6 paragraph 1 line 3 of the *Betriebsordnung* (Work Rules) 1994. Because in the case at hand it was determined during the investigative process that the announced decision (notwithstanding the objected-to deficit of justification) is, in the final result, lawful, the complaint could only be recognized as valid insofar as that a citizen should expect that rejections of his applications be justified in a mistake-free manner, in concordance with the ideal of transparency in government.

2.9 Data Protection (Section 1 of the *Bundesgesetz über den Datenschutz 2000*) (DSG – Federal Data Protection Law 2000)

2.9.1 Dissemination of Sensitive Health Data (VA BD/22-GU/04; VA B/18-SOZ/04)

On 6/2/2004 Ms. O was personally given a registered letter with return receipt from the district commission of the Urfahr area by an official of the Gendarmerie (Austrian Regional Police), on the outside of which the handwritten comment "Attention: Open Tuberculosis HIV" was written. Furthermore, the Gendarmerie official had been notified by the authorities before delivering the letter that the complainant was infected with HIV and that she may have also been infected with Tuberculosis.

According to the constitutional provision of Section 1 paragraph 1 of the *Datenschutzgesetz 2000* (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 designates that, concerning the use

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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 confidentiality are allowable only for the predominantly justified protection of a third party's 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. The same concept can be derived from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Right to Respect of Private Life.

According to the legal definition of Section 4 line 2 of the *Datenschutzgesetz 2000* (Austrian Federal Data Protection Law) 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, Section 14 of the *Datenschutzgesetz* (DSG – Austrian Federal Data Protection Law) contains a detailed commitment to implementing procedures for data protection, in which the duty of ensuring that the use of data occurs according to the rules is to be emphasized.

In a constitutional appraisal of the above situation it is to be noticed that the danger of a transmittal of an HIV infection during a delivery taking place under normal circumstances is impossible according to current medical knowledge. Given this, the constitutional order to undertake an intrusion [of personal privacy] only in the mildest manner in accordance with the intended goal it is not recognizable why it should be necessary to inform the *Gendarmerie* official delivering the letter of the existence of a HIV infection.

Under the data protection law the circumstance that a message concerning the existence of a tuberculosis infection be written on the outside of a registered letter with return receipt about to be delivered is not justifiable, furthermore it is not even recognizable on what legal basis this invasion of basic rights could possibly be protected.

The complaint was therefore recognized as justified, and the responsible *Bundesministerium* (BM – Austrian Federal Ministry) was requested to effect compliance with the provisions outlined in the Data Protection Law.

A further case in which sensitive health data was disseminated in an illegal manner is exemplified by the investigative proceedings Austrian Ombudsman B/18-SOZ/04. In this case, the Ombudsman Board found that in a decision of the district commission of Neusiedl am See notifying the complainant that her application for an Authorization for the Adoption of a Child in the Capacity of a Foster Mother had been rejected, the name of the municipality in which the complainant resided was revealed, although the management procedure at hand was not authorized [to access her personal data]. Because health data – as shown above – “especially protection-worthy” data in the sense of Section 4 line 2 of the *Datenschutzgesetz 2000* (DSG- Austrian Federal Data Protection Law) and because a psychological examination was quoted many times in the decision in discussion, an injury to the basic right of data protection was determined, and the validity of the complaint was recognized.

This complaint was used as a reason by the government of the province of Burgenland during the *Bezirkshauptleutekonferenz* (meeting of district heads) on 06/03/2004 to intensively bring the applicable data protection provisions to attention. The district heads were instructed to follow the applicable legal procedures.

2.9.2 Non-observance of Confidentiality in a Driver’s License Procedure (VA BD/351-V/04)

Mr. H submitted to the Ombudsmen a copy of a document provided to him by the district commission of Neunkirchen, which contained not only personal information concerning him but also sensitive information about his neighbor, with whom Mr. H. had apparently been living in a state of conflict for years. In the document, remarks appear about his neighbor’s priority notices concerning violations of sections 4 and 5 of the Straßenverkehrsordnung (StVO – Traffic Regulations), as well as the NÖ Polizeistrafgesetz (Lower Austrian Police Penal Code), section 81 of the SPG and section 83 of the Strafgesetzbuch (StGB – Austrian Criminal Codes). Additionally the conjecture was made that he “[may have] regularly imbibed alcohol.”

