



VOLKSANWALTSCHAFT

2007

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

Preface

The present volume is a short 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 2007 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 Constitution dated 13/8/1997, Federal Law Gazette 1997/87.

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

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Ombudswoman Mag. Dr. Maria Theresia Fekter
Ombudswoman Mag. Terezija Stoitsits

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

1.1 Development of activities

The AOB was engaged in 15 204 cases in the 2007 calendar year. 9 820 of the grievances concerned the administration sector. Investigative proceedings were instigated in 6 092 cases. Official proceedings were not yet completed or else the complainants still had means of legal recourse (legal assistance) open to them in the remaining 3 728 cases of grievance (comp. Art. 148a of the Federal Constitution [*Bundes-Verfassungsgesetz*]). *Ex officio* proceedings were launched in 70 cases.

15 204 engagements led to 6 092 investigative proceedings.

	<u>2006</u>	<u>2007</u>
Contacts	16 005	15 204
Administration (Federal & provincial administration)	10 448	9 820
Investigative proceedings	6 542	6 092
Federal administration	3 911	3 821
Provincial & district administration	2 631	2 271

Activities

Federal administration investigative proceedings

	Year 2006	Year 2007
Federal Chancellor's Office	30	25
Federal Ministry for European and International Affairs	38	41
Federal Ministry of Science and Research	95	92
Federal Ministry of Finance	276	273
Federal Ministry of Health, Family and Youth	140	122
Federal Ministry of the Interior	377	470
Federal Ministry of Justice	760	817
Federal Ministry of National Defence	59	43
Federal Ministry of Agriculture, Forestry, the Environment and Water Management	195	159
Federal Ministry of Social Affairs and Consumer Protection	930	850
Federal Ministry of Transport, Innovation and Technology	495	427
Federal Minister of Economics and Labour	462	431
Federal Minister of Education, Arts and Culture	52	68
Federal administration total	3 909	3 818
Provincial and district administration total	2 631	2 271

File code	Investigative proceedings according to assignment area	2006	2007
	Assignment area of Ombudsman Dr. Peter Kostelka		
BKA	Chancellor	30	25
SV	Federal Minister of Social Affairs and Consumer Protection	930	850
SV	Federal Minister of Economics and Labour (Labour Exchange Office area)	259	237
JF	Federal Minister of Health, Family and Youth (families area)	88	73
LV	Federal Minister of National Defence	59	43
GU	Federal Minister of Health, Family and Youth (health area)	52	49
VIN	Federal Minister of Transport, Innovation and Technology (transport area)	133	159
AA	Federal Minister for European and International Affairs	38	41
VORS	Chairman's scope of competence	2	3
	Provincial and district administration	649	598
	<i>Subtotal Ombudsman Dr. Peter Kostelka:</i>	<i>2 490</i>	<i>2 078</i>
	Assignment area of Ombudswoman Mag. Dr. Maria Theresia Fekter		
FI	Federal Minister of Finance	276	273
J	Federal Minister of Justice	760	817
	Provincial and district administration	1 218	1 096
	<i>Subtotal Ombudsman Mag. Dr. Maria Theresia Fekter:</i>	<i>1 784</i>	<i>2 186</i>
	Assignment area of Ombudswoman Mag. Terezija Stoitsits		
WA	Federal Minister of Economics and Labour	254	194
V	Federal Minister of Transport, Innovation and Technology (Federal roadways, patent affairs and road-tax sticker areas)	311	268
I	Federal Minister of the Interior	377	470
LF	Federal Minister of Agriculture, Forestry, the Environment and Water Management (agriculture and forestry area)	173	132
U	Federal Minister of Agriculture, Forestry, the Environment and Water Management (environment area)	22	27
UK	Federal Minister of Education, Arts and Culture	52	68
WF	Federal Minister of Science and Research	95	92
	Provincial and district administration	764	577
	<i>Subtotal Ombudswoman Mag. Terezija Stoitsits:</i>	<i>2 268</i>	<i>1 828</i>
Total		6 542	6 092

Activities

1.2 Completed cases

A total of 6691 investigative proceedings were concluded in the year under review. In 11 cases, the members of the Ombudsman Board set out the findings of their investigations in the form of **joint declarations of grievance and recommendations**. A joint decision was also required when the Board filed an **application** with the Constitutional Court (*Verfassungsgerichtshof*) **to examine the lawfulness of an ordinance**.

6 691 investigative proceedings concluded

Completed cases	2006	2007
Grievance justified / objection	786	785
Grievance unjustified / no objection	3 729	3 333
Grievance impermissible	1 002	933
Grievance withdrawn	515	494
AOB not competent	1 517	1 045
Not suitable for treatment in terms of business rules and regulations	155	89
Formal declaration of grievance and Recommendation	28	11
Appeals of ordinance	3	1
Total completions	7 735	6 691

1.3 Contacts with citizens and authorities regarding investigative proceedings in 2007

Contacts with citizens and authorities	2006	2007
Appointment dates	211	198
Visits	1 535	1 257
Information service	8 571	8 417
Written correspondence with complainants	19 252	19 053
of which outgoing letters to complainants	8 574	8 332
incoming letters from complainants	10 678	10 721
Written correspondence with authorities	8 559	8 265
of which to certified executive organs and authorities	4 396	4 351
from certified executive organs and authorities	4 163	3 914

1.4 Information service

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

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

toll-free service number

Of the total of **8 417** telephone and personal contacts with the information service, **3 728** regarded administration.

The AOB was not competent to deal with the remaining **4 689** 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 Cooperation of the Ombudsman Board in the resolution of the petitions and citizen initiatives addressed to the National Council (Article 148a(3) of the Federal Constitution)

During the reporting period, the Ombudsman Board was sent 12 citizen initiatives and 21 petitions by the Petition Committee.

The Ombudsman Board issued an opinion on Citizen Initiative No. 13 Regarding the Kärntner Petition for a Survey of Mother Tongues (XXIII. GP. NR) (VA 6105/20-V/1/07).

1.6 Legal assessments and legislative proposals of the Ombudsman Board

In accordance with past practice, the Ombudsman Board issued opinions in relation to its review activity within the framework of assessment proceedings. This occurred with respect to the following bills:

- Bill for a Federal Act Amending the General Social Security Act, the Veterinary Medicinal Products Controlling Act, the Veterinary Medicine Act, the Animal Protection Act and the Feed Safety and Consumer Protection Act (VA 6100/3-V/1/07)
- Bill for an Amendment of the Education Assistance Act (VA 6100/4-V/1/07)
- Bill for a Federal Act Amending the Law Enforcement Act (VA 6100/5-V/1/07)
- Bill for a Federal Act Amending the Child Care Support Act (VA 6100/6-V/1/07)
- Bill for an Act Amending the Federal Constitution and Establishing a First Constitutional Reform Act (VA 6100/7-V/1/07)
- Bill for an Federal Government Ordinance Amending the Establishment Ordinance of 2007 (VA 6100/8-V/1/07)
- Bill for an Amendment of the University Act of 2002 (VA 6100/9-V/1/07)
- Bill for a Federal Act Establishing a Federal Act for the Creation of a Federal Institute for Education Research, Innovation and Development in the Austrian School System and Amending the Federal School System Supervision Act and the School Organization Act (*BIFIE-Gesetz 2008*) (VA 6100/10-V/1/07)
- Ordinance of the Federal Minister for Health, Family and Youth Amending the Animal Protection Events Ordinance (VA 6100/11-V/1/07)

- Bill for an Amendment of the Education Assistance Act (VA 6100/12-V/1/07)
- Bill for a Federal Act Amending the Equal Treatment Act, the Federal Act on the Equal Treatment Commission and the Ombudsman for Equal Treatment and the Federal Act for Equal Treatment for Persons with Disabilities (VA 6100/13-V/1/07)

1.7 International Contacts

International Ombudsman Institute (I.O.I.)

The I.O.I., the world's largest association of ombudsman institutions, is required to relocate its General Secretariat (headquarters), the location of its administration. The law faculty at the University of Alberta in Canada no longer sees itself in a position to continue supporting the necessary organisational tasks from 2009 onwards. The Board of the I.O.I. resolved at its meeting in November 2007 to invite all institutional members to apply to become the headquarters of the new General Secretariat and specified a list of criteria to be met for acceptance of the tender. Accordingly, the new General Secretariat should not only be in a position to ensure smoothly functioning administration and enhanced services for members of the I.O.I., but also have the competence to effectively advance the development of the organisation in the context of the protection of human rights, the rule of law and democracy. On schedule and after appropriate preliminary discussions with members of the Federal Government, the Austrian Ombudsman Board (AOB) announced it was ready to participate in the application procedure. The fact that the AOB satisfies all the preconditions for the relocation of the General Secretariat to Vienna must be documented in a formal application by no later than June 2008. The AOB's application is partly to be viewed in the context of its intense international activity, and partly as a reflection of the objectives laid down in the Government Programme 2007-2010 to strengthen Austria's position as the location for the headquarters of international organisations – particularly from the aspect of the protection of human rights.

Application of the AOB to host the headquarters of the General Secretariat of the I.O.I.

However, in order to submit an application and participate in the selection process, the AOB needs the declared assistance and active support of the Federal Government and Parliament, since taking on this task requires financial and personnel resources to be secured over the long term. Assuming a positive outcome to the selection process, the AOB, alongside the Austrian Court of Audit, which has housed the International Organisation of Supreme Audit Institutions (INTOSAI) since 1968, would be the second constitutionally structured controlling authority to be able to operate as the headquarters of the global umbrella organisation of its international sister institutions. All applications received will be assessed by the Board of the I.O.I. at a meeting in the autumn of 2008 in Hong Kong. The decision on the headquarters of the new General Secretariat will be taken by the General Meeting of the I.O.I. at the next I.O.I. World Conference to be held in Stockholm in 2009. As far as is currently foreseeable, the Austrian Ombudsman Board and the ombudsman institution of Catalonia (Síndic el defensor de les persones) are the two institutions that have the best chance of being chosen as the headquarters of the General Secretariat of the I.O.I.

Selection procedure

In reaction to various reports suggesting that the Ombudsman of Georgia, Sozar Subari, had been intentionally beaten by special units during the mass protests in Tbilisi on 7 November 2007, the European Board of the I.O.I., under the chairmanship of Ombudsman Dr. Peter Kostelka, requested leading government representatives from Georgia to initiate a thorough and independent investigation into what happened. The Georgian Interior Ministry promised to publish the results of the investigation, which is already underway.

Council of Europe

On the basis of Resolution (85) 8 reached by the Committee of Ministers of the Council of Europe on 23 September 1985, the Commissioner for Human Rights now organises a round table of ombudsman institutions of the member states of the Council of Europe every two years for the purpose of discussion and the exchange of experience between the national ombudsman boards regarding their contribution to the protection and promotion of human rights.

Round Table

The general topic of the 10th Round Table held in Athens on 12-13 April 2007, at which Ombudsman Dr. Kostelka represented the AOB, was "The cooperation between ombudsman institutions and the European Commissioner for Human Rights". As a result of the discussions, it was established that the national ombudsman institutions are (for the most part) in a position to make a contribution to protecting human rights and announced their interest in stronger cooperation with the Council of Europe (Commissioner for Human Rights) (in detail: "Conclusions of the Round Table and perspectives", European Commissioner for Human Rights Thomas Hammarberg, CommDH/Omb-NHRI(2007) 16). Immediately following this and at the initiative of the Austrian OB, the Commissioner for Human Rights set up a network of national ombudsmen and national human rights institutions, for which the AOB provisionally announced the name of a leading employee to act as contact person. The possibility of the ombudsman institutions contributing to the implementation of judgements issued by the European Court was discussed with representatives of the Council of Europe at a first meeting of employees in Strasbourg on 6-7 November 2007. This question is also the object of a pilot project in which the AOB, the ombudsman institutions of the Republic of Belgium and the Republic of France, as well as the national human rights institution of Northern Ireland will participate. This pilot project, which was suggested during the Round Table, is intended to explore the possibilities and any limits to strengthened cooperation between ombudsmen and the Council of Europe (Commissioner for Human Rights). A first meeting of the organisations involved in the project took place in Strasbourg on 31 January and 1 February 2008.

Cooperation with the European Commissioner for Human Rights of the Council of Europe.

Activities

Members of the AOB had detailed discussions with the Commissioner for Human Rights of the Council of Europe Thomas Hammarberg during his visit to Austria on 21 May 2007.

International Conferences

An expert from the AOB spoke at the series of lectures entitled “La difesa civica istituzionale dalla Città all’Unione Europea” organised by Unesco and the University of Padua at the end of February 2007, on European and international associations for human and civil rights, with special consideration being given to the activities of the I.O.I. The I.O.I. was also one of the key elements of the lecture given by Ombudsman Dr. Peter Kostelka at the Biennial Conference of the British and Irish Ombudsmen Association held in Birmingham from 26 to 27 April 2007 on the topic ‘Ombudsmen: boundaries and balance’. Another topic on the agenda in Birmingham was “good administrative practice” propagated by the European Union and by many individual institutions. The preoccupation with proper administration continued at the Eunomia seminar ‘The Ombudsman’s Intervention between the Principles of Legality and Good Administration’, held in Sofia from 17 to 18 September 2007 and the ‘Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries: Rethinking Good Administration in the European Union’, held in Strasbourg from 14 to 16 October 2007.

6th EU seminar of national ombudsmen

Human rights and the ensuring of human rights guarantees were discussed at ombudsmen conferences in Kosovo (‘The Support of and Obstacles to the Protection of Human Rights’, 8 to 9 June 2007), in Azerbaijan (‘Strengthening the Ombudsperson’s capacities in the Promotion and Protection of Human Rights’, 18 to 19 June 2007) and in Armenia (‘The Role of the Constitutional Court and Human Rights Defender in Human Rights Protection Issues’, 5 to 6 October 2007). Ombudsman Dr. Kostelka was pleased to accept these invitations to also appear as a speaker.

Conferences in Kosovo, Azerbaijan and Armenia, with a focus on human rights

At the invitation of the ombudsman for the Veneto region, Ombudswoman Dr. Maria Theresia Fekter, took part in the conference “La Difesa Civica in Europa e in Italia: Esperienze e prospettive” in Venice on 22 October 2007.

Bilateral contacts

A Danish-Jordanian delegation visited the AOB on 3 May 2007 as a sign of inter-institutional cooperation between Europe and the Middle East. The Danish Ombudsman, who is actively supporting the creation of an ombudsman institution in Jordan, had already lodged a request in January with Ombudsman Dr. Peter Kostelka and the European Board of the I.O.I. to discuss the draft law for the Jordanian ombudsman institution in Amman. These discussions were subsequently held in Vienna.

Denmark/Jordan

At the request of the Ombudsman of the Republic of Albania, Ermir Dobjani, the AOB carried out employee training subsidised by the KTC (Know-how Transfer Centre) of the *Österreichischer Städtebund* (Association of Austrian Cities and Towns) from 14 to 16 March 2007. In accordance with the training wishes of the Albanian partners, topics from the areas of building law and media work were also intensively dealt with following a general introduction to the activity of the AOB. Particular interest was shown in the media-based processing and presentation of complaints in the ORF (Austrian Broadcasting Cooperation) series "Volksanwalt – Gleiches Recht für alle" ("*Ombudsman – One law for everyone*") (now called "Bürgeranwalt").

Albania

The legal principles and organisational structure of the AOB were discussed during the one-day visit made by a legal advisor to the President of Latvia on 12 March 2007.

Latvia

Dutch Ombudsman Prof. Alex Brenninkmeijer visited the AOB from 23 to 24 March 2007. Talks centred on questions of "Best Practice" models for administration and matters faced by the I.O.I.

Netherlands

As newly elected President of the European Ombudsman Institute (EOI), the Ombudsman for the state of Rhineland-Palatinate, Ullrich Galle, visited the AOB from 13 to 16 September 2007. Discussion with members of the AOB focussed particularly on the coordination of and cooperation between the activities of the European Ombudsman Institute and the I.O.I. in Europe.

EOI

Newly elected Slovenian Human Rights Ombudswoman Dr. Zdenka Čebašek-Travnik paid a working visit to the AOB on 19 September 2007. Talks focused on an institutional comparison of the two institutions.

Slovenia

The visit of the Ombudsman of Thailand from 27 to 28 August 2007 and the visit of the Ombudsman of Korea on 5 November provided the opportunity to exchange information and experience.

Thailand / Korea

1.8 Public Relations Work

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

In 2006, 146,683 (2006:130,906) visitors logged a total of 961,161 (2006:966,939) hits on the Ombudsman Board's Website.

The following Websites received the most hits:

	Hits 2006	Hits 2007
'The Ombudsmen "	21.455	25.587
'Complain form	12.151	14.239
'Function and Responsibilities"	12.378	13.910
'Appointment dates"	13.825	13.602
'Up-to-date (ORF-cases)	9.785	10.558
'Selective processes'	7.716	8.102
'Reports'	5.385	5.490

The visitors came from the following countries:

Austria	776 731 Hits
Germany	66 673 Hits
Sweden	25 977 Hits
USA	24 453 Hits
Slovenia	7 872 Hits
Switzerland	6 595 Hits
Poland	3 948 Hits
France	3 546 Hits
United Kingdom	3 313 Hits
Italy	2 358 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. **778** (2006:625) visitors submitted a complaint using the online form, while **5,558** (2006:4,406) sent an e-mail directly to the Ombudsman Board.

Ombudsman – Equal Rights for Everyone

The series 'Ombudsman – Equal Rights for Everyone', where the Ombudsmen discuss particularly noteworthy cases from their review area, was restarted by the ORF (Austrian Broadcasting Company) in January 2002. From the beginning, the show received very positive feedback despite a slot in the broadcast schedule on Saturdays at 5:45 that typically has small audiences.

In April 2007, the ORF developed a new conceptual design for the series. It now has a different title ('Bürgeranwalt' – 'Citizens' Advocate') and additional air time (starting earlier on Saturdays at 5:30). In addition to studio discussions with members of the Ombudsman Board, 'Citizens' Advocate' shows reports which the ORF arranges itself. This gives lobbies, associations and lawyers the opportunity to present cases which do not fall within the responsibility of the Ombudsman Board or have not (yet) been investigated by the Board. The members of the Ombudsman Board, who were and still are partners of the ORF, could not refuse to accept the changes although the new title and the larger variety of reports definitely have a negative effect on how our work is perceived. Nevertheless, we are indebted to the ORF; no other ombudsman institution has a similar opportunity to reach the broad public.

The 45 broadcasts in 2007 achieved an average market share of 31.4 percent (in 2006: 32.3 percent) with an average audience of 344,000 (in 2006: 405,000). 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, 2007 – December 31, 2007

Annual Ratings			
Target Group	Average Gross Rating Points in %	Average Gross Rating Points in Thousands	Market Share in %
Adults aged 12+	5.0	344	31.4

1.9 Parliamentary ceremony commemorating "30 years of the Ombudsman Board"

The Austrian Ombudsman Board has been serving the citizens of Austria now for 30 years. Federal President Heinz Fischer and Vice Chancellor Wilhelm Molterer and a series of high-ranking representatives from political life, administration and the judicature lined up to congratulate the Board.

The ceremony was opened on 26 November 2007 by National Council Chairwoman Barbara Prammer. At the start of her speech, she recalled the origins of the Ombudsman Board, emphasizing that the Board functions as more than a rights protection institution; it functions as a seismograph for the relationship between Austrian citizens on the one hand and the state and public administration on the other. Proximity to citizens, transparency and comprehensibility are today seen, according to Prammer, as the basis for any administrative reform. The Ombudsman Board also enlivens democracy, because it illustrates to Parliament how legislation is implemented and how the administration works.

Federal President Heinz Fischer called the Ombudsman Board a "success story," which is based on a sound piece of parliamentary work. As he recalled the many years of legislative assessment and debate, he stated that this institution represents an authentic contribution to the Second Republic.

Invited as keynote speaker was the Austrian author Franzobel, who philosophized about "what is just and right." His full speech is reprinted below with his generous approval:

And Justly So

by Franzobel

In the name of justice. Ladies and gentlemen, let's be honest – in the history of mankind, more people have been killed in the name of justice than on any other pretext. Most wars were characterized as just. So was the burning of witches, and virtually every genocidal campaign. The medieval trial by ordeal and the feudal droit du seigneur were considered just. And how about us? We find it just that wealth is inequitably distributed. We think refugee camps and deportations are just. According to a Persian legend, the king of an affluent land believes it is just to send a glass of milk filled to the brim to a people that is seeking refuge in his kingdom, in order to demonstrate that "we are as full as this glass; any further drop would cause us to overflow."

So what is just? Is it just to lose an eye or have a tooth knocked out because like must be returned for like? Is a prison term for murder just? Is it just for petty theft motivated by hunger? Does justice come from revenge or from a settling of scores? Etymologically the word Recht (right, law, justice) derives from gerade richten (straighten out), from richtig (right, correct). But what is right? Aren't there often many truths? So is justice something different from a society's legitimation of deterrence and retaliation?

If five passengers on a sinking ship decide their chance of survival would increase if they threw the sixth one overboard, that is a democratic majority and

logically justifiable, but is it legal? No. There is no justice in the world, only a sense of justice which everybody regards as healthy, at least his own. Justice does not exist, it must first be administered. And each act of administering justice, as justified as it may seem, inevitably leads to injustice, which seeks redress, which leads to injustice, which seeks redress, which leads to injustice, and so on and so forth. A veritable round dance. Perhaps I too am failing to do justice to justice when I claim that by law the law is pretty clumsy. There is only a certain element of justice in the fact that all of us are going to die.

A look back at history shows that justice and the law are neither God-given nor permanent. I will just mention the name of a man who was sentenced in Austria for treason and even though this judgment was never reversed, would later become a leading chancellor of his country, guiding its fortunes for a long period of time: Bruno Kreisky.

Now let's lie to one another openly. Fortunately, we live in a morally highly developed society with a complicated legal system that is doubtless perceived as being, on the whole, just, and which keeps a lid on injustice. Nevertheless, most people would probably prefer not to come in conflict with the law too often, and would have even less desire for contact with its executive organs. The extent to which an individual is at the mercy of the state can be seen in mild form every time you cross a border, when you have to show your passport and wait to be waved through. Anyone who has been to some of the more unstable countries knows how long the inspection can take. Even such a routine administrative procedure can open the door to harassment and the arbitrary exercise of power.

It's no different with traffic violations. I know people who are regularly hit with hefty fines for minor infractions while others commit serious breaches of the rules and get off with a slap on the wrist simply because the police officers once again have turned a blind eye. They, the ones who get off lightly, look honest and they also behave appropriately, namely submissively, while the others, the ones who get punished, look dishonest, are somewhat recalcitrant, or just have problems with authority. And then there are the legal experts, who for example park their car facing the wrong way on a one-way street, and when they're confronted with the accusation, "You were driving the wrong way," justify themselves by saying, No, I was going backwards. – Can he do that? – By the time you've figured it out, I'm back home again. And when the legal expert is caught on radar speeding at 200 kilometers an hour, it turns out he had lent his car to an acquaintance from the Congo or some other country with which Austria doesn't have an extradition treaty, and he gets off scot-free. Is that just? Not very.

But what if you're punished twice for the same offense? Or your mother goes missing in a foreign country and you organize a canine unit yourself but fail to get approval for its deployment because of the poor language skills of the embassy staff? What if you chase after a bank robber, get shot in the stomach and receive no disability pension? What if you feel you were unfairly treated by a judge? What if your son is banned from a swimming pool for the entire summer and his picture is prominently displayed? What if a mobile phone mast is erected on the property next to yours? If the opening of a new club robs you of your sleep? If your training courses are not credited to you? If you're fined for crossing a street a few centimeters outside the zebra crossing, or if the official responsible for issuing passports stipulates that the background of your photo has to be white,

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you understand, white, and not ivory as in your picture. Does it serve you right? In my case they just obliterated me. It was possible to get my pen name "Franzobel" entered into my old passport. But not in the new one, it's against EU regulations. What can I do about it? Sue the EU? I need an ombudsperson, otherwise I no longer exist.

Going to court represents an enormous financial risk for an individual. If he loses the case and has to pay the court costs, his livelihood may be threatened. The individual has no right to his rights. Ah, but he does. That's what the ombudsperson is for. An advocatus populi. This institution is so self-evident, so useful and laudable that it seems surprising that it is only 30 years old. The ombudsman's role is so logical and legal under the rule of law that one wonders why Montesquieu didn't add the institution of the ombudsman, an advocate for the ordinary person, to his famous division of powers into the executive, legislative and judicial branches. From a purely literary point of view it is a good thing that the institution is no older than it is, because otherwise works like Kleist's Michael Kohlhaas, Kafka's The Trial or Böll's The Lost Honor of Katharina Blum would never have been written. The victims of injustice would simply have marched right over to the ombudsperson. From a rule of law perspective, however, it is outrageous that the institution is still so young.

The work of the Austrian Ombudsman Board – I poured through the 400-page report from 2006, which makes for gripping, and at times grotesque reading – the work of the Ombudsman Board covers every area of life, including soldiers whose rightfully earned medals were withheld from them, allowances for conscientious objectors performing civilian service, police dogs that have bitten family members, prisoners deprived of their rights, home care allowances not paid out, water rights, problems made for private schools, temporary driver's licenses, social security benefits not received, and on and on.

The individual is often at the mercy of the authorities. What do you do if your boss behaves like an inflexible despot and announces: I can do whatever I want. What do you do if you come up against grumpy, waspish, dogmatic officials who dig in their heels because they're not infected with the slightest sense of humanity and make your life miserable out of sheer malice or laziness? In that case the individual is alone, helpless, completely at their mercy. The Ombudsman Board then takes him into its embrace and deals with the matter. The Ombudsman Board does its best to get him justice, as dubious as that justice may be. It protects the individual, deals with his problem – and makes the world a tad more just, and that is certainly justified. Thank you. Keep it up.

In that Persian legend, by the way, the leader of the people seeking asylum put a spoonful of sugar in the full glass of milk, to show "that's what we are." There's always room for a little bit more. It can only make life sweeter.

Thank you.

2 Fundamental rights section

2.1 Fundamental constitutional requirements of the federal constitution (Articles 18 and 129 ff. of the Federal Constitution)

2.1.1 Rescission of an approval pursuant to § 134a of the Aviation Act (*Luftfahrtgesetz; LFG*) (VA BD/41-VIN/07, Federal Ministry of Transport, Innovation and Technology -58.502/0011-II/L1/2007)

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

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

In the Fundamental Rights Section of the **30th Report to the National Council and Federal Council (pp. 352 ff.)**, the Ombudsman Board explained in detail that § 134a(4) of the Aviation Act must be interpreted in conformity with the constitution, such that the person affected by this measure must be granted a right to defense in the proceeding resulting in "notification" and therefore (also) has a right to service of this notification (which is to be qualified as an official notice):

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

In view of these legal consequences, the "notifications" in question intervene in the private autonomy of the civil airport keeper, because they restrict him in the freedom to decide for

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himself which persons he can employ in which functions and thus also intends to grant access to the security area of the airport. The same also applies to companies in a legal relationship with the civil airport keeper and requiring personnel with access to the security area, in order to fulfill their resulting obligations.

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

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

In its case law, the Constitutional Court has always emphasized that the constitutional definition of an official notice fulfils constitutional functions, among these, particularly ensuring legal protection with respect to the administration (cf. e.g. VfSlg. 11.590/1987, VfSlg. 13.223/1992 and 13.699/1994). To the extent that this case law is relevant in this context, it can be summarized with the following quotation from decision VfSlg. 17.018/2003:

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

In summary, it can therefore be noted that a legal regulation that empowers an authority to pass an individual sovereign act, without granting the negatively affected citizens a legal protection option in the form of an appeal (at least) to the Constitutional Court, is not recon-

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cilable with the legal protection system anchored in the constitution and is therefore unconstitutional.

The consequence of this legal situation is that the "notification" by the Federal Ministry of Transport, Innovation and Technology intervenes in constitutionally guaranteed rights of the civil airport keeper/his contractual partners as employers, as well as in those of the (potential) employee and must be regarded as an "official notice" within the meaning of Art. 144 B-VG when interpreted in conformance with the constitution, because an intervention in constitutionally guaranteed rights may only be carried out in conformity with the constitution by way of an official notice which is ultimately opposable before the Constitutional Court. This official notice must be delivered to the civil airport keeper/his affected contractual partner, as well as to the (potential) employee, to whom an airport pass will not be issued/from whom an airport pass must be revoked, due to the results of the security examination.

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

As can be gathered from the official notice, which is the subject of the complaint, the Federal Ministry of Transport, Innovation and Technology nevertheless regards the approach chosen by it as being compulsory, as § 134a(4) of the Aviation Act does not establish a legal relationship between this person and the Ministry. If this view was accurate, § 134a(4) of the Aviation Act would be unconstitutional, for the reasons mentioned above, due to non-fulfillment of the requirements of the federal constitutional legal protection system.

The Ombudsman Board concedes that § 134a(4) of the Aviation Act explicitly only looks at the case of the "notification" to the civil airport keeper regarding existing security misgivings and does not expressly mention whether the respective notification must also be sent to the (potential) employee. However, on the basis of the constitutional situation described above, the conformity with the constitution of the legal provisions under discussion can only be

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affirmed, if it is regarded as admissible when interpreted in conformance with the constitution—and thus, consequentially, as necessary—to also serve the "notification" from the federal minister on the "potential" employee negatively affected in the sphere of his fundamental rights. That view is supported by the fact that the Constitutional Court also permits analogous application of the law when interpreted in conformance with the Constitution (e.g. VfSlg. 15.197/1998 and 16.350/2001) and neither the wording of the legislative provision nor the intention of lawmakers expressly excludes service of the "notification" here in question to the (potential) employee.

In view of these considerations, the Ombudsman Board resolved unanimously in the collegial meeting on 12 May 2006 that the official notice of the Federal Ministry of Transport, Innovation and Technology, with which the petition of the complainant for access to files due to lack of right to defense was rejected, **represents a deficiency** in public administration. In order to eliminate this deficiency, the Federal Ministry of Transport, Innovation and Technology was issued a **recommendation** to ensure that the official notice forming the subject of the constitutional complaint be officially rescinded in the application of § 68(2) of the 1991 General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz 1991; AVG 1991*) and the notification dated 20 September 2005, which was delivered to the civil airport keeper, be served on the complainant, as well as in future cases, to formulate the notification to the civil airport keeper unequivocally as an official notice and also to serve it on the person affected.

By letter dated 17 July 2006, the Federal Ministry of Transport, Innovation and Technology informed the Ombudsman Board that this **recommendation** would not be complied with, because, in its opinion, the wording of § 134a(4) of the Aviation Act did not leave any room for an interpretation in conformance with the constitution, in the sense of the **recommendation** by the Ombudsman Board.

At the urging of the Ombudsman Board, the competent state secretary established a working group in the reporting period that is to search for ways to find a solution taking into account all affected interests.

With respect to the specific constitutional complaint case, it must be noted that a decision was rendered against the Republic of Austria in both the first and second instance of official liability proceedings being conducted by the appellant.

2.2 Right to a fair trial (Article 6 European Convention on Human Rights (ECHR))

2.2.1 **Decision-making period in accordance with 2000 Act for the Review of Environmental Compatibility (*Umweltverträglichkeitsprüfungsgesetz; UVP-G 2000*) exceeded ten times; Office of Burgenland State Government (VA BD/11-U/04, Office of Burgenland State Government LAD-ÖA-V949-6-2005)**

By petition of 5 August 2004, N.N. filed a complaint concerning a procedural delay that had occurred. The petition filed with the Office of the Burgenland State Government on 28 January 2004 has still not been decided to date. Instead, the authorities are trying to move N.N. to assume the costs for obtaining an expert opinion. The complainant sees a "deficiency in the administration" in the delay on the part of the Burgenland State Government and in the repeated attempt to pass on the burden of the administrative costs.