According to the constitutional provision of Section 1 of the *Datenschutzgesetz* (Austrian Data Protection Law), everyone has a claim to confidentiality of data concerning his person, to the extent that an interest meriting protection exists. Restrictions made by a lawmaker to the right to confidentiality are only allowable for the protection of the predominantly justified interest of a third party, in which any legal provision authorized for intrusion [on personal privacy] must meet the criteria of Article 8 paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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In the face of this constitutional legal position, it is evident that the dissemination of sensitive information about Mr. B. to his neighbor represents a serious injury to basic rights in the absence of a corresponding legal provision that could support this method of action.

The Ombudsmen have therefore requested the district commission to make its employees aware of the necessity of compliance with provisions concerning data protection.

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

2.10.1 **During the gathering of required information, “incognito adoptions” must be taken into consideration (VA BD/88-V/04, BMVIT-14.500/0115-I/CS3/2004)**

According to Section 19 paragraph 1 of the 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 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, provided that one of the chosen escorts 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.

According to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, every person has the right to respect of his private and family life. According to unanimous case law and scholarly opinion, (compare e.g. *Wiederin*, Artikel 8 EMRK in *Korinek/Holoubek* [eds.], *Bundesverfassungsrecht* [5. Lfg. 2002] as well as *Grabenwarter*, *Europäische Menschenrechtskonvention* [2003] 201 et seq.), a duty of the state to abstain from inappropriate transgressions on this basic right and furthermore to take appropriate steps to prevent personal data concerning origins or ancestry from being exposed can be derived from this provision of the convention. It is therefore a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms if in the case of an “incognito adoption” unauthorized third parties, for whatever reason, receive information regarding the identity of the biological parents of a child adopted in this manner. Equally unconstitutional is if the affected person is required to provide corresponding data particularly if it is not recognizable what public interest

could justify the corresponding questions that invade the most intimate region of personal life, even though neither the driving competence nor the mental or physical maturity of the juvenile are dependent on which family name he/she had at the time of his/her birth, as well as if the fore- and surnames of the biological parents are known or not.

In light of these considerations, the Austrian Ombudsman Board has determined, with a **recommendation** from 06/02/2004, that the information requested of the applicant on page one of Internet form 19 of the Application for Authorization of Driving for the Purpose of Instruction and Issue of an Advanced Driver's Permit for Class B according to section 19 of the *Führerscheingesez* (Driver's License Law) represent **grievances** in management. At the same time the *Bundesministerium für Verkehr, Innovation und Technologie* (Austrian Federal Ministry of Transportation, Innovation and Technology) has been **advised** to alter the form in question in a manner in conformance with the constitution, so that no required entries about "Family name at the time of birth" as well as "Forenames of biological parents" be requested of the applicant.

The *Bundesministerium* (Government Ministry) has informed the Ombudsman Board that a constitutional solution to the indicated problems will be found within the framework of the project "Redesign of the Process of Issuing a Driver's License", which is already in progress.

2.10.2 Needless Entrance of an Apartment (VA BD/129-I/04, BMI 64.630/106-II/1/04)

Because of a complaint about a disturbance by a radio alarm clock, an official of the Bundesgendarmerie (Austrian Federal Police) intruded into an apartment during the absence of the owner and turned the radio off.

Article 8 of the *Europäische Menschenrechtskonvention* (MRK – European Convention on Human rights) provides for the right to respect of private life and should ensure the individual a private area in which he/she can freely unfold and develop his/her personality. Article 8 of the *MRK* also normalizes the right (based on the right to private and family life) to respect for the apartment. The area protected by this basic right is therefore larger than the one described in Article 9 of the *Staatsgrundgesetz* (StGG – Basic Law of the State) in connection with the Law for the Protection of the Sanctity of the Home, because this law merely concerns house searches and binds these to more narrow conditions than the legal provisions of Article 8 make possible.