In the review proceedings initiated, the Ombudsman Board obtained the response of the Office of the Burgenland State Government of 23 November 2004 regarding Case No. LAD-ÖA-V949/1-2004 and of 16 December 2004 regarding Case No. 5-N-B3533/17-2004. The documents presented by the complainant were checked. Furthermore, an opinion from the Office of the Burgenland State Government dated 30 March 2005 to the Austrian Broadcasting Corporation (*ORF*), which was passed on to the Ombudsman Board, was considered in the assessment.

The review proceedings conducted by the Ombudsman Board revealed:

I. Relevant in assessing the present case are provisions from the 2000 Federal Act for the Assessment of Environmental Compatibility (*Umweltverträglichkeitsprüfungsgesetz; UVP-G 2000*), BGBl. 1993/697 as amended and from the 1991 General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz 1991; AVG 1991*), BGBl. 1991/51 as amended.

The 2000 Environmental Compatibility Assessment Act consists of the text of the law and two annexes. Annex 1 contains the projects subject to the Act pursuant to § 3 thereof. Number 43 of the Annex establishes for the agriculture and forestry industry thresholds which, when exceeded, trigger environmental compatibility assessments of facilities designed for keeping and breeding animals.

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Pursuant to § 39(1) of the 2000 Environmental Compatibility Assessment Act, the state government is competent for proceedings in accordance with Part One, which includes the assessment of the projects listed in Annex 1. Pursuant to § 42(1) of the 2000 Environmental Compatibility Assessment Act, state government must apply the 1991 General Administrative Procedure Act, unless administrative provisions are stipulated in the Federal Environmental Compatibility Assessment Act.

Section 3(7) of the Environmental Compatibility Assessment Act in fact contains such a variant provision, stipulating that the authorities must determine at the request of the project applicant, a cooperating agency or the Environmental Ombudsman whether an environmental compatibility assessment needs to be conducted in accordance with the Federal Act and what state of affairs in Annex 1 or § 3a, Paragraphs 1 to 3 are realized by the project. This determination may also be made *ex officio*. The decision must be made in the first and second instances within 6 weeks by official notice.

Section 3(7), third sentence of the 2000 Environmental Compatibility Assessment Act thus stipulates a variant period from § 73(1) of the 1991 General Administrative Procedure Act.

The period in this case has been exceeded by ten times, and it is not evident that the overstepping of this reliable decision-making period is not largely the authorities' fault. Such a serious procedural delay is equivalent to a denial of rights. Procedural delays that are entirely disproportionate to the administrative decision-making periods are regularly qualified by the European Court of Human Rights (ECHR) as a violation of Article 6(1) of the European Convention on Human Rights, without the Court of Human Rights going into the complexity of a case in any further detail (e.g. decision of 21 December 1999, Appl. no. 26297/95, Nos. 33 ff).

II. Continuous legal rulings by the European Court of Human Rights regarding Article 6(1) of the European Convention on Human Rights have established that the state is obliged to organize a legal system in which proceedings can be concluded within a reasonable period of time so as to assure rapid decisions. The Court of Human Rights expressly requires that the state assure that a sufficient number of experts is available (cf., e.g., the statements regarding No. 53 in the decision of 14 January 2003, Appl. no. 38804/97).

The Environmental Compatibility Assessment Act took force pursuant to § 46(1) there (BGBl 1993/697) on 1 July 1994. The Burgenland State Government has therefore been

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competent for implementing the Environmental Compatibility Assessment Act in Burgenland for over 10 years. Irrespective of the fact that proceedings have been conducted in the State of Burgenland in which civil-servant agricultural experts have conducted investigations and given opinions and civil-servant veterinarians have rendered opinions on safety buffers (cf. only the administrative court findings in 99/05/0162 and 98/05/0024), it is astonishing that the Burgenland State Government does not possess the necessary specialized personnel to ascertain the facts relevant to a decision in implementation of the Environmental Compatibility Assessment Act. This deficit can only be seen as a failure to fulfill organizational responsibility.

III. The Ombudsman Board views the attempts to shift the costs for obtaining a non-civil-servant expert opinion to the complainant as inadmissible. As the petitioner has not requested that a non-civil-servant expert opinion be obtained, the costs of the expert cannot, pursuant to § 76(1) of the 1991 General Administrative Procedure Act, be imposed on the petitioning party if it was necessary in accordance with the situation of the case to obtain the opinion and no civil-servant expert was available or the special circumstances of the case demand this (VwSlgNF. 9370 A/1977 and others).

None of these conditions has been met in this case: The Burgenland State Government has civil-servant experts at its disposal from the field of veterinary medicine, as is evident from the comments of Department 4a–V. Nor do the special circumstances surrounding the case require that a non-civil-servant expert be involved by way of exception. According to legal rulings on § 52(2) of the 1991 General Administrative Procedure Act involving a non-civil-servant expert is only justified if the expert appears particularly suited to render an assessment due to his or her special knowledge of the case (e.g. the local planner in relation to a spatial development concept) (VwSlgNF. 13.366 A/1991).

No outsider can claim to have such specific knowledge in this case. Nor is any such knowledge required. As communicated to the authorities in the ongoing investigative proceedings by letter of 3 September 2004, in fact-finding proceedings pursuant to § 3, Paragraphs 1 and 2 of the 2000 Environmental Compatibility Assessment Act it is merely to be reviewed whether the thresholds determined in Annex 1 of the 2000 Environmental Compatibility Assessment Act have been exceeded or whether the specific project is spatially near to other projects and crosses the relevant threshold together with them and could thus have a significant harmful, damaging or disruptive effect on the environment due to an accumulation

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of factors. In such proceedings, nothing can and may anticipate the results of an environmental compatibility assessment.

It is incomprehensible to the Ombudsman Board that the Burgenland State Government does not feel capable of conducting such an assessment.

IV. In conclusion, it must be noted that should the Burgenland State Government actually not possess the necessary experts and require non-civil-servant experts to conduct the relevant assessment of the state of affairs, it does not appear justified to invoice the complainant for the costs incurred for this. Otherwise, if only to avert recourse based on administrative liability law, the Ombudsman Board **recommended** that the Burgenland State Government conclude these proceedings as quickly as possible by way of an official notice. That the **recommendation** of the Ombudsman Board has not been followed is regrettable.

2.2.2 27 months for an alternate notice—Market Town of Neukirchen am Großvenediger (VA S/24-LGS/05, Office of the Salzburg State Government 20001-VA-585/11-2006, Marktgem. Neukirchen/Großvenediger EAP616-000/2006)

N.N. contacted the Ombudsman Board with the following request. He was an abutting owner of a private sidewalk, which connected Neukirchen-Warbichl-Kochleiten in the municipal territory of Neukirchen am Großvenediger.

In 1999 the mayor instituted investigative proceedings *ex officio* concerning the use of the path in accordance with the 1972 Salzburg State Roadway Act.

By official notice of 10 February 2000, the mayor of the Municipality of Neukirchen am Großvenediger declared that the "path connecting Oberwartbichl-Kochleiten should be commonly used" and should not be impeded by anyone. X.X. filed an appeal against this official notice. The representatives of the Municipality of Neukirchen am Großvenediger "dismissed" the appeal as without merit by way of an official notice of 14 September 2000. The concept raised against this by the affected land owners was dismissed as without merit by the Salzburg State Government by official notice of 7 August 2003.

The affected property owner, X.X., then filed a complaint against this official notice with the Constitutional Court. By order of 17 May 2004, the Higher Administrative Court then rescinded the official notice of the Salzburg State Government due to the illegality of its con-

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tent. In connection with the legal opinion of the Higher Administrative Court, the Salzburg State Government had to rescind by official notice dated 12 July 2004 the appeal decision of the municipal representatives of the Market Town of Neukirchen am Großvenediger of 14 September 2000 and remanded the matter back to the Municipality for new decision.

N. N., who was not party to the proceedings, complained to the Ombudsman Board that he could still not use the relevant sidewalk. Because this fact related to the outcome of the proceedings in accordance with the § 40(2) of the Salzburg State Roadway Act of 1972, the current state and length of the proceedings had to be reviewed.

By letter of 25 March 2005, the Ombudsman Board requested the Municipality of Neukirchen am Großvenediger to inform it of the status of the relevant proceedings. Only after repeated urging the mayor of the Municipality of Neukirchen am Großvenediger communicated by letters of 19 July 2005 and 12 September 2005 that the proceedings had to be "restarted." Despite repeated queries by the Ombudsman Board, the Municipality did not instigate anything further.

Pursuant to § 73(1) of the 1991 General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz; AVG 1991; BGBl 1991/51*) as amended, the authorities are obligated, unless stipulated otherwise by administrative provisions, to issue a notice on parties' petitions and appeals without unnecessary delays, at the latest 6 months after they are filed.

Salzburg State Roadway Act does not foresee any special provisions regarding the length of proceedings.

It must be noted that the authorities have the duty to render a decision even in appeal proceedings (cf. also Higher Administrative Court, 22 December 1987 Slg. 12599 A). A delay in a decision is attributable to the fault of the authorities if the delay was not caused either by the fault of the party or by insurmountable obstacles (cf. Higher Administrative Court, 28 January 1992, 91/04/0125).

In the present case, the Salzburg State Government rescinded the appeal decision by official notice of 12 July 2004 and remanded the matter back to the Municipality for new decision. Since 21 July 2004 and thus for more than 15 months, the municipal representatives have not instigated any action in these appeal proceedings. From the available administrative file, no grounds are evident that in any way explain or could justify the long period of

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inactivity on the part of the authorities. The long period of inactivity of the authorities and the related excessive length of the proceedings are therefore to be viewed as the exclusive fault of the authorities.

Due to the long period of inactivity of the municipal representatives, the Ombudsman Board declared in the proceedings in accordance with § 40(2) of the Salzburg State Roadway Act an "administrative **defect**" and issued a **recommendation** to the Municipality how to remedy the defect. The municipal representatives of the Market Town of Neukirchen am Großvenediger received this recommendation on 29 November 2005. For completely incomprehensible reasons, despite repeated intervention and urging by the supervisory authorities to the municipal representatives, which ultimately also included threats of having the proceedings conducted in an alternative fashion, nearly a year passed until the outstanding official notice was finally issued on 14 November 2006.

From the perspective of the Ombudsman Board, this failure, which has additionally delayed the proceedings, must be **protested** to nearly the same degree as the procedural delay that gave rise to the original **deficiency declaration** and **recommendation** by the Ombudsman Board. In conclusion, a period of 27 months was necessary for a new consultation on an appeal. We can no longer speak of proceedings "within a reasonable time" in the terms of Article 6 of the European Convention on Human Rights in light of the serious delay, which the Market Town of Neukirchen am Großvenediger has not even attempted to explain.

2.3 Principle of equality (Article 7 of the Federal Constitution (*Bundesverfassungsgesetz; B-VG*), Article 2 of the Basic Law (*Staatsgrundgesetz; StGG*))

2.3.1 B. Implementation

2.3.1.1 Rejection of petitions for exemption from TV and radio receiver fees on unsubstantiated grounds (VA BD/123-V/04, 313-V/06 a.o.)

In the Fundamental Rights Section of the 30th Report to the National Council and Federal Council (p. 376 f), the Ombudsman Board criticized that petitions for exemption for TV and Radio receiver fees are regularly rejected in official notices by the Gebühren Info Service (Radio and TV Fee Information Service; GIS) on the unsubstantiated ground that the

*household's income exceeds the relevant assessment limit for fee exemption. To rectify this deficiency, the Ombudsman Board **recommended** on July 9, 2004 that the GIS alter its method of communicating the grounds for its official notices so as to take into account both the legal requirements in §§ 58(2) and 60 of the 1991 General Administrative Procedure Act and the constitutional right granted to all citizens to stand equally before the law in accordance with the requirements to be derived from the legal rulings of the Constitutional Court.*

This **recommendation** has meanwhile been met through a change instituted by the GIS in its method for communicating the grounds for its notices. The unconstitutional administrative practice criticized by the Ombudsman Board therefore does not exist any longer.

2.4 Data protection (§ 1 of the 2000 Federal Data Protection Act)

2.4.1 **Inadmissible dissemination of sensitive health data (VA BD/583-SV/06)**

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

According to the constitutional provision in § 1(1) of the 2000 Austrian Federal Data Protection Act (*Datenschutzgesetz; DSG*), everyone has a claim to confidentiality of data concerning his person, to the extent that an interest meriting protection exists. Paragraph 2 of this constitutional provision explicitly provides with respect to the use of personal data (to the extent that such use is not vitally important to the health of the affected person or is undertaken with his approval) that restrictions on the claim to confidentiality are only permissible to protect the overriding legitimate interests of another person. For the use of data deemed especially worthy of protection, further restrictions are foreseen in the cited constitutional provision, among others that use be restricted to cases requiring the "protection of important public interests." It is further explicitly ordered that the intervention may only be made, even in the case of admissible restrictions, in the mildest possible manner required to attain the desired goal.

According to the legal definition of § 4(2) of the 2000 Data Protection Act all health data is to be regarded as "sensitive" as well as "especially worthy of protection." These data are

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subject to a general prohibition on use, which can be lifted only for the exceptions exhaustively listed in § 9 of the 2000 Data Protection Act. In order to have an impact on the legal situation thus created, § 14 of the 2000 Data Protection Act contains a detailed obligation to implement measures that warrant data security, including, in particular, the duty of ensuring the proper use of data.

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

The corresponding electronic adjustments may only be made once the legal foundation required for this has been established. On the basis of the new Act on the Use of Telematics in the Health Care Sector (*Gesundheitstelematikgesetz*), the so-called Ordinance on the Use of Telematics in the Health Care Sector (*Gesundheitstelematikverordnung*) is being drafted. It might establish the necessary legal foundation so that the indicated problem will soon become a thing of the past.

The drafting of this Ordinance was unfortunately delayed in the reporting period because the Ordinance will be closely related to the provisions of the e-Government Act and the Signature Act and both pieces of legislation were amended by legislative resolutions of the National Council in December 2007. The Ombudsman Board hopes, however, that after the announcement of the two legislative amendments in question in January 2008 work on the Ordinance on the Use of Telematics in the Health Care Sector will be able to be brought to a speedy conclusion.

2.4.2 Form to procure a free annual motorway permit sticker (VA BD/30-BKA/06)

Ms. H. contacted the Ombudsman Board in connection with the design of an application form to receive a free motorway permit sticker for 2007, complaining about text contained therein to the effect that the applicant agreed "that the Federal Ministry of Social Security, Generations and Consumer Protection could send my data (name and pass number) to the Highways Financing Corporation (Autobahn- und Schnellstraße-Finanzierungs-AG; ASFI-NAG) for more effective settlement of the 2002 Act on Federal Highway Tolls." It was incomprehensible for the complainant why the dispatch of the free motorway permit sticker had to be linked to the above declaration.

The review proceedings of the Ombudsman Board revealed that there was no legal foundation upon which the aforementioned federal ministry could justify the protested text regarding the disclosure of data to ASFINAG. In light of this, the Ombudsman Board defended the opinion that the corresponding application form had to be reformulated so that it was unequivocally clear for handicapped applicants that they could—but did not have to—issue their consent to the data disclosure to ASFINAG in order to obtain the requested free motorway permit sticker. The Ombudsman Board then also criticized in this context that through the design of the application form at the time the complaint was raised the affected person could not see from the form—nor was referred to this fact by any corresponding explanations—that he or she would be sent the free motorway permit sticker even if he or she did not consent for data to be disclosed to ASFINAG. The protested design of the form instead created the optical impression that the request for the dispatch of the free permit sticker and the consent to the data disclosure formed an inseparable unit, so that no free permit sticker would be sent if the consent to the data disclosure were not granted.

Based on the efforts of the Ombudsman Board, the form in question was revised so that the applicants could now unmistakably see that they could, but did not have to issue their consent to have data disclosed to ASFINAG in order to receive the requested free motorway permit sticker. The newly designed application form was already used in the permit sticker campaign in November 2007.

2.5 Right to respect of private and family life (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms)

2.5.1 Accurate reproduction of the diacritical marks in a family name is required by the constitution (VA BD/25-BKA/06, BKA-184.490/0010-I/8/2008)

In the course of processing a complaint lodged by Dr. M., the Ombudsman Board had to find that family names are often written incorrectly by authorities, with diacritical marks being left out above the corresponding letters in the family name.

Article 8 of the European Convention on Human Rights contains a constitutionally guaranteed right to respect of private and family life. In light of the applicable legal rulings both of

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the Austrian Constitutional Court and the European Court of Human Rights (cf. VfSlg. 13.661/1994 and 15.031/1997 and the decision of the ECHR in the case *Burghartz* of 22 February 1994, reprinted in ÖJZ 1994, 559; also the rulings in the cases *Stjerna* and *Guillot* of 25 November 1994 and 24 October 1996), no doubt can exist that the right to respect of private life also encompasses a constitutionally guaranteed right to respect of one's own name.

From a constitutional point of view, it must be asked whether the protective sphere of the right to respect of one's own name also entails a right to have diacritical marks in first and last names reproduced accurately by the authorities.

Several weighty arguments speak in favor of this view, in the opinion of the Ombudsman Board:

First, it is only logical that respect for a name is also expressed by its being written properly. If this were not the case, the administration would be able to alter names by spelling them in any which way or by merely considering an arbitrary number of letters (e.g. the first five letters of the family name) or to replace a first name with another by consistently reproducing a typographical "error" in all official documents. It is methodologically not evident to what extent the derivation of the right to have one's name written correctly from the right to respect of the name might constitute a larger step than the derivation of the right to respect of the name from the right to respect of private life.

In relation to the case behind the present complaint, the objection could at least be raised that the omission of a diacritical mark would have to be assessed differently than, for example, an abbreviation of the family name or the intentional alteration of the first name as a result of a conscious false spelling. This argument can admittedly be countered with the argument that the omission of a diacritical mark would, as in the cases mentioned above, cause the name not to be depicted properly. Due to general dogmatic considerations regarding fundamental rights, the matter cannot depend on the intention behind the administrative measure but on its factual effects—in this case, the incorrect spelling of the name.

The following systematic constitutional considerations speak in favor of this interpretative outcome:

When ascertaining the normative content of constitutional standards, not only the standard to be interpreted but also its normative environment and ultimately even the entire constitu-

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tional system has to be taken into account. Such a systematic constitutional interpretation is also required in the context at hand, because the European Convention on Human Rights is applicable as constitutional law in Austria and the normative content relevant for Austria first becomes evident with due regard to other normative provisions in Austrian constitutional law.

It can therefore not be viewed as insignificant that the authors of the Federal Constitution saw the need to expressly set forth in the form of Article 7(3) of the Federal Constitution official designations, titles, academic degrees and professional designations can be used in the form that expresses the gender of the officeholder. All authorities must respect the relevant decision and issue the official documents in accordance with the relevant legal rules of implementation.

It is of course true that an official designation, a title, an academic degree or a professional designation is something different than the first or last name of a person. Nonetheless, the constitutional norm in question is of great relevance in the present case because it was not the aim of the authors of the constitution in the opinion of the Ombudsman Board to create a constitutional situation that protects the correct designation of official designations, titles, academic degrees and professional designations but left the correct spelling of first and last names of persons to the free discretion of administrative authorities, even though the diacritical marks that can be placed on other characters (normally letters) alter their meaning, stress or pronunciation. This can even go so far that a combination of letters and diacritical marks in one language forms an independent sign with its own sound, while the combination in another language only defines the stress.

In the given context, it should finally not be overlooked that spelling a family name without diacritical marks represents a particular annoyance especially for members of linguistic minorities, because forms of discursive appreciation and recognition of minorities and their identities by the majority and the state occur in the written language precisely through diacritical marks. Diacritical marks have full orthographic significance. As the name itself suggests, they serve as signs that differentiate letters from otherwise identical looking letters. The constitutional recognition several years ago in Article 8(2) of the Federal Constitution of the linguistic and cultural variety that has emerged within the Republic of Austria as expressed in autochthonous groups of people contains a value judgment of the authors of the

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constitution that at minimum suggests that only the correct spelling of a minority family name would not constitute intervention in the constitutional sphere.

In summary, the Ombudsman Board is therefore of the opinion that it can at least be derived from the combination of Article 8 of the European Convention on Human Rights as related to Articles 7(3) and 8(2) of the Federal Constitution that the correct spelling of a name is also constitutionally protected. The Ombudsman Board assumes in this regard that this legal opinion is necessary in order to allow the value judgments expressed in the provisions on fundamental rights and state goals to have practical effect in everyday life. Only such an understanding sufficiently takes into account the dynamic legal rulings of the ECHR (in this regard, cf. Grabenwarter, *Europäische Menschenrechtskonvention*² [2005] 39, Marginal No. 12 f with numerous references to legal rulings).

In the given context, reference must also be made to the following:

Pursuant to the legality principle anchored in Article 18(1) of the Federal Constitution, the entire state administration may only be exercised based on the laws. This key constitutional principle is clarified and underscored by Article 8(2) of the European Convention on Human Rights which orders that any intervention in the protected sphere of the right constitutionally guaranteed by Article 8(1) of the European Convention on Human Rights must be foreseen by law.

The current legal situation prescribes the use of diacritical marks in the civil registry system as compulsory. Applications derived from that system (e.g. registration of residency) must support diacritical marks in all cases. All other applications are to be converted quickly in order to avert inconsistencies. In the Ombudsman Board review proceedings, no legal provision came to light that would empower the administration for whatever reason to make a false representation of a name. In particular, neither the Constitutional Section—according to whose commentary "any justification of intervention [in legal positions guaranteed by Article 8(1) of the European Convention on Human Rights] breaks down on the absence of a legal foundation"—nor the Federal Ministry of Finance could refer to a corresponding provision. This is also not surprising, as it was undisputed even before the software first triggering the problem was introduced that the authorities had to correctly spell names, if necessary making additions by hand. No legal provision exists in accordance with which it is admissible—at most for financial reasons—when using new software to overlook the need to spell a name correctly.

It follows from the above that the inaccurate storage and representation of diacritical marks by the software and hardware of Federal IT Center (BRZ GmbH) creates a lawless and thus unconstitutional situation. Observance of the constitutional requirements stemming from the legality principle is inalienable and can therefore under no circumstances be placed at the disposition of the electronic administration, however it is set up in organizational terms.

In light of these considerations, the Ombudsman Board unanimously resolved at the collegial meeting on 17 December 2007 that the failure to establish suitable measures aimed at enabling the software and hardware used by the Federal IT Center (BRZ-GmbH) to properly store and represent diacritical marks constitutes a **defect** in public administration. To remedy this **defect**, a letter was sent to the Federal Chancellor and Vice Chancellor with the **recommendation** to instigate the steps necessary using the "Manual of Diacritical Marks—Diacritics 1.1.0" agreed within the framework of e-government between the Federal Government, the states and municipalities to change the storage and representation of diacritical marks by the software and hardware used in the Federal IT Center (BRZ-GmbH) and thus to (gradually) warrant the correct spelling of personal names.

In reaction to this **recommendation**, the Federal Chancellor's Office admitted that the entire treatment of the marks representable in 8-Bit Unicode Transformation (UTF-8) format can currently not be disclosed in ELAK, electronic filing system of the Austrian government. However, ELAK is to be modified in the future so that diacritical marks can be stored and represented in the future and integrated into transactions. Moreover, this topic would be placed on the agenda for the next meeting of the "Digital Austria" platform.

The Vice Chancellor and Federal Minister of Finance promised the Ombudsman Board that all IT processes in the finance administration would gradually be rendered diacritically fit within the framework of the ongoing "e-Finanz" Project.

2.5.2 Residence permits—non-approval of petition filed in Austria for humanitarian reasons (VA BD 141-I/07, BMI 70.011/845-III/4/07)

An Iranian citizen applied for residence permits for herself and her three children in order to live in a family community with the father who was resident in Austria as a key maker. Because the family initially came to Austria on entry visas and only applied for residence in Austria, an inadmissible application was in principle made within Austria pursuant to § 21 of the Establishment and Residence Act (Niederlassungs- und Aufenthaltsgesetz; NAG). Pur-

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suant to §§ 72 ff. of the Establishment and Residence Act, however, the Federal Minister of the Interior has the option to admit applications filed in Austria for humanitarian reasons. Despite all efforts, the Federal Minister of the Interior did not wish to recognize humanitarian grounds in the present case.

The Federal Ministry of the Interior was of the opinion that the decision was made based on the legal rulings of the Higher Administrative Court, which assesses the observance of the principle of filing applications from abroad and the related weighing of interests at the expense or contrary to the familial interests in light of the greater weight of the public interests in an orderly immigration system to be unproblematic—even with a view to Article 8 of the European Convention on Human Rights. There was no legally admissible ground for issuing the requested residence permit in Austria, according to the Ministry. *"If the authorities would have deviated from the provisions of law based on only subjective grounds in the person of the parties, they would have run the risk of violating the principle of equality because they acted arbitrarily. Moreover, such decisions would be discriminatory with respect to immigration applicants who adhere to the provisions of law when filing applications,"* the Federal Ministry of the Interior argued to the Ombudsman Board.

From the viewpoint of the Ombudsman Board, the argumentation of the Federal Ministry of the Interior can be counted with the argument that §§ 72 ff. of the Establishment and Residence Act form the basis for issuing residence permits in Austria. That the aforementioned legal foundations provide leeway for assessing humanitarian grounds was explained by the Ombudsman Board to the Federal Ministry of the Interior. The admission of an application filed within Austria would thus naturally not constitute a deviation but an implementation of the legal foundations. Every decision as to whether humanitarian grounds are given depends on the specific case. It must be determined in each specific case whether the authorities can assume the existence of humanitarian grounds or not. The corresponding evidence must also be provided for this. Hence, the argumentation of the Federal Ministry of the Interior that the principle of equality could be violated appears to be very general, because the criteria to be applied can be different in each specific case.

On a constitutional level, it is evident that the decision of the Federal Ministry of the Interior impairs the protection of private and family life pursuant to Article 8 of the European Convention on Human Rights. Though dismissing the application for the issuance of a residence permit does not mean automatic deportation, residence without a residence permit leads to deportation proceedings. Likewise in the present case, the authorities carried out deportation proceedings, which are pending before the Constitutional Court. That the right

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to private and family life is to be afforded great significance even in relation to public security and order was explained vividly by Prof. Funk at the 64th Meeting of the Human Rights Advisory Board on 5 December 2006:

"At the forefront is the priority interest of the state, anchored in the institution of basic rights, to the protection of private and family life (Article 8(1) of the European Convention on Human Rights). This is always a basic principle to be protected. Juxtaposed with this are the intervention options based on the legal reservation in Article 8(2) of the European Convention on Human Rights. Such options constitute exceptions. They are subordinate to the basic principle. The weighing of interests runs afoul if the private interest of the applicant for residence is weighted against the public interest in intervention in his rights. The public interest in the warranty of the protection of basic rights does not need to be proven and is higher than the public interest in intervention in the form of a complete and utter end of residence. If no compulsory grounds exist to intervene in basic rights, then the protective duty of the state comes to the fore. With respect to these considerations, a different paradigm arises for the weighing of interests than that normally used in practice. The individual's interest in residence is not to be weighed against the general public's interest in ending the residence. Instead, strong, compulsory grounds for intervention are to be brought against the weight of the guarantee of basic rights that is in no need of justification—grounds which could "outweigh" this guarantee. The authorities bear the burden of proof. In cases of doubt, the public interest in desisting from intervention is overriding."

That the Constitutional Court has also recently attributed respect for private and family life (particularly in deportation cases) increased significance was shown in the ruling of 12 June 2007 (B 2126/06). In its ruling of 29 September 2007 (B 328/07), the Constitutional Court summarized the criteria stipulated by the ECHR which are to be applied in deportation cases in view of Article 8 of the European Convention on Human Rights. Likewise, the numerous decisions of the ECHR issued regarding Article 8 of the European Convention on Human Rights demonstrate how decisive the details of an individual case can be when assessing proportionality. The length of residence is not the solely decisive criterion. Several other factors, such as the requirements of public order, integrity before the law, the degree of integration, the connection to the home state, the intensity of family life and the date the family life originated are of significance when making the assessment (see also Peter Chwosta, "Die Ausweisung von Asylwerbern und Art. 8 MRK," ÖJZ 2007/74).

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From the viewpoint of the Ombudsman Board, it can therefore be concluded that the Federal Minister of the Interior had (and still has) the legally admissible and defensible option based on the arguments made and documents submitted by the complainant to enable the complainant and her three children to file an application from within Austria on humanitarian grounds. Because the spouse and father work in Austria as a key maker, the family has very good prospects of being issued residence permits. Merely to fulfill the formality of "filing an application from abroad," the family would be separated unnecessarily for an extended period of time. The Ombudsman Board concluded that the non-admission of the application filed within Austria constitutes on humanitarian grounds an administrative **defect** and **recommended** to the Federal Ministry of the Interior to admit applications filed within Austria on humanitarian grounds when new applications are filed.

3 Anti-discrimination

3.1 General remarks

3.1.1 Introduction

In this reporting period as well, a number of persons contacted the Ombudsman Board complaining about presumed discrimination in public service. The complaints related to different grounds for discrimination, though the largest number of cases involved suspected discrimination based on ethnic origin and based on illness or handicap.

A further focus of activity were *ex officio* review proceedings of the Ombudsman Board concerning the implementation of the prohibition of racist discrimination, as reported in the previous report of the Ombudsman Board to the National Council and the Federal Council. These review proceedings were able to be concluded in the reporting period with the **declaration** of an **administrative defect** and the issuance of the corresponding **recommendations** to the Federal Government. The first measures have already been taken to implement the **recommendations** of the Ombudsman Board.

Another complaint case reported in the **previous year's report** was able to be concluded in this reporting period. Because the case dealt with a fundamental problem in the law governing equal treatment—namely the jurisdiction of equal treatment institutions over civil servants in spun-off undertakings—and also is an example of the lack of transparency in equal treatment law criticized in many places, the case is to be presented before other complaint cases in this area being reported in accordance with the individual grounds for discrimination.

As in last year's report, this report will discuss complaint cases from reports to the state parliaments (*Landtage*) relating to questions of equal treatment and anti-discrimination, in order to provide federal legislators an overview of the many problems in this area and to point out possible regulatory deficits.

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3.1.2 Planned amendment of the Equal Treatment Act (*Gleichbehandlungsgesetz*): Ombudsman Board seeks clarity in equal treatment law and the furnishing of equal treatment institutions with urgently required resources

In the 2007 reporting period, the Bill to Amend the Federal Equal Treatment Act, the Federal Act on the Equal Treatment Commission and the Ombudsman for Equal Treatment and the Federal Act for Equal Treatment for Disabled Persons (142/ME, XXIII. GP) was sent for assessment. The key issue is to implement EU Directive 2004/113/EC by extending the scope of application of the Equal Treatment Act and the elements constituting discrimination to equal treatment of men and women with respect to access to and provision of goods and services. The new agendas are to be assumed by the Ombudsman for Equal Treatment without distinction based on ethnic affiliation in other areas. However, no increase in resources has been foreseen.

In its commentary on this bill (12/SN-142/ME XXIII. GP), the Ombudsman Board point out *inter alia* that the resources at the disposal of the Ombudsman for Equal Treatment are already scant. The massive extension of the scope of responsibilities planned in the bill must be accompanied, in the opinion of the Ombudsman Board, with an extension of resources to the Ombudsman for Equal Treatment, if this is not merely to be a legalistic cosmetic measure without any actual effect in reality (also see the commentary of the Human Rights Commissioner of the European Council, Thomas Hammarberg, on the lack of resources among equal treatment institutions, Report of 12 December 2007, CommDH(2007)26) Marginal No. 53 f).

The Ombudsman Board also pointed out in its commentary that the bill further increases the varying protective standards between the individual areas of discrimination. Because Austria is naturally not limited to the minimum implementation of the Directive, the Ombudsman Board favors standardization in this respect and comprehensive protection against discrimination on any grounds in relation to access to goods and services, as was recently recommended by the United Nations Human Rights Committee in its reaction to the Austria's Fourth Report on Human Rights (Concluding observations of the Human Rights Committee, CCPR/C/AUT/CO/4/CRP.1, pg 3).