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According to Section 39 of the SPG, institutions of the public security service are authorized to enter upon private property and buildings, insofar as this is necessary to the fulfillment of the duty of general first aid.

The mere fact that the apartment of the affected party was entered was, however, not a house search in the sense of Article 9 of the *Staatsgrundgesetz* (StGG – Basic Law of the State) because the element of a “search” was not present. However, the right of respect for the apartment in the sense of Article 8 of the *Europäische Menschenrechtskonvention* (MRK – European Convention on Human Rights) was violated.

This was because the official could not seriously assume a concrete danger to the apartment’s owner. Without the appearance of further, concrete indicators of the presence of danger, there was no sufficient reason for such a serious intrusion of privacy, which violated Article 8 of the *Europäische Menschenrechtskonvention* (MRK – European Convention on Human Rights). This behavior was a cause for the Ombudsman Board to **determine a grievance** in administration.

Excerpt from the 26/27 report of the Ombudsman Board to the Salzburger Landtag (Parliament of the Province of Salzburg (2003-2004))

2.10.3 Documentation of the Consent of a Patient to Undergo a Sterilization Provided-for in Constitution (VA S/38-GES/04, Amt d. Sbg LReg 9-1184/77-2004)

Ms D., who exhibits perinatal brain damage with moderate dementia and is up to 50% mentally disabled, gave birth to a son on 05/15/1996 in the hospital of the community of Oberndorf, after which a tubal ligation was performed in connection with the birth. In 2003 the woman filed a criminal complaint because the sterilization was undertaken without her consent. Without anticipating the outcome of the trial, it is nevertheless clear beyond a doubt that the declaration of consent is not to be found in the patient’s medical records. However, the head of gynecology and obstetrics at the Oberndorf Hospital informed the Regional Police Office that the operation in question took place after a discussion with the patient and her mother.

According to the opinion of the Ombudsman Board, it is immediately apparent and therefore in no need of further justification that sexual behavior and fertility with its potential relevant effects fall under the protection of Article 8 of the *Europäische Menschenrechtskonvention* (MRK – European Convention on Human Rights). Furthermore it is generally recognized that central tenets of medical ethics – like, for example the principle of autonomy or public assistance – also fall under the scope of Article 8 of the *MRK* (see for

example *Kopetzki. Verfassungsfragen des Patientenschutzes, in Österreichische Juristenkommission [Hrsg], Patientenrechte in Österreich [2001] 19 [24]*). It is further self-evident that disabled people are also in possession of this basic right.

Because intrusions on an individual's fertility affect this basic right in an especially intensive (and to some extent even irreversible) manner, it should be strictly ensured that such procedures are only undertaken with the accordant patient consent. This is especially valid if – as in the above-mentioned complaint – sterilization is carried out on a disabled person, who, due to his/her disability is only able to express his/her constitutionally protected interests with difficulty.

This constitutional analysis leads the Ombudsman Board to conclude that the convention provision in discussion implies a duty of the state to take appropriate steps that – if at all possible – a legally valid declaration of consent be obtained from the patient and securely stored. The protective duty of the state under the scope of Article 8 of the *Europäische Menschenrechtskonvention* (MRK – European Convention on Human Rights) and recognized in the established case law of the *Europäischer Gerichtshof für Menschenrechte* (EGMR – European Court of Human Rights) must come to the foreground especially where an individual is in need of special protection due to his/her physical or mental constitution. Furthermore, special weight must be placed on the documentation of the presence of a valid consent especially in the case of sterilization, which represents a significantly serious violation of the rights protected under Article 8 of the *Europäische Menschenrechtskonvention* (MRK – European Convention on Human Rights).