The problem of a lack of transparency in equal treatment law is also greatly compounded: The literature already criticizes the legalistic overload in the current Federal Equal Treat-

ment Act with largely identical provisions and the resulting lack of clarity in protection against discrimination (cf., e.g., Rebhahn, *Kommentar zum Gleichbehandlungsgesetz* [2005], Introduction, Marginal Nos. 18 and 42).

This problem is compounded even more with the planned insertion of a new Part IIIa. (§§ 40a to h), in which the existing provisions are to be largely repeated for the new area of protection. That this is not only a legalistic eyesore, but constitutes a massive obstacle to access to the law for persons affected by discrimination has also been pointed out by the Human Rights Commissioner of the European Council, Thomas Hammarberg: "*However, due to the complexity of the legal framework and the complaints mechanism associated with it, it may be difficult for the public and even those with legal training to access the procedures.... In terms of the legal framework, the Commissioner recommends its simplification....*" (Report of 12 December 2007, CommDH(2007)26), Marginal No. 53 f). That the fears of the Human Rights Commissioner are actually justified is demonstrated by the following case:

3.1.3 Competence of equal treatment institutions for a spun-off undertaking—a nearly irresolvable problem?

In the Ombudsman Board's 2006 report to the National Council and the Federal Council (p. 413), the Ombudsman Board reported on a case of presumed age-related discrimination involving a civil servant in a spun-off undertaking and her problems in locating the equal treatment agency office competent for her case.

After more than a year, the Ombudsman Board has now been presented a statement from the competent ministry regarding this question. The question of the jurisdiction of equal treatment institutions over employees in spun-off undertakings in fact appears to be a question which one should approach with a certain penchant for solving brain-teasers. Rapid action on the part of the equal treatment institution is opposed by the legislative situation, which represents an obstacle that should be removed through legislation creating clear and comprehensible rules of jurisdiction.

Ms. M., 57 years old, has been employed at the bank BAWAG-PSK as a civil servant for 38 years. She contacted several equal treatment agency offices with an urgent matter, but was initially dismissed by all offices due to a lack of jurisdiction.

In its statement to the Ombudsman Board dated 17 November 2007, the competent department of the Federal Ministry for Health and Women, where the Equal Treatment Commission has been established, stated the following regarding the general approach in the case of problems with jurisdiction: "*If, when a petition is submitted, a problem of jurisdiction*

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*arises between the Equal Treatment Commission for the Federal Public Service and the private sector—which can occur in spin-offs due to the different personnel structures—the senate discusses and decides on the jurisdiction based on the relevant spin-off law." Unfortunately, the relevant spin-off law in this case is silent about the applicability of the Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*).*

The complainant has the status of a civil servant employed by the Austrian postal savings office (PSK), which is subordinate to the Federal Ministry of Finance. The Ombudsman Board therefore contacted the Federal Minister of Finance by letter of 17 October 2006, asking whether his ministry was responsible for equal treatment issues pertaining to civil servants in spun-off undertakings such as BAWAG/PSK. On 3 April 2007 the Federal Ministry of Finance notified the Ombudsman Board that the legal question raised could not yet be clarified and that a query had been sent to the Federal Chancellor's Office. By letter of 30 November 2007, i.e. more than a year after the query from the Ombudsman Board, the Federal Ministry of Finance commented on the matter at hand (File No. BMF-410101/0134-I/20/2007). An extract from the reply reads as follows:

"... Regarding the question of jurisdiction (in civil service law), we would first like to cite a reply of the Constitutional Section of the Federal Chancellor's Office likewise from 1999 to the Federal Ministry of Finance: 'It must be noted that the responsibilities of the employer vis-à-vis federal civil servants assigned to PSK-AG are to continue to be carried out by bodies of the Federal Government subordinated in civil service law to a Highest-Level Institution in the terms of Article 19(1) of the Federal Constitution. In no case may the structuring of the employment relations of the Federal Government be transferred by the employer to parties other than institutions of the Federal Government...'

It appears undisputed that the Federal Minister of Finance is in principle to be allocated supervisory powers and the inseparably related powers to give instructions based on his position as Highest Official and thus his function as Highest Civil Service Authority for the federal civil servants assigned to the spun-off legal entities in first-instance civil service agencies (including personnel offices).

Also undisputed is the issue of supervision in questions related to federal civil servants. Supervision will normally be concentrated in the hands of the respective manager of the civil service agency, who will thus also function as a direct addressee for instructions from the Highest Civil Service Authority.

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The employment issues and the technical issues beyond the civil service issues, particularly the structure of labor deployment, the application of the sample management instruments cited above, and also the content of the employment are normally subject to the control and supervision of the spun-off legal entities. These elements too are therefore not subject to the supervision of the Highest Official. Supervision of employment-related and technical issues thus naturally falls to the manager of the first-instance civil service agency. A technical order may in some circumstances affect employment components, while employment and/or organizational powers of instruction, in contrast, even concerning civil servants in a spun-off legal entity, remain within its [the agency's] management hierarchy."

It is therefore now clear that the supervision of civil servants in spun-off undertakings (i.e. issues relating to the circumstances underlying the employment relation) is still assigned to the competent ministry, which, in principle, also establishes the jurisdiction of the equal treatment institutions over the public sector.

That the issue of the jurisdiction of equal treatment institutions over civil servants in spun-off undertakings is often not clearly resolved is also noted by the Ombudsman for Equal Treatment in a statement on a bill to amend the Equal Treatment Act (19/SN-142/ME XXIII. GP): *"Various spin-off laws refer to Parts Three and Four of the Federal Equal Treatment Act in order to assure both the positive measures contained in the Federal Equal Treatment Act (promotion of women) and the special institutions foreseen therein for employees of these (quasi-public) undertakings. Through the Amendment to the Equal Treatment and the Federal Equal Treatment Act, the effect of the latter has been restricted. As a result, problems arise regarding the applicability of the Federal Equal Treatment Act to employees in spun-off undertakings; jurisdiction is often difficult to clarify. In the interest of the affected parties, the law must be rectified in this area."*

It is to be hoped that clear and practicable rules are reached and that the public institutions actually exercise their supervisory authority in this specific case. Irrespective of this, it is at least clear that the obtainment of rapid advice and assistance should not have to hinge on the clarification of jurisdictional issues.

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3.2 Discrimination based on gender

3.2.1 **No gender-specific designation of civil servants in the clerk's office of the Higher Regional Court of Vienna (VA BD/429-J/07, BMJ-99001565/0002-Pr3/2007)**

N.N. from Vienna has lodged a complaint with the Ombudsman Board that he received a letter from the president of the Higher Regional Court of Vienna regarding proceedings in accordance with the provisions of the Judicial Collections Act (*Gerichtliche Einbringungsgesetz*) that contained the words in the closing formula: "XX, Deputy Director of the Collections Office." (*XX-Stellvertreter des Leiters der Einbringungsstelle* – the German word *Stellvertreter* being the masculine form) He assumed that XX was a man and addressed his replay accordingly. In the course of his face-to-face meeting, he learned that XX was a female civil servant in the Higher Regional Court of Vienna; this fact was also not revealed by the corresponding name sign on her office door.

Irrespective of the fact that the mistaken designation in his letter was embarrassing, he could not comprehend such discrimination against a woman in the employ of the Higher Regional Court of Vienna.

The requested commentary from the Federal Ministry of Justice revealed that decision-making officials in most areas of the judiciary have been labeled in a gender-specific fashion now since 1986; merely in minor IT applications of the "Collections Office" and "Child Support Section" has a change not been possible to date due to technical reasons. A change is foreseen in 2008, however.

It is likewise foreseen to create new name signs for the doors of the Collections Office. Currently, the official titles appear on the doors only in the abbreviated, masculine or gender-neutral form with the family name of the civil servant. Reference was made to the fact that the division of responsibilities printed on the official directory also contains the first names of the employees and that the first and last names and official and professional titles are generally listed in other areas of the Higher Regional Court of Vienna.

The Ombudsman Board recognized the **complaint** of N.N. as **legitimate**, because it was not comprehensible why a gender-specific designation of decision-making officials should

not have been possible in the automated processing of minor IT applications since 1986, i.e. for nearly 20 years.

The problem of the name signs on the doors could have been resolved long ago, in the opinion of the Ombudsman Board, in the easiest fashion, e.g. by putting a piece of tape over the designations, had the offices responsible for this at the Higher Regional Court of Vienna wanted to end this discriminatory practice against the female civil servants.

3.3 Discrimination based on nationality or ethnicity

3.3.1 **Racial discrimination a misdemeanor? The Ombudsman Board identifies defect and recommends improvements in protection from racial discrimination (VA W/356-LAD/06)**

*After being approached by the ZARA association, which has filed suit in response to hundreds of racist job and housing ads, the Ombudsman Board conducted an **official** procedure to review all racial discrimination cases in Vienna since the beginning of 2005.*

*The review indicates that the authorities have been entirely inconsistent in their application of the prohibition of discrimination in Article IX (1)3 of the Introductory Law to the Administrative Acts of 1991. Violations of this prohibition are often viewed by the authorities as misdemeanors and accordingly not prosecuted with sufficient vigor. The Ombudsman Board therefore **found** that this situation constitutes an administrative **defect** and **recommended** that the competent national government take steps to ensure effective and consistent enforcement of the prohibition of discrimination. The national government and the municipal government of Vienna have already announced their first steps in this direction.*

Clearly, xenophobic comments with respect to migrants and members of ethnic minorities are still widespread in Austria, as was observed by the Human Rights Commissioner of the Council of Europe, Thomas Hammarberg, during his visit to Austria on 21-25 May 2007. In his report on the visit, Mr. Hammarberg therefore called on the Republic of Austria to take broad political measures to combat racist and xenophobic practices in all segments of the population. He particularly stressed the importance of raising consciousness and educating people about human rights (Report of 12 December 2007, CommDH(2007)26) Marginal Nos. 44 et al).

Pursuing the same matter, the Ombudsman Board conducted an **official** review of the enforcement of the prohibition of discrimination pursuant to Article IX(1)3 of the Introductory Law to the Administrative Acts of 1991, which was concluded this year.

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The case which triggered the review was an ad campaign by an NGO against racist and discriminatory job and housing ads in the media: towards the end of 2005, the ZARA association (the Association for Civil Courage and Anti-Racism) checked ten print and online media outlets for discrimination in their job and housing ads. In just two weeks, over 100 discriminatory ads were found, such as "*Shoe saleswoman wanted. Austrians only,*" or "*Apartment for rent. Natives only please,*" and suits were filed for unlawful racial discrimination (cf. **30th Report of the Ombudsman Board (2006) to the National Council and Federal Council**, p. 405).

Article IX(1)3 of the Introductory Law imposes administrative penalties for racial discrimination: *Whoever "unjustly discriminates against persons based solely on their race, skin color, nationality or ethnicity, religion or disability, or whoever prevents such persons from entering places or utilizing services which are intended for public use" has committed an administrative offense subject to a fine of up to € 1,090.00, to be levied by the district administrative authority."*

In the course of the Ombudsman Board's **official** review, all racial discrimination cases conducted in the City of Vienna in the past one and a half years were examined. 112 cases were subjected to close review and compared. Based on this extensive review, the Ombudsman Board found that the authorities are entirely inconsistent in their enforcement of this law. Violations of the discrimination ban are often treated by the authorities as misdemeanors, and are accordingly not prosecuted and penalized with sufficient vigor.

In one case, for example, persons of dark skin were refused service in a bar, with the explanation that "*no food or drink will be served to blacks, since there's a massive drug problem in the neighborhood.*" This explanation was accepted by the authorities as "*credible and excusable*" and the bar owner was not penalized.

In some suits based on discriminatory housing and job ads, the authorities took the position that such acts did not constitute wrongful discrimination at all "*in the absence of concrete discrimination against a specific person.*" In other cases, the authorities clearly viewed the discriminatory ads as a misdemeanor and refused to track down those who placed the ads using the telephone number given in the ad and to penalize them, since "*the necessary expense is out of proportion to the degree and significance of the violation of public interests inherent in this administrative offense.*" Other cases had to be suspended due to expi-

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ration of the statute of limitations because the authorities had neglected to take the necessary action before the statutory deadline.

In general, the Ombudsman Board's review revealed that the authorities pursued matters which are essentially equivalent with varying degrees of intensity, and came to completely different conclusions. The actions taken in these cases ranged from the imposition of various fines to issuing a warning to foregoing imposition of a penalty due to the mildness of the offense to the finding that the acts in question did not constitute discrimination at all.

The Ombudsman Board's review concluded that this inconsistent and, in some cases, inefficient application of Article IX(1)3 of the Introductory Law is insufficient to meet Austria's obligations under national, Community and international law with respect to combating discrimination. The Ombudsman Board therefore found unanimously in its session of 28 August 2007, that this situation constitutes an administrative **defect**. A **recommendation** was issued to the Austrian federal government, which is responsible for enforcing the relevant provision, to take the steps to ensure effective and consistent enforcement of the prohibition of discrimination nationwide. The Ombudsman Board also **recommended**, in line with the recommendations of the European Commission Against Racism and Intolerance (ECRI) in the course of its reports on Austria [most recently CRI (2005) 1 of 25 June 2004, pp. 12-14], that Austria strengthen protection against discrimination based on nationality and avoid any interpretation which would limit the elements of discrimination.

In response to the Ombudsman Board's **recommendations**, both the Austrian federal government and the municipal government of Vienna have taken action to improve protection from racial discrimination. The Constitutional Section of the Federal Chancellery instructed all competent authorities that racial discrimination is not a misdemeanor and should therefore be prosecuted and penalized using the appropriate official means. The Constitutional Section also clarified that discriminatory job and housing ads constitute wrongful racist discrimination (Opinion of the Constitutional Section of the Federal Chancellery by Resolution of the Federal Government of 21 November 2007).

The City of Vienna also reacted to the Ombudsman Board's **recommendation**: prosecutions will no longer be conducted by the 19 district magistrates, but in four prosecutorial centers of competence, in order to ensure consistent and efficient enforcement of the discrimination ban. In addition, a coordinator and contact person was appointed to coordinate

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the prosecutions (Opinion of the Chief Executive Office [*Magistratsdirektion*] of the City of Vienna of 22 October 2007, MPRGIR – V-1263/06).

It is to be hoped that these actions will ensure more efficient and more consistent protection from racist discrimination nationwide. Only once violations of the discrimination ban are no longer treated by the administrative authorities as mere "peccadilloes" but are instead efficiently prosecuted and penalized can we hope to succeed in changing the attitudes and raising the consciousness of the public at large. The Ombudsman Board will continue to work towards this goal in the future.

3.3.2 Headscarves as a barrier to employment? (VA BD/336-SV/07)

Foreign-born women and women with an immigrant background face grave difficulties in the job market for various reasons, and wearing a chador may represent an additional barrier when seeking a job. The competent bodies are therefore called upon to intensify their efforts to promote equal treatment of all societal groups.

Mr. L., an instructor in a vocational school, turned to the Ombudsman Board because female Muslim students had reported to him that they had experienced problems with their training position, which was being administered on behalf of Public Employment Service Austria (*Arbeitsmarktservice Österreich*; AMS), because they wore a headscarf/chador.

The Ombudsman Board confronted the national director of AMS with this problem. In his response to the Ombudsman Board, he stated that there are no instructions from the training center or AMS which prohibits the wearing of a chador although possible discrimination due to the wearing of a chador is indicated in the context of multiple unsuccessful applications. In response to the Ombudsman Board's inquiry as to the action taken by AMS in the case of presumed discrimination on the part of employers (e.g. concrete indications that employers generally do not consider applications from women with chadors), the national director stated as follows:

"...We notify the employer that this conduct may constitute wrongful discrimination and may be subject to administrative fines and/or duties to pay compensatory damages ...In any case, we seek to ensure that AMS does not make discriminatory selections and that any discriminatory selection criteria are not transported in our IT system. If businesses ignore applications from certain groups based on personal traits which have nothing to do with their qualifications for the job they are seeking, we give them the above warning and notify

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them that AMS does not run the risk of discrimination in this case and, to stay with this example, will interview applicants wearing headscarves.

By no means is this practice contradictory with our communications with women wearing headscarves (advising them not to insist on headscarves). It is merely an expression of the general function of AMS as an intermediary, seeking to promote adjustments on both sides of the job market in order to better match supply and demand."