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Excerpt from the 22/23 report of the Ombudsman Board to the *Burgenländischer Landtag* (Parliament of the Province of Burgenland (2003-2004))

2.10.4 Delayed Removal of Junk and Halt to Rat-plague (VA B/68-BT/02, B/99-NU/02, B/104-NU/02, Gemeinde Neusiedl/See 40-141/2001, 40-141/2002 BH Neusiedl/See 02/04-258/4-2003)

At the beginning of July 2002, N.N. turned to the Ombudsman Board with a request for help because wrecked bicycles, scrap iron and other junk were stored in a disorderly manner on his neighbor's property. N.N. pointed out the danger of fire, as well as the fact that the junk was at least partially stored in illegally erected structures. Compelling photographs were provided for the purpose of visualizing the disturbance.

An official inspection by the construction authority was carried out only on December 13, 2002 and ended with a referral to the building inspector (on February 4, 2003) although the complainant had already notified the construction authorities that "several unauthorized objects partially constructed out of wood and sheet metal, as well as cement asbestos" were erected on the property zoned for "building and living" and [although] the mayor of the township of Neusiedl am See had already promised to follow up on these accusations in his capacity as construction authority without delay (also because of the recording of the broadcast "Ombudsman Board – Equal Rights for All").

Apparently, the authorities assumed that it would suffice [merely] to reach a decision (of whatever kind). A fire inspection was cut short without being negotiated, due to the circumstances, which called for the issuing of an official order to clear the grounds.

In this context, the Ombudsman Board criticizes the fact that a determination of a fire inspector indicating that the objects stored in the open did not present a fire hazard was not to be found in the text [of the official order].

The Fire Inspection Regulations require that a property be inspected. The Fire Inspection Regulations consider not only the building and facilities, but also the grounds belonging to the property (compare Section 6 paragraph 1 *Feuerbeschauordnung* LGBl. 1995/87) to be part of a property. If deficiencies that affect fire safety are determined during the fire inspection, the proprietor or "owner" in the sense of Section 3 paragraph 1 of the above-cited law (for this purpose the lessee of the property also counts) must carry out a remedy to this deficiency before an appropriate deadline.

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The behavior of the fire inspector is not comprehensible to the Ombudsman Board even though it is clear that a building erected without permission for which a removal order must be issued makes a **complaint** regarding fire safety deficiencies redundant. Especially in light of the fact that the objects stored in the open presented a fire hazard, it is not apparent why the applicable circumstances were not taken care of in an orderly manner in the sense of Section 3 paragraph 4 in connection with Section 6 of the Fire Inspection Regulations on January 23, 2003.

In the progress of a sanitary inspection of the property that is the object of the complaint, it was determined that no garbage in the sense of *Burgenländischen Abfallwirtschaftsgesetzes 1993* (Burgenland Law Regarding Waste Processing 1993) existed.

The Ombudsman Board had to show the township of Neusiedl am See as well as the Administration of the region of Neusiedl am See many times that they were not able to share the position represented by the authorities, that the objects stored did not qualify as garbage according to the *Burgenländischen Abfallwirtschaftsgesetzes 1993* (Burgenland Law Regarding Waste Processing 1993), without qualification. The definition namely states that garbage consists of moveable items whose orderly gathering, storage, collection, conveyance and handling as garbage is in the public interest. The gathering, storage, collection, conveyance and handling as garbage is especially important if the danger of fire or explosion could be caused if action were not taken or if the development of multiplication of harmful animals and plants as well as pathogens would be promoted.

As related to the Ombudsman Board, old moped tires were repeatedly incinerated by the tenant on the property, which caused the police and fire departments to have to be notified by the neighbor because of the danger of explosion – there were also barrels of oil and bottles of gas on the property.

Another local woman indicated that upholstered furniture, serving as breeding and nesting places for rodents (rats), could be found among the objects stored on the property. The distribution of rat poison by public servants of the community of Neusiedl am See did not result in an effective remedy. The [rat] population had gained the upper hand to the extent that the animals were to be seen even during the day in the yard surrounding the house.

Concerning the rat extermination urged by the Ombudsman Board, it was stated that a specialty firm in Bruck an der Leitha had been commissioned to combat pests through the

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dispersal of baits in the sewers of Mittlerer Sauerbrunn, but separate records and transcripts regarding this [claim] were not made.

Finally, a remedy was brought about not by a rigorous intervention by the authorities in execution of the laws, but through an obviously completely independent realization on the part of the originator [of the problem], who disposed of the junk during the summer of 2003 and thus relieved the authorities from the need of taking further action. For the Ombudsman Board, there remain in spite of, or perhaps because of the removal of the cause of the complaint, many shortfalls and delays on the part of the authorities to **object** to.

The complainant would have been spared the acceptance of years of disturbances, had there been an appropriately rigorous intervention by the authorities. Admittedly, these disturbances – if taken individually – may not seem excessive. Taken together, they would lead to a very considerable lessening of the standard of accommodation and quality of life. A region [of the law], protected by the rights of the convention was thus violated, as the *Europäischer Gerichtshof für Menschenrechte* (EGMR – European Court of Human Rights) has recognized multiple times (9.12.1994, 41/1993/436/515; 19.2.1998, 116/1996/735/932, each concerning Article 8 of the *Europäische Menschenrechtskonvention* (EMRK – European Convention on Human Rights)). Because, as is known, the *EMRK* enjoys the same status as that accorded to the constitution in Austria, the failure of the authorities extends to constitutionally protected values. The *Europäischer Gerichtshof für Menschenrechte* (EGMR – European Court of Human Rights) recognized decidedly in the second above-named decision that “positive duties” for the protection of the *Europäische Menschenrechtskonvention* (EMRK – European Convention on Human Rights) also apply to state authorities.

- 2.11 Right to Education (Article 2 1.2 of the *Europäische Menschenrechtskonvention* (EMRK – European Convention on Human rights)).

Excerpt from the 22/23 report of the Ombudsman Board to the *Burgenländischer Landtag* (Parliament of the Province of Burgenland (2003-2004))

- 2.11.1 Attendance of a school in a foreign district – improper shifting of the burden of the school-maintenance fee onto parents.
(VA NÖ/536-SCHU/03, Amt d. Bgld LReg LAD-ÖA-V917/1-2004)**

In 1998-1999, the daughter of the complainant (residing in the township of Pöttsching) attended the Hauptschule Neudörfel (Austrian Secondary School) in her home school district. Shortly before the beginning of the 1999-2000 school year, the headmaster of the Hauptschule Lichtenwörth contacted the complainant with the question of whether she would not be willing to send her daughter to the Hauptschule Lichtenwörth, because otherwise it would be necessary to combine two classes in his Hauptschule (Austrian Secondary School).

In the beginning, the school-maintenance fee for the attendance of the complainant's daughter in a foreign school district were taken on completely by the community of Pöttsching. This was accounted for in a memorandum of the community of Pöttsching by [the statement that] the parents had not expected any expenses associated with the attendance of a school in a foreign district. However, after the school year of 2002-2003, the community of Pöttsching was no longer willing [to take on the fee] and noted this further in the above-named memorandum; furthermore it was also noted that the parents and/or guardians (among them the complainant) "took notice [of this fact] approvingly."

Therefore the community of Pöttsching assumed that the complainant had obligated herself to taking on the school-maintenance fee, and on October 27, 2003 issued the complainant a bill for €940.00. Thereupon the complainant turned to the Ombudsman board.

Because the case at hand was interregional, the governments of both Burgenland and Lower Austria were requested to provide statements of position. Both saw a violation of the [right to] free education. The government of Burgenland also explicitly stated in its statement of position that no payment obligation was applicable to the complainant, and justified this in that the complainant's acceptance of obligation was invalid according to Section 879 of the ABGB, and could therefore not bring about any payment obligation.