Under § 17 of the Equal Treatment Act (*Gleichbehandlungsgesetz*), discrimination by employers based on ethnicity or religion is prohibited. If job applicants suffer discrimination due only to the fact that they wear a headscarf/chador without any objective justification, such conduct is in violation of the discrimination ban (cf. Windisch-Graetz in Rebhahn [ed.], *Gleichbehandlungsgesetz – Kommentar*, p. 437).

Prohibiting employees from wearing headscarves or chadors on the job or discriminating against job applicants who wear chadors can only be justified on specific grounds: for example, an employer may be justified in ordering an employee to remove the Islamic headscarf in order to wear a protective helmet or certain sterile head coverings. However, the wearing of the Islamic headscarf does not hinder a saleswoman from performing her job (cf. Windisch-Graetz in Rebhahn [ed.], *Gleichbehandlungsgesetz – Kommentar*, pp. 439 et al, with further references).

Accordingly, even private employers may not discriminate against certain employees arbitrarily or on non-objective grounds (cf. e.g. Austrian Supreme Court, Case No. 9 Ob A 182/00f, ASoK 2001, 131). If found guilty of racial discrimination, the employer may lose his business license (§ 87(1)3 of the Industrial Code (*Gewerbeordnung*) in conjunction with Article IX(1)3 of the Introductory Law).

The federal government has emphasized the integration of immigrants and children of immigrants living in Austria. Both the Report on Immigration presented by the Austrian Minister for Women, the Media and Public Service in autumn of 2007 and the Report on Integration presented in January 2008 by the Minister for the Interior reveal that foreign-born persons, and especially foreign-born women, suffer particularly severe discrimination in the job market. The reasons for this discrimination are diverse, but it is clear that urgent action is necessary. In particular, it would be advisable to define immigrants and the children of im-

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migrants as a separate target group within AMS and to broaden the offerings for this group (Federal Ministry for the Interior; Integration: Moving Closer Together, p. 67).

The Ombudsman Board applauds the extensive efforts made by AMS in the past to ensure equal treatment of all societal groups in the job market and hopes for rapid implementation of the **recommendation** to broaden efforts on behalf of persons with an immigration background.

3.3.3 Plaintiffs' Association asks Ombudsman Board to review conduct of proceedings by the Equal Treatment Commission (VA W/622-LAD/07)

The EU Equal Treatment and Non-Discrimination Directives require member states to allow interested associations and organizations to assist in taking legal action to protect victims of discrimination (Article 7 Par. 2 of the Non-Discrimination Directive, Article 9 Par. 2 of the Framework Directive and Article 6 Par. 3 of the Amendment Directive).

Implementing this requirement, § 62 of the Equal Treatment Act states that so-called "plaintiff's associations" may join a lawsuit as an intervening party in order to enforce the victims' claims provided the victim or victims request such intervention. In addition, § 12(2) of the Federal Act on the Equal Treatment Commission and the Ombudsman for Equal Treatment (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, GBK/GAW*) allows potential victims of discrimination to seek representation in proceedings before the Equal Treatment Commission by a person of their choice, particularly a representative of a special interest group or NGO. The Equal Treatment Commission must allow these representatives of the NGO to join the proceedings at the victim's request.

The Plaintiffs' Association for Enforcement of the Rights of Victims of Discrimination (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*) is an umbrella association of several NGOs dealing with discrimination in various fields.

In November 2007, the Plaintiffs' Association and the ZARA association turned to the Ombudsman Board and complained about the Equal Treatment Commission's enforcement of the Equal Treatment Act. Those organizations feel hindered in their representation of discrimination victims, as provided by law, by supposed defects in the conduct of proceedings by the Equal Treatment Commission. The complaint involves several aspects: the duration

of the proceedings, principles of evidentiary assessment, the manner in which NGOs are included in proceedings before the Equal Treatment Commission, as provided by law, and the content of recommendations by the Equal Treatment Commission in cases where discrimination is found.

A review of this complaint was still pending at the time of publication.

3.3.4 Continuing discrimination in the delivery of family benefits to non-Austrian families (VA BD/80-JF/06, 83-JF/06, 17-JF/07)

In view of the continuing complaints, it should be emphasized once again that families with non-Austrian citizenship who qualify for family benefits are to be treated on an equal footing with Austrian families. Abbreviated terms or interruptions in the delivery of benefits are permissible only if particular grounds exist.

Last year, the Ombudsman Board found that the abbreviated period for delivery of benefits to families with non-Austrian citizenship without objective justification constituted an administrative **defect**. A **recommendation** was issued to the competent ministry, the Federal Ministry for Health, Family and Youth, to issue the necessary instructions in order to ensure that review periods in all family benefit cases are defined properly and to prevent discrimination between families with Austrian citizenship and families with non-Austrian citizenship. In cases where temporary benefits are awarded, the Ombudsman Board **recommended** that the recipients of the benefits should receive a brief explanation for the abbreviated benefit period, citing objective facts (cf. **30th Report of the Ombudsman Board to the National Council and the Federal Council (2006)**, p. 401).

However, comparable complaints arose this year as well. Once again, several families in which one parent has non-Austrian citizenship turned to the Ombudsman Board and complained that they had been awarded family benefits for just one or two years while families with Austrian citizenship typically received benefits until their child is 18 years old. As explanation for these heavily abbreviated benefit periods, the authorities stated merely that one parent has non-Austrian citizenship and that there is a chance that the family will leave the country and therefore forfeit their claim to family benefits. In both cases, the Federal Ministry for Health, Family and Youth ultimately conceded to the Ombudsman Board that there are actually no grounds for the abbreviated benefits, and reinstated the typical delivery of benefits through the child's 18th year (VA BD/83-JF/06, 17-JF/07).

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In another case (VA BD/80-JF/06), a single mother of three was denied family benefits for several months due solely to the fact that she is a Hungarian citizen. The authorities explained only that they needed to ascertain whether she was receiving benefits twice, even though there were no concrete grounds for such a suspicion. While the benefits withheld in this case were eventually paid once the review found that, in fact, she was not receiving family benefits twice, this case makes clear that an interruption in the delivery of benefits for several months without objective justification constitutes an unreasonable burden, especially for families which depend on these funds.

In its **Opinion on the 2006 Annual Report of the Ombudsman Board** (BMGFJ-90500/0041-I/B/8/2007), the competent Ministry stated that a decision to award family benefits for a limited period does not mean that the claim to such benefits is denied, but only that time is needed to ascertain whether the family still qualifies for the benefits. The Opinion argued that this is in the interest of families as it protects them from having to repay the funds should it eventually become clear that the family, in fact, no longer had a claim to receive benefits.

The Ombudsman Board does not object to this argument, in principle. It should be noted, however, that a severe abbreviation of family benefits, as is often the case, represents a burden for families, since it requires them to undergo multiple official proceedings and furnish documents. If there is no objective justification for the abbreviation of benefits, such an act constitutes discrimination and is inconsistent with constitutional principles and the principles of European Community law (for details, see **last year's report**). Above all, the uncertainty as to the receipt of benefits in the future and interruptions in the delivery of benefits to families which depend on these funds constitute an unreasonable burden.

The cases cited here demonstrate that problems continue to arise with respect to the delivery of family benefits to non-Austrian families. If this occurs, as in the first case, to a single mother of three who depends on these funds, such an action may endanger the life and well-being of the family members. Therefore, it must once again be urgently stressed that families with non-Austrian citizenship are to be treated on an equal footing with other families, and that abbreviated benefits or interruptions in the delivery of family benefits are permissible only if specific grounds exist.

A recent report in the media reveals that such problems affect not only families with non-Austrian citizenship but also those with "foreign-sounding names." As reported in the

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"Presse" newspaper of 12 January 2008, a mother has been asked by her local Tax Office in Vienna to present a school or kindergarten attendance certificate and to document the citizenship of her three children. For a child of just 6 years, family benefits were actually suspended as of January 2008.

In response to her inquiry, the Tax Office explained to the mother that her family is under review because the children have "foreign names." In this case, all family members have Austrian citizenship; the children have the name of their father, who is a Carinthian Slovene. This matter is currently the subject of a parliamentary inquiry and the Ombudsman Board has also initiated an **official** review.

Extract from the 28th/29th Report of the Ombudsman Board to the Salzburg Landtag (2005-2006)

3.3.5 Man brings his pregnant wife to the doctor for acute pain and misses his German course – welfare cut in half – District of St. Johann im Pongau (VA S/132-SOZ/06, Amt der Sbg LReg 20001-VA-632/4-2007)

A single non-attendance in a four-month course in German does not justify a reduction in welfare benefits.

The following case was brought to the OB: Mr. K. lives in Salzburg as an acknowledged refugee, together with his wife. He is unemployed and receives welfare benefits. As part of a training program prescribed by AMS, he attended a 4-month course on "German and Job Market Integration for Acknowledged Refugees." The purpose of this course is to help refugees who have received asylum in Austria to succeed in the job market. The letter from the Welfare Office in which the persons in question are "nominated" for the course includes a passage stating that *"failure to attend may lead to a reduction in welfare benefits pursuant to § 9 of the Salzburg Welfare Act."*

On 30 August 2006, Mr. K missed a class because he had to bring his pregnant wife, who was suffering from acute circulatory problems and sharp pains, to the doctor. In response, his welfare benefits for the following month were cut in half by Notice of the District of St. Johann im Pongau of 5 September 2006. As explanation, the authority stated that Mr. K. had one unexcused absence from the German course offered by AMS. The fact that he

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was bringing his pregnant wife to the doctor for massive circulatory problems and sharp pains was not recognized by the authority as an excuse. This decision was actually upheld on appeal by the government of the State of Salzburg on 27 November 2006.

The authority's conduct in this case is unacceptable, in the Ombudsman Board's view: the meaning and purpose of welfare is, after all, to enable the people who need this assistance to lead their life with dignity (§ 1 of the Salzburg Welfare Act (*Salzburger Sozialhilfegesetz; SSHG*)). Welfare is to be awarded if the applicant is prepared to perform reasonable work in order to obtain what he needs to live. He is also required to "*submit to reasonable measures serving to make him more employable*" (§ 9 of the Salzburg Welfare Act). In this spirit, measures on behalf of welfare recipients which are designed to make it easier for them to get a job and escape their current predicament are helpful and positive, and this certainly includes courses which help welfare recipients master the German language. However, imposing massive cuts in welfare benefits because of a single comprehensible absence is entirely inconsistent with the intent of the law. In the Ombudsman Board's view, there is no indication of any kind in the present case that Mr. K was no longer prepared to seriously attend the course in German or to perform reasonable work.

The case was brought before the Administrative Court, at which point the authority amended its conduct and paid Mr. K the welfare benefits which had been withheld. The case before the Administrative Court was suspended as the appellant's complaint had been removed. The Ombudsman Board's **official** review of the general conduct of the authorities in such cases revealed that there are apparently no cases comparable to this one.

However, this case demonstrates another problem: as the Ombudsman Board has long pointed out, the fact that several years often pass before a final and binding decision is reached is a massive problem for those affected, especially in welfare cases. This practice is inconsistent with the intent of the Welfare Act: to rapidly provide assistance to those in need in their time of need. The Ombudsman Board has therefore long advocated the creation of a procedural code to resolve this problem and expedite the process or which allows applicants to appeal to the superior courts with suspensive effect (cf. e.g. the Ombudsman Board's study: "Securing needs through welfare: initiatives to effectively combat poverty" on 18 March 2004; **Ombudsman Board 2004 Report to the National Council and Federal Council**, p. 28).

3.4 Discrimination based on illness or disability

3.4.1 **Television for the hearing-impaired: still a long way to go (VA BD/450-V/06, 64-VIN/07)**

The deaf and hearing-impaired generally must pay full radio fees despite their disability. However, they are able to take advantage of only a small part of the Austrian Broadcasting Corporation's (ORF's) offerings, since only some programs are subtitled and since the quality of the subtitles has been inadequate. ORF is already taking measures to expand and improve its offerings. The Ombudsman Board hopes for the continued rapid expansion of offerings for the hearing-impaired.

The deaf and hearing-impaired continue to turn to Ombudsman Board to complain that, since the Budget Companion Act of 2003 took effect (*Bundesgesetzblatt I* No. 71/2003), they are required to pay the full radio fee but can take advantage of only some of ORF's offerings. Only a small percentage of ORF's programs are subtitled and some subtitles are incomplete or appear irregularly (e.g. subtitles disappear too quickly or the same sentence appears over and over, etc.).

In its **29th Report (2005) to the National Council and Federal Council** (p. 361), the Ombudsman Board reported on review proceedings then pending on this question before the Constitutional Court. By ruling of 16 March 2006, in Case No. G 85/05, the Constitutional Court found that the charging of full radio fees to the hearing-impaired does not violate the constitutional principle of equality.

In light of this ruling, the Ombudsman Board considers it all the more important to improve ORF's offerings for the hearing-impaired as soon as possible. The Ombudsman Board therefore turned to ORF's General Director on this matter. In his opinion of 18 December 2007 (GD81sgs), the General Director stated that ORF had agreed in the course of conciliation proceedings under the Federal Act on Equal Treatment of Persons with Disabilities (*Bundesbehindertengleichstellungsgesetz*) to provide subtitles for 50% of its programs by 31 December 2016. However, he stated that ORF was endeavoring to reach this goal even earlier: in 2007, 26% of ORF's programs were designed to meet the needs of the hearing-impaired, an improvement of more than 18% over 2006.

With respect to the quality of the subtitles, the General Director stated that this depends to a great extent on whether the program is broadcasted live or pre-recorded. Many programs (especially those of the news program) include both live and pre-recorded segments. It may

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be, he noted, that the live segments were "subtitled into" the pre-recorded part, so that the pre-produced subtitles will sometimes disappear very quickly. On the other hand, in such a situation those subtitles may be inserted again at another time in order to make the program easier for viewers to understand. These problems arise due to technical problems which cannot yet be overcome. Unfortunately, it is not currently possible to resolve these issues for technical reasons. He stated that ORF can only await further technical improvements, and that ORF stays informed about such improvements at all times.

Especially in light of the aforementioned Constitutional Court ruling, the Ombudsman Board hopes that the scope and quality of ORF's offerings for the hearing-impaired will be improved as soon as possible.

3.4.2 Barrier-free public spaces, particularly in public transportation (VA BD/54-VIN/07, 147-VIN/07)

Complaints to the Ombudsman Board demonstrate that elderly and disabled persons are unfortunately still confronted with a wide range of hindrances and barriers in public spaces.

Persons with disabilities are constantly turning to the Ombudsman Board to complain about problems taking advantage of public facilities, and very often these complaints involve the use of public transportation. For example, Mr. K. complained that a new pedestrian bridge had been built over the Westbahn tracks without any climbing aids. As a result, persons in wheelchairs, as well as elderly and disabled persons, persons with baby carriages, bicycles, etc. cannot use this pedestrian bridge. Mr. K., who lives adjacent to this area, had approached the competent bodies as early as summer of 2004, i.e. prior to completion of the final structure, to notify them that a climbing aid or ramp is necessary for this bridge. Nevertheless, the bridge was built without a ramp.

In accordance with § 19(10) of the Federal Act on Equal Treatment of Disabled Persons, Austrian Federal Railways (ÖBB) presented a "Transportation Timetable" in December 2006 defining specific target dates for the creation of barrier-free transportation infrastructure. In its response to the Ombudsman Board, the General Director of OBB-Holding AG, the owner of the pedestrian bridge, stated that *"barrier-free design of this pedestrian bridge so as to meet the needs of disabled persons ... is the subject of intensive negotiations with the City of Vienna"* and that technical and statutory questions are still in need of clarification. Actual completion has been announced for winter of 2008.

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As the complaints to the Ombudsman Board demonstrate, persons of advanced age or limited mobility are unfortunately still confronted with a wide range of hindrances and barriers in public spaces. Removing as many of the barriers as possible is essential in order to enable the independent and unfettered access of this group to all areas of public life, as required by Community law, the Constitution and other statutes. This makes it all the more important to enable barrier-free access to public spaces as soon as possible.

Extract from the 25th/26th Ombudsman Board Report to the Upper Austria Landtag (2005-2006)

3.4.3 Nursing home rooms not adapted to the needs of their occupants: government of the State of Upper Austria (VA OÖ/155-SOZ/05, Amt der OÖ LReg ZI. 510.078-2005)

Despite the obvious need, many nursing homes are still not adapted to meet the requirements of wheelchair users. As a result, it is completely unacceptable to sue for damages caused to nursing home furniture from the use of wheelchairs.

The new Federal Act on Equal Treatment for Persons with Disabilities (*Bundes-Behindertengleichstellungsgesetz*) states that structural and other facilities, means of transportation, technical tools, IT systems and other areas are considered to be "barrier-free" if they are accessible and usable for persons with disabilities in the generally common manner, without particular difficulty and, in general, without outside help. The ÖNORM B 1600 standard defines "Planning Principles for Barrier-Free Construction" and ÖNORM B 1601 includes specific "Planning Principles with Respect to Specific Structures for Elderly and Disabled Persons."

However, Mr. W found that barrier-free living in nursing homes is unfortunately not yet a reality. He was living in a district home for senior citizens in Upper Austria. Because of his physical disability, he had to use an electrical wheelchair. The use of this wheelchair caused damages in the amount of € 3,585.60 to the furniture in his room because his room was not designed for a wheelchair, and was therefore not adapted for its use. After his death, a claim for these damages was asserted against his estate. In an expensive court case, which did not conclude with an overwhelming finding of negligence, an expert was asked to assess which damages to the room would have been unavoidable even if the disabled person had exercised due care and which may be attributable to the carelessness of

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the occupant. The Ombudsman Board tried in vain to prevent this costly proceeding, calling upon both parties to reach an out-of-court settlement. The welfare association which operates the home was not prepared to settle in this case, however, hoping to win the case in spite of the fact that the structural condition of the room assigned to the deceased occupant was not suitable for use of an electrical wheelchair.

It is entirely incomprehensible why old age homes, where occupants with wheelchairs are no rarity, have failed to adapt to the existing Ö-NORM standards. If, due to inadequate structural conditions, damages are caused because wheelchair users inevitably run into door frames etc., this situation is unbearable for all involved.

Law suits in which, as in this case, it is clear from the beginning that no overwhelming negligence will be found on the part of the disabled person, will not solve the problem and merely create legal expenses for the operator of the home. Accordingly, the willingness expressed by the government of Upper Austria, in response to Ombudsman Board's request, to take suitable measures in order to prevent further inevitable damages by home occupants in any individual case, is only the first step in the right direction.

Extract from the 24th/25th Ombudsman Board Report to the Lower Austria Landtag (2004-2005)

3.4.4 Barrier-free living: municipality of St. Pölten (VA NÖ/634-SOZ/04; Amt der NÖ LReg GS-SH5742/001-2005)

Ms. S, who is severely disabled, was awarded € 360.00 in aid from the municipality of St. Pölten to even out a difference in floor heights between her living room, anteroom, bathroom and toilet. After a house call, the competent public health officer deemed it necessary to install wooden wedges in order to help her climb the small steps. However, the contractor which had been commissioned to perform the work expressed the view once on-site that such a measure was senseless and that the installation of such wedges would actually increase the danger of stumbling, so that Ms. S decided on the spot to pay a premium out of her own pocket to install completely even laminate flooring for € 730.00, which would eventually be suitable for wheelchair use. When Ms. S notified the municipality of the completion of this work, however, the aid which had previously been awarded was cancelled entirely,

as the authorities took the position that the work which had been performed had not been approved and had exceeded the scope necessary due to her disability.

In a review procedure, Ms. S was finally awarded € 150.00 in benefits from the Federal Welfare Office, in addition to the € 360,00 in aid awarded by the State of Lower Austria. The Ombudsman Board took the position in this procedure that the removal of stumbling blocks in her apartment had essentially been deemed eligible for assistance from the beginning and that Ms. S should not be made to suffer because of her decision to pay more for an adaptation of her apartment which anticipates her future needs as a disabled person as recommended to her by a professional.

3.4.5 Fragmented administrative procedures for persons with disabilities

The wide range of problems encountered by persons with disabilities in receiving assistance for purchases or adaptations which meet their needs as disabled persons is a permanent fixture of the Ombudsman Board's activities. Fragmented administrative procedure represents a major cause of these problems (cf. most recently, the **30th Ombudsman Board Report (2006) to the National Council and Federal Council**, p. 412). This year as well, the Ombudsman Board received many complaints from persons affected by these problems.

3.4.6 Jobs in workshops for the blind endangered due to sales problems and the loss of public assistance (VA BD/863-SV/2007)

Workshops for disabled persons are an essential tool in integrating disabled persons into the job market. They offer jobs and productive activity to persons with disability who would otherwise be unable to obtain a job, or would only obtain one with extreme difficulty. With the loss of public subsidies for goods produced in workshops for disabled persons (the "factory premium"), these workshops are experiencing massive sales problems endangering the jobs of disabled persons. The Ombudsman Board has turned to the responsible public authorities and called upon them to take advantage of the possibilities afforded under public procurement law in order to increase purchases of goods produced by disabled persons. The Ombudsman Board also proposed statutory protection for goods produced by the blind.

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3.4.7 Failure to award an anniversary bonus

Mr. D worked for over 40 years in Austria's Ministry of European and International Affairs. He turned to the Ombudsman Board because he had not received a so-called "anniversary bonus," which is awarded for loyal service upon completion of 40 years of service. The complainant speculated that his failure to receive the bonus was attributable to several extended leaves which he had to take because of health problems. After the Ombudsman Board became involved, the competent Ministry promised to pay him the anniversary bonus at the next possible date.

Extract from the 26th/27th Ombudsman Board Report to the Salzburg Landtag (2003-2004)

3.4.8 Documentation of patient's consent to sterilization required under the Constitution – Salzburg state government (VA S/38-GES/04, Amt d. Sbg LReg 9-1184/77-2004)

Ms. D, who is mentally disabled, gave birth to a son in 1996 in a Salzburg hospital. Following the birth, a tubal sterilization was performed. In 2003, the woman filed a criminal complaint, claiming that the sterilization was performed without her consent. The hospital told the police, however, that the operation in question had been performed in consultation with the patient and the patient's mother.

Without anticipating the outcome of this court proceeding, it is certainly true that a declaration of consent cannot be found in the patient's file. Such a declaration, however, is an indispensable prerequisite for such a procedure in accordance with Article 8 of the European Convention on Human Rights.

It is immediately apparent, requiring no further explanation, that sexual behavior and fertility, which may potentially influence such behavior to a considerable extent, are among the main activities protected by Article 8 of the Convention. It is also generally acknowledged today that central principles of medical ethics, such as the principles of autonomy and beneficence, also fall within the scope of Article 8 of the Convention (for example, see *Ko-petzki, Verfassungsfragen des Patientenschutzes*, in *Österreichische Juristenkommission* [ed.], *Patientenrechte in Österreich* [2001] 19 [24]). It also goes without saying that persons with disabilities hold these basic rights without restriction.

Since procedures which affect a person's fertility violate this basic right in particularly intensive (and in some cases even irreversible) fashion, it must be ensured, at the very least,

that such measures are only taken with the consent of the patient. This is particularly the case if, as in the case of the present complaint, sterilization is performed on a disabled person who, as a result of her disability, has a great deal of difficulty effectively protecting her basic right to maintain her fertility.

Extract from the 28th Ombudsman Board Report to the Vienna Landtag (2006)

3.4.9 Integration of disabled children (VA BD/1102-SV/05, MPRGIR-V-1871/05)

Under the Vienna Day Care Center Act, day care centers are charged with facilitating children's physical, mental and intellectual development. This applies in a particular degree for disabled children. A total of 1,879 children with disabilities currently attend Vienna kindergartens and nurseries in 250 integration groups. In addition, there are 28 therapeutic pedagogy groups for several disabled children. Each integration group is entrusted to a special nursery teacher, a nursery teacher and a teacher's assistant. In severe cases, in which medical or nursing care is necessary, a special group is to be installed in Vienna General Hospital in order to ensure that no children are excluded from day care services.

The daughter of a complainant has suffered since birth from hyperinsulinism, a rare and life-threatening metabolic disorder. She requires 24-hour care. The girl, who is now 6 years old, has to be fed through a PEG tube. In addition, routine blood sugar measurements are necessary every three hours, as well as the administration of a medication by permanent infusion, in order to prevent hypoglycemia.

The girl attends elementary school and belongs to an integration group for children with special needs in the nursery. At school, the girl's nutritional formula, which is prepared in advance by her mother, is administered by the staff. After her lessons are over, the girl attends the nursery, which is one floor lower, where the child must be fed through the tube once again.

Municipal Department 10, which is responsible for operating kindergartens and nurseries, was originally unwilling to arrange for her feeding by the staff of the school. Accordingly, a Directive was issued on 12 September 2005 stating that, while teachers can voluntarily perform certain medical services after having undergone the necessary training, all medical procedures had to be performed by trained nurses at the parents' expense.

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The shifting of all expenses for these services to the parents is completely unacceptable in the Ombudsman Board's view. The purpose of the nursing allowance paid for these children is to compensate parents for added expenses incurred due to the need for nursing services and thus enable them to secure the necessary care and assistance, if possible, and improve the child's chance of leading a nearly independent life in accordance with his or her needs. There is no justification for requiring parents to spend the vast majority of the nursing allowance on nursery care even though their child spends only a portion of his or her time there.

Once the Ombudsman Board intervened, the City of Vienna conceded that the administration of care by trained nurses is not actually feasible for the complainant and promised to find an individual solution, as well as to form an additional nursery group in Vienna General Hospital for similar cases, where trained doctors and nurses would be available in case of emergency.

In April 2006, in the course of a session to educate the directors of Vienna kindergartens about caring for chronically ill children, a new form was introduced which should ensure implementation of the 5th Amendment to the Medical Practice Act (*Ärztegesetz, BGBl. I Nr. 140/2003*) in the everyday lives of the affected children.

Extract from the 25th/26th Ombudsman Board Report to the Upper Austria Landtag (2005-2006)

3.4.10 Transfer of custody for children of a mother who is under guardianship – Municipality of Linz (VA OÖ/124-SOZ/06; Mag. d. Stadt Linz 302-13-5-L10, 302-13-5-L11)

If a parent with custody over the children is under guardianship, custody over the children passes to the youth welfare office, which must reach clear written agreements regarding the transfer of duties to care for and educate the children. Major changes must also be recorded in writing. In the matter of involving the family and guardian, the authorities must proceed in sensitive fashion and must state its position in a clear and unambiguous manner.

Mr. L is the guardian for his daughter, whose health is impaired due to an accident. The young woman is a mother of two. After a private change, the mother could no longer care for her children adequately. The grandparents took the children in but declared themselves

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incapable of caring for the children permanently. It was therefore decided to place the children in a foster home.

In May 2004, an agreement was reached under which full responsibility for the children's education was transferred to the Youth Welfare Office (*Jugendamt*) and the children's guardians agreed to consent to the placement of the children in a foster home, but not in an orphanage. At first, the agreement was signed only by the mother of the children and the Youth Welfare Office, even though Mr. L repeatedly stated that he was the mother's guardian and that his consent was therefore necessary as well. Since a suitable foster family could not be found for both children, a verbal agreement was ultimately reached to place the children in an SOS Children's Village facility.

In August 2004, just four days before the children were set to move into the facility, the Youth Welfare Office notified Mr. L that, as guardian, his signature was also needed. Finally, a few minutes before the children were picked up, the Youth Welfare Office demanded Mr. L's signature, stating that otherwise the matter would be referred to the courts, in which case it might not be possible to keep the children together. Faced with this alternative, Mr. L finally signed the May agreement. The date of the signature was not documented.

In the course of the following year, there were differences of opinion between the orphanage and the family as to the frequency of their visits. In September 2005, the grandparents expressed the desire to permanently adopt the children. The Youth Welfare Office opposed returning the children, stating that the special care needed by the children in this case could be better ensured in the orphanage and that the children, who were still very little, had adapted well to their new home.

In consultation with her daughter, the grandmother petitioned the courts for a transfer of custody. This petition was granted in January 2006. Due to a formal defect, however, this decision was cancelled in July 2006 and the case had to be re-tried. At the same time, a decision was pending regarding the Youth Welfare Office's petition for a temporary injunction. In April 2006, Mr. L terminated the agreement regarding the voluntary transfer of responsibility for the children's education in writing.

The family turned to the Ombudsman Board and complained about the Youth Welfare Office's conduct. Mr. L felt pressured by the methods used by the Office to obtain his signa-

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ture. They also claimed that the Youth Welfare Office had failed to give them the time and assistance they needed to find ways of keeping the children in the family. The Ombudsman Board found that the **complaint was justified** in two respects:

The Youth Welfare Office erred in failing to document in writing that the written agreement had been amended to stipulate that the children were to be placed in an orphanage and not in a foster home, as originally agreed. The Ombudsman Board also **objected** that the Office's conduct was not clearly comprehensible and that the legal basis for taking the children from their family is not clearly evident. At first, a voluntary agreement was reached with the mother of the children: the consent of her custodian was not obtained until months later, just before the children were to be taken away, in something of a pressure-packed situation. In its statement to the Ombudsman Board, however, the Youth Welfare Office argued that, because a custodian had been appointed for the mother, it had legal custody over the children in any case, and therefore did not need any consent whatsoever, neither from the mother nor from her custodian.

The family, which was in a difficult situation to begin with, was made to suffer even more due to this conduct on the part of the Youth Welfare Office. Sensitive matters of considerable legal complexity must be handled accordingly by the authorities. If parents or the parent with custody over the children had to have a guardian appointed, custody passes to the youth welfare office, which must reach clear written agreements regarding the transfer of duties to care for and educate the children. Major changes must also be recorded in writing. In the matter of involving the family and guardian, the authorities must proceed in sensitive fashion and must state its position in a clear and unambiguous manner.

The court case finally came to an end in late 2006, and a visitation agreement acceptable to the family was reached.

Extract from the 28th Ombudsman Board Report to the Vienna Landtag (2006)

3.4.11 Rejection of an application for a departmental assistant in SMZ-Ost (VA W/539-GES/06, MPRGIR-V-1330/06)

Ms. R turned to the Ombudsman Board in connection with the rejection of her application for a job as departmental assistant at the Social Medical Center East (SMZ-Ost). According

to statements made by the complainant, she was invited to an interview in July 2006 and, after completing two trial days, she was assured by the head nurse in the nursing department that she would receive her desired job as departmental assistant in September 2006. In the course of her medical examination at the end of July 2006, additional tests were conducted with respect to the complainant's diabetes. Although she reported the findings to her future employer and although the findings did not disqualify her, the complainant received a phone call from the human resources department of SMZ-Ost informing her, to her surprise, that she would not be hired after all.

After further discussions with the nursing department at SMZ-Ost and another examination by Municipal Department 15, the Ombudsman Board was able to obtain the hospital's agreement to hire Ms. R as a departmental assistance for a period of one year.

3.4.12 Road signs a source of danger to the blind and visually impaired (VA BD/84-V/07)

The director of the Joint Traffic Committee of Organizations for the Blind and Visually Impaired: Eastern Region (Gemeinsames Verkehrsgremium der Sehbehinderten- und Blindenorganisationen der Ostregion) turned to the Ombudsman Board due to repeated injuries to the blind and visually impaired as a result of road signs which are sharp-edged or mounted too low. The complainant therefore proposed a law stipulating the minimum height of road signs placed on sidewalks, footpaths and bicycle paths. However, the Federal Ministry for Transportation, Innovation and Technology opposes such a law.

The Federal Ministry for Transportation, Innovation and Technology explained its opposition by arguing that such a law would make it nearly impossible to adapt to local conditions when maintaining roadways.

In the Ombudsman Board's view, road signs which are sharp-edged and too low represent an additional source of danger and therefore discriminate against the blind and visually impaired in traffic.

Accordingly, it is incomprehensible that the competent Ministry would cite the need for official discretion in connection with this source of danger and discrimination against the blind and visually impaired.

Especially in view of the laws on the books in Germany and Denmark regarding the minimum height of road signs on sidewalks, footpaths and bicycle paths, a similar law should be enacted in Austria as well.

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3.5 Discrimination based on social status

3.5.1 E-cards for welfare recipients – still no news (VA S/5-SOZ/08)

In last year's **Report of the Ombudsman Board (2006) to the National Council and Federal Council** (p. 417), the Ombudsman Board reported welfare recipients have repeatedly complained that they have received a special health insurance certificate instead of an e-card. Those affected are often embarrassed when they have to present these certificates, thus identifying them in public as welfare recipients. As demonstrated by a new complaint, there have also been problems in connection with referral to specialists.

While the statutory basis has been created for the issuance of e-cards to this group as well (66th Amendment to the General Social Security Act (*Allgemeines Socialversicherungsgesetz*), *Bundesgesetzblatt* I No. 131, 2006), whether and when this will actually be done depends on the ongoing debate in connection with the introduction of standardized minimum coverage nationwide. Accordingly, the persons affected can only be informed of possible improvements in the future.

Extract from the 28th Ombudsman Board Report to the Vienna Landtag (2006)

3.5.2 Discrimination against low-income persons through the new pocket money rule for accommodation in homes for the disabled (VA W/522-SOZ/06, 824-SOZ/06)

Pursuant to § 43(4) Sentence 1 of the Vienna Disabled Persons Act (*Wiener Behindertengesetz*), persons who reside in homes for the disabled had to receive at least 40% of their Level 3 nursing allowance, or € 148.00, as pocket money. In a ruling by the Constitutional Court (VfSlg. 17.497/2005), this provision was repealed as unconstitutional due to violation of the consultation principle [*bundesstaatliches Berücksichtigungsgebot*]. The Vienna Disabled Persons Act has since been adapted accordingly, although this adaptation has led to a worsening of the financial situation of persons with little or no income.

The Ombudsman Board is aware that the Vienna Social Fund (*Fonds Soziales Wien*) is trying to cushion the blow by voluntarily increasing this pocket money so that each person receives at least € 123.25 a month in pocket money.

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According to a survey by the Vienna Social Fund of 1,107 persons who had lived in a full-service home for the disabled prior to the ruling by the Constitutional Court, 769 persons (69%) saw their pocket money reduced by the new law. For 633 persons (57%), the Vienna Social Fund pays compensation to bring them up to € 123.25. For 136 persons (12%), the pocket money under the system is between € 123.25 and € 168.80 and 338 persons (31%) receive more than € 168.80 in pocket money under the new law.

These numbers make it very clear that, in the interests of effective social policy, an amendment to this statute is required which would increase the pocket money for residents of homes for the disabled with little or no income.

Extract from 26th/27th Ombudsman Board Report to the Salzburg Landtag (2003-2004)

3.5.3 Pocket money rule for welfare recipients violates human dignity – Salzburg State government (VA S/7-SOZ/04; Amt d. Sbg LReg 20001-VA-439/6-2004)

Pursuant to § 8(2)2 of the Salzburg Welfare Act, the exemption limit for protected benefits saved by nursing home occupants as pocket money applies only to persons over 65 years of age. The Ombudsman Board advocates an amendment of this statute, which is extremely strict even compared to those of other Austrian States, and reiterates its call for a federal welfare act.

Ms. K, 55, was brought to a Salzburg old age home after suffering a stroke. She receives a small pension and nursing allowance, 80% of which goes to the operator of the home to partly cover the cost of her accommodations. The remainder of her pension and nursing allowance, which was to remain at her free disposal as pocket money, was not spent by Ms. K, but rather saved, with the knowledge and approval of her guardian, in order to purchase clothing and a color television at a later date. By notice of 7 October 2003, the competent district, the District of Zell am See, announced that Ms. K is required to repay the pocket money she saved over five years, in the amount of € 3,113.20, to the State of Salzburg. This decision was upheld on appeal by the Independent Administrative Court of Salzburg.

Pursuant to § 43(1) of the Salzburg Welfare Act, welfare recipients are required to reimburse the state for its expenses once they obtain adequate income or assets or if it be-

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comes known after the fact that they had adequate income or assets at the time they received the welfare benefits. § 8(2)2 of the Salzburg Welfare Act essentially states that nursing home occupants less than 65 years of age may be deprived of all of their welfare benefits to cover the state's expenses, i.e. that they are not allowed to save any of the money. Persons over 65 years of age are currently allowed to set aside a sum of € 3,940.00 exclusively for their funeral expenses ("protected assets").

In the Ombudsman Board's view, a statute providing that welfare benefits may not be saved at all or may be set aside only for funeral expenses violates human dignity and represents a clear case of age discrimination. The Ombudsman Board therefore advocates an amendment of this statute, which is extremely strict even compared to those of other Austrian States.

This case clearly demonstrates once again what different standards of welfare exist in the various States. The Ombudsman Board therefore reiterates its call for a federal welfare act which would implement consistent standards.

In the case of Ms. K, a mutually acceptable solution was reached: the color television was purchased through a donation and the clothing purchase was financed by Ms. K herself with the consent of the guardian.

4 EC Treaty

- 4.1 Discrimination in cemetery fees in Salzburg between persons with ordinary place of residence within the municipality and persons who fail to meet this criterion; official review on § 36 of the Salzburg Cemetery and Burial Act of 1986; amendment to the law enacted – Salzburg State government (VA S/80-G/05, Amt d. Sbg LReg 20001-VA-2013/487-2005)

1. In 2005, various complaints were received by the Ombudsman Board in connection with discrimination in cemetery fees between persons with ordinary place of residence within the municipality and persons who failed to meet this criterion.

Under the law in effect at the time of the review, the Salzburg Cemetery and Burial Act of 1986, *Landesgesetzblatt* No. 84/1986, the following applied:

§ 36 (1) ...

(2) ...

(3) *Cemetery fees for each individual cemetery of each municipality may be assessed differently based on location and equipment. Cemetery fees for the burial of persons who do not maintain their ordinary place of residence within the municipality and do not maintain a place of residence in Austria, may also be assessed differently, but may not exceed twice the cemetery fees which would otherwise be assessed. However, this shall not apply for fees for renewal of burial plots and exhumation fees.*

(4) ...

The Ombudsman Board has concerns in connection with this regulation of fees, which is based solely on residence within the municipality and the country, in light of the principle of equal treatment, as well as the case law of the European Court of Justice (ECJ) on Articles 12 and 49 of the EC Treaty regarding the privileged treatment of residents at the expense of nationals of other EU member states and non-residents in cases involving public cemeteries.

According to the rulings of the European Court of Justice, the freedom to provide services extends not only to service providers (active freedom to provide services), but also to ser-

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vice recipients (passive freedom to provide services; ECJ on Article 49 of the EC Treaty, Case Nos. 286/82 and 26/83, *Luisi and Carbone*).

Article 12 of the EC Treaty prohibits all discrimination based on nationality within its scope, without prejudice to specific provisions of the EC Treaty.

Article 49 of the EC Treaty prohibits restrictions in the free provision of services within the Community for nationals of member states established in a member state other than the one for which the services are intended.

In a ruling by the European Court of Justice in Case No. C-388/01, *Commission versus Italy*, that member states which allow discriminatory, advantageous rates for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralized state authorities only in favor of its own nationals and persons resident within the territory of those authorities running the cultural sites in question who are aged over 60 or 65 years and by excluding from such advantages tourists who are nationals of other member states and non-residents who fulfill the same objective age requirements fail to fulfill their obligations under Articles 12 and 49 of the EC Treaty.

As the ruling indicates, the principle of equal treatment in Community law prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, through the application of other discriminatory criteria, effectively lead to the same result.

Based on this ECJ Judgment, not only are rules to this effect in government statutes or ordinances in violation of the prohibition of discrimination in Community law, but even provisions e.g. in the general terms and conditions of public companies which stipulate a residence requirement would be in violation of this prohibition. After all, according to the view expressed by the European Court of Justice, distinctions based on place of residence discriminate primarily against nationals of other member states, since most non-residents are foreigners.

The European Court of Justice also stated in the above Judgment that purely economic arguments, such as the argument that such preferential rates constitute consideration for the payment of taxes by residents to the governments of their respective states, are not sufficient to justify discriminatory rates.

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II. The Ombudsman Board therefore called upon the Salzburg State government by letter of 5 August 2005 to submit an opinion prior to 12 September 2005 as to the conclusions to be drawn from the constitutional principle addressed above and the aforementioned case law of the ECJ with respect to § 36(3) of the Salzburg Cemetery and Burial Act of 1986, *Landesgesetzblatt* No. 84/1986, and as to the actions to be taken by the State of Salzburg in light of these conclusions.

III. In an e-mail of 23 August 2005, including a letter from the State government dated 17 August 2005, the Ombudsman Board received a detailed opinion from the Salzburg State government which stated in part as follows:

"Whether 'overriding reasons in the general interest' exist in terms of the ECJ's rulings on Article 12 of the EC Treaty, making the fees consistent with Community law, is uncertain, especially since purely economic objectives do not constitute such reasons (European Court of Justice, Judgment of 16 January 2003, Case No. C-388/01). While the argument can be made that this case involves more than the mere economic interests of the municipalities but also ensuring that all residents of the municipality can be buried in the municipal cemetery and that the capacity of such cemeteries is not exhausted due to the burial there of outside descendents, whether or not this argument is sufficient to fully overcome the concerns with respect to Community law cannot be conclusively stated, according to the Salzburg State government, in the absence of rulings to this effect by the European Court of Justice.

Much clearer in any case is the inconsistency with national law, specifically with the Constitution in this case, presented by § 36(2) of the Cemetery and Burial Act, which states that cemetery fees may be no higher than needed to cover costs. Under § 16(3)4 of the Revenue Equalization Act of 2005, and based on their freedom to adopt resolutions, municipalities may charge up to twice their annual requirement for the maintenance and operation of municipal facilities and buildings, in contrast to the revenue equalization system in effect in 1980. In exercising their powers in accordance with § 8(1) of the Financial Constitution Act, State legislatures are prohibited from limiting or restricting the powers granted by federal law to the municipalities in accordance with § 7(5) of the Financial Constitution Act of 1948 (cf. e.g. VfSlg. 2170/1951, 8099/1977, 10.738/1985, 11.294/1987, 15.107/1998). Since there is need for legislative action in any case in order to remedy the unconstitutionality of this provision, a non-discriminatory formulation of § 36(3) of the Salzburg Burial Act will also

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be under review in connection with this amendment, according to the opinion of the Salzburg State government."

On 20 January 2006, the bill amending the Salzburg Cemetery and Burial Act of 1986 was transmitted to the Ombudsman Board, and the Act was amended by *Landesgesetzblatt* 64/2006.

The Ombudsman Board applauds this amendment since it addresses Ombudsman Board's concerns with respect to the principle of equality in connection with the discriminatory assessment of fees based solely on the criterion of ordinary residence within the municipality or the country leading to the initiation on 5 August 2005 of an **official** review of VA S/80-G/05. The amendment also takes into account the rulings of the European Court of Justice on Articles 12 and 49 of the EC Treaty with respect to the privileged treatment of residents over other EU citizens and non-residents in cases involving public cemeteries.

With the elimination of discrimination based on place of residence as was expressly permitted by Sentence 2 of § 36(3) of the Salzburg Burial Act of 1986, the statute now appears to be consistent with Community law with respect to the ruling of the European Court of Justice in Case No. C-388/01.

4.2 Discriminatory prices for boat moorings; recommendation – Municipality of Breitenbrunn (VA B/100-G/04, Amt der Bgld LReg 2-GI-G1188/34-2005)

Even though the supervisory authority, in its statements to the Ombudsman Board and in the ORF program, took the position that a municipal council resolution discriminating between residents and non-residents is unlawful and in violation of Community law, thus adopting the Ombudsman Board's view, the resolution has not been repealed by the supervisory authority pursuant to § 90 of the Burgenland Municipal Ordinance.

As a result, the Ombudsman Board unanimously adopted a resolution at its session on 1 July 2005, stating that

- I. the lease of 7 boat moorings at a preferential gross annual rent of € 36.36 and 33 boat moorings for a gross annual rent of € 72.72 by the Municipality of Breitenbrunn without a municipal council resolution to that effect and without a written lease agreement, and

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- II. the resolution of the Municipal Council of 31 August 2004, ZI. 4/2004, each represents a **defect** of public administration in terms of Article 148a(1) of the Federal Constitution, in conjunction with Article 148i(1) of the Federal Constitution and Article 70 of the State Constitutional Act of 14 September 1981 on the Constitution of the State of Burgenland, *Landesgesetzblatt* No. 42/1981, as amended.

The Ombudsman Board issued a **recommendation** to the Municipal Council of Breitenbrunn pursuant to Article 148c of the Federal Constitution in conjunction with Article 70 of the State Constitutional Act of 14 September 1981 on the Constitution of the State of Burgenland, *Landesgesetzblatt* No. 42/1981, as amended, that

- I. all those leasing boat moorings should be charged the preferential rent for the duration of the lease and that they should be reimbursed for the difference between rent paid in the past and the preferential rent; and
- II. that the Municipal Council Resolution of 31 August 2004, ZI. 4/2004, should be repealed.

The Mayor of Breitenbrunn notified the Ombudsman Board on 15 September 2005 of a resolution adopted by the Municipal Council in its session of 8 September 2005, in which the Municipal Council resolved to repeal the resolution adopted in the session of 31 August 2004 under Item 12, "Rules pertaining to boat mooring rents for persons with primary residence in Breitenbrunn," which provided for preferential rents effective 1 January 2005 for persons maintaining their primary residence within the municipality for 12 years or more.

Appeals from the complainant and another appellant for reimbursement of rent paid in the past were dismissed by the Municipal Council of Breitenbrunn, which refused to follow the Ombudsman Board's **recommendation** to charge the preferential rent to all those leasing boat moorings for the duration of the lease and to reimburse them for the difference between the rent paid in the past and the preferential rent, arguing that such a course of action would involve considerable financial difficulties and would jeopardize the Municipality's ability to balance its budget. According to an opinion submitted by the Mayor of Breitenbrunn, if such a course were adopted, the municipality would no longer be in a position to meet its statutory and private payment obligations and would possibly lead to insolvency.

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In a supplementary opinion submitted by the Mayor of Breitenbrunn to the Ombudsman Board, dated 7 December 2005, it is stated that the difference between rents paid in the past and the preferential rent amounts to € 1,517,347.16 for the period from 1995 to 2005. No statements could be made as to the period prior to 1995, according to the opinion, since the records from that period no longer exist. The Municipal Council has yet to adopt a resolution in place of the repealed resolution of 31 August 2004, the opinion notes.

Department 2 (Municipalities and Schools) of the Burgenland State Government notified the Ombudsman Board on 6 October 2005 that, on grounds of frugality, efficiency and expediency, the Municipality had been advised to adjust the 40 preferential lease agreements to the framework agreement pursuant to the Municipal Council resolution of 28 December 2001 at the earliest possible date, with or without termination depending on the individual case and that the complainant had been notified of this by the Burgenland State government.

4.3 Discriminatory fees for admission to the beach in the Municipality of Breitenbrunn (VA B/83-G/05, Amt der Bgld LReg LAD-ÖA-V966/3-2005)

Mr. NN complained to the Ombudsman Board that different fees are charged for admission to Breitenbrunn beach depending on whether the person in question has his or her primary residence within the municipality or not.

In a letter to the Ombudsman Board, the Municipality of Breitenbrunn argued that its discriminatory treatment of beach attendees was justified in part because Breitenbrunn beach is operated by the municipality as a commercial business.

Based on this letter, the Ombudsman Board appealed to the government of the State of Burgenland, as the supervisory authority, for an opinion as to such discriminatory treatment.

The State government stated in response to this inquiry that discrimination based on primary residence is not objectively justified and is furthermore inconsistent with the permanent rulings of the Constitutional Court with respect to discrimination in favor of residents, as well as the rulings of the European Court of Justice. It concluded that the municipal council's 1988 resolution setting prices for admission to the beach is unlawful since only "persons with primary residence in Breitenbrunn" were given free admission to the beach.

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There is clearly no justification for discrimination based on whether the persons in question maintain their primary residence within the municipality or not. The European Court of Justice has already heard a case involving fees for the use of a public beach and found that discriminatory admission fees based solely on the place of residence were in violation of the prohibition