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In effect, this corresponds to the legal standpoint of the Ombudsman Board. Accordingly, the **complaint** was recognized as **valid** and the community of Pötsching notified. Therefore the collection of the invoice was not pursued by the community of Pötsching.

Because this case is of general importance, since such arrangements are apparently met often, and fulfilled (unjustly) by the party obligated to pay, the legal situation representing the legal standpoint of the Ombudsman Board shall be further expounded upon at this point.

The principle of free education at public (obligatory) schools has been explicitly normalized by federal and provincial lawmakers many times: compare e.g. Sections 5 (1) SchOrgG, 14 PflSchErh-GG.

Even though no right to cost-free attendance of obligatory schools can be derived from Austrian Constitutional Law as well as Article 2 ZP 1 of the *Europäische Menschenrechtskonvention* (EMRK – European Convention on Human Rights) (Grabenwarter, *Europäische Menschenrechtskonvention* [2003] 247), free education as established by individual country laws corresponds to the modern understanding of a social state that wishes to provide all citizens – without regard to what social or financial background they may have – with the best possible education in the interest of equality of opportunity. This has been a fundamental European standard to the extent that the right to cost-free school attendance has found its way into the Charter of the European Bill of Rights (compare Bernsdorff in Meyer [ed.], *Kommentar zur Charta der Grundrechte der Europäischen Union* [2003] 207 et seq.).

According to Section 879 (1) of the ABGB, contracts that infringe on a legally defined prohibition are null and void. Any arrangement, which results in the relativizing or circumventing of the right to free education, contradicts both the explicit meaning as well as the purpose of the relevant legal provisions and is therefore null and void (Resch, RdM 1994, 43 et seq.; Jonak-Kövesi, *Das österreichische Schulrecht* [2003] 444). If one were to allow exceptions to this rule, this could promote situations in which – especially in times of budgetary shortages – quality assurance is neglected and the affected parties are confronted with the possibility of attending another (public) school, for the right price. Such a development (which has unfortunately already begun, especially in the case of public schools in crowded areas) clearly contradicts the goal of the right to free education (the widest possible equality of opportunity without regard to social or financial background).

In the interest of completeness it should also be stated that, concerning the interests of the affected parties in the case currently under discussion, it makes no difference if arrangements contradicting the right to free education are met with the local community or with the community of the “foreign” school district. In the case of the latter variant, it could be the case that the school district of residence might agree to pay the school-maintenance fee to the [foreign] school district, on condition that the school district of residence be remunerated (at least partially) by the students’ requiring the funding (such a case is the basis for the comments of Jonak-Kövesi, I.c. 444). Both variants lead to contractual nullity in accordance with Section 879 (1) ABGB, due to the same teleological considerations.

And even if the precedent mentioned had not reached the degree of precision shown, the result could not have been any different. The question of the acceptance of a child to a public school is not one concerning private law, but public law. The question of whether a specific legal case is to be interpreted based upon the criteria of public or private law is not up to the affected citizens or authorities, but rather arises from the relevant legal precedents (F. Bydlinski in Rummel, Kommentar zum ABGB I³ [2000] RZ 4 to Section 1; Darstellung der Judikatur des OGH especially in RZ 9 et seq.).

Public schools are to be seen as institutions dependent on public law (compare *Juranek, Schulverfassung und Schulverwaltung in Österreich und in Europa I* [1999] 211 et seq.). The relationship between students or their authorized representatives and public entities comprises a relationship concerning the use of institutions, which is outlined in public individual law and its corresponding responsibilities (for more on this topic see *Juranek, I.c. 216 et seq.*). The right to cost-free attendance of public schools (under the prerequisite conditions) belongs to these rights.

Legal relations governed by public law differ from contracts governed by private law in that they cannot be formed with autonomy by the parties involved. The rights and responsibilities in legal relations under public law must result directly from written law, unless the rights to form the relations are explicitly granted (VwGH ZI. 2001/12/0064).

The right to form or change [the legal relationships governed by public law] could for example be granted in that the possibility of closing an “administrative legal contract” between the citizen and the public servant be made available. Such arrangements are allowable, however, only on an explicitly legal basis. (Raschauer, Allgemeines Verwaltungs-

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recht [2003] 341). In the absence of a legal basis, all such arrangements met under civil law are null and void (VwGH ZI. 95/17/0119). There has not now nor ever been any “subordinate legal” basis for arrangements for the relinquishment of the right to free education, although such a solution has recently been suggested, exactly for the purpose of making it easier to attend schools in foreign districts (Juraneck, *Schulverfassung und Schulverwaltung in Österreich und in Europa II* [1999] 240 et seq.).

2.12 Fundamental Rights of the European Union

2.12.1 Article 28 and 30 of the TEC (Treaty on the European Community)

2.12.1.1 Absolute Ban on Mail Order Businesses Dealing in Pharmaceuticals Against European Community Law (VA BD/23-GU/04, BMGF-90500/0030-I/B/8/2004)

With its decision Rs C-322/01 on 12/11/2003, the European Court of Justice made clear that an absolute ban on mail order businesses dealing in pharmaceuticals is not allowable with reference to Articles 28 and 30 of the Treaty on the European Community. The European Court of Justice decided therewith that an authorized community pharmacy doing business through the mail is allowed to do so insofar as it does not ship prescription medicine taking the appearance (packaging, language) of authorized packaging in the receiving country.

In contrast, Section 59 paragraph 9 of the Pharmaceutical Law prohibits any kind of mail-order transactions involving pharmaceuticals – independent of whether a prescription or over-the-counter medication is concerned. This undifferentiated ban is obviously against European Community Law in light of the above-quoted decision of the European Court of Justice.

The Ombudsman Board is of the opinion that a change in Section 59 of the Pharmaceutical Law (under consideration of the above-quoted legal decision) is called for by European Community Law. A corresponding reorganization would have to apply to domestic pharmacists as well in order to avoid privileging foreign pharmacists over domestic pharmacists in accordance with the established case law of the *Verfassungsgerichtshof* (VfGH –

Austrian Constitutional Court) (compare VfSlg. 16.214/2001; VfGH 1.3.2004, G 110/03; VfGH 15.12.2004, G 79-81/04 et al.).

2.13 European Social Charter

Excerpt from the 22/23 report of the Ombudsman Board to the *Burgenländischer Landtag* (Parliament of the Province of Burgenland (2003-2004))

2.13.1 The Right to Electrical Power (VA B/44-SOZ/04, Amt d. Bgld LReg LAD-ÖA-V934/3-2004)

Mr. P. informed the Ombudsman board that he lived in a remote shack without electrical power and running water. The welfare authorities refused to take on any costs for the connection of electrical power, although a power line ran only 150 meters from his cottage. In order to cook warm meals and have a little light even just twice a week, he used a gasoline-powered generator, which was very expensive and furthermore inadequate for powering appliances and lights at the same time.

According to Article 12 line 3 of the European Social Charter, the Republic of Austria is required under international law “to strive progressively to bring social security to a higher standard.” In fulfilment of the resulting obligations, a corresponding commonly-attained social standard must be applied.

At the beginning of the 21st century an electrical power connection is obviously a commonly-attained social standard and not a luxury. Under this assumption, the Ombudsman Board is of the opinion that the interpretation of the *Burgenländische Sozialhilfegesetz 2000* (Welfare Law of the Province of Burgenland 2000) (which explicitly sets the integration of people in need of assistance into the general social environment as its goal) is to be understood in light of international law as guaranteeing welfare recipients a right to an electrical power connection.

One can reach the same conclusion in consideration of Article 1 of the *Burgenländische Landesverfassung* (Constitution of the Province of Burgenland), which states that the province of Burgenland is a democratic and social constitutional state. An interpretation of the *Burgenländische Sozialhilfegesetz 2000* (Welfare Law of the Province of Burgenland) supporting a right to electrical power connection can also be derived from the rule of law anchored in the provincial constitution.

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Following the discussion of this complaint with a representative of the province of Burgenland during the ORF TV series "Volksanwalt – Gleiches Recht für alle" (Austrian Broadcasting Service - "Ombudsman – Equal Rights for All"), many viewers and an electrician spontaneously offered to help Mr. P. The remaining costs of the electrical power connection were paid with the help of the province of Burgenland.

2.14 The United Nations Human Rights Pact

Excerpt from the 26/27 report of the Ombudsman Board to the Salzburger Landtag (Parliament of the Province of Salzburg (2003-2004))

2.14.1 Domestic Implementation of Decisions of the Human Rights Committee (VA S/97-LAD/04, BKA 12.01/0023-KabHBK/2004)

Dr. P. was active as chief officer of the community of Salzburg. After several abuses of office on his part were established (dereliction of duty, use of office resources for private reasons, etc.) he was first suspended from his position and subsequently fired. The resulting court case was argued in many courts, but the termination was finally made legally valid after the Verwaltungsgerichtshof (Administrative Court) found an objection to the termination to be unsubstantiated.

The UN Human Rights Committee assembled for the purpose of ensuring compliance with the international pact concerning civil and political rights subsequently found there to be a violation of Article 14 paragraph 1 of the pact (concerning both the right to an unbiased court and the right to a reasonable length of trial) in the case of Dr. P in its decision from 07/20/2004. It did not however recognize any of the other complaints brought by Dr. P during the duration of the trial as valid. The UN Human Rights Committee did however explicitly indicate that Austria, as a contracting party to the pact, was obligated under international law to grant the complainant effective legal help, which encompasses appropriate compensation. More than a half year later it was admittedly still unclear, if this decision could be implemented within the state [of Austria].

The Ombudsman Board is not under the misconception that the Human Rights Committee is a legal entity, or that its decision (entitled "Opinion" in conformance with the pact) is legally binding in and of itself (for example *Nowak*, CCPR-Kommentar [1989] Rz 33 et seq., Article 5 FP with further references). This circumstance does not change the fact that individual rights provided for at the international level create obligations under international law that the Republic of Austria has committed to comply with. In the opinion of the Ombudsman Board it would be inequitable and unconscionable if the Republic of Austria were to recognize the authority of the Human Rights Committee (to ensure compliance with the Human Rights Pact and the rights resulting from it) on the one hand and to de-

clare its decisions for not legally binding when they are negative for the state of Austria on the other.

The Ombudsman Board is therefore of the opinion that (even if not mandatory under international law) it would be appropriate to place decisions of the Human Rights Committee on the same level as those of *Europäischer Gerichtshof für Menschenrechte* (EGMR – European Court of Human Rights) out of respect for the United Nations and for the rights resulting from the pact under discussion. This is because both the committee and the convention on human rights fulfill important and indispensable duties in the service of human rights.

In accordance with this basic understanding, the Ombudsman Board is of the opinion that the complainant in the case under discussion should be treated as if the *Europäischer Gerichtshof für Menschenrechte* (EGMR – European Court of Human Rights) and not the UN Human Rights Committee had established a rights violation. Because the Human Rights Committee established that a trial of excessive duration and a violation of the right to an unbiased court had taken place (but did not however recognize any of the other complaints as valid), it would be thinkable that the court would award damages of about € 700.00 per year of the criticized trial as well as court costs of € 3,500.00. On the basis of this decision, there can be no doubt (contrary to the opinion of the complainant) about how the domestic trial would have ended, had the established rights violations not taken place. Because of the legal situation of this case, corresponding damages are out of the question. The complainant insists however on being put back into the same financial situation he would have been in had he kept his position. The Ombudsman Board is therefore not able to confront the government of Salzburg if Salzburg is not prepared to recognize any demands that reach beyond those that can be shown through the use of the analogy to the established case law of the *Europäischer Gerichtshof für Menschenrechte* (EGMR – European Court of Human Rights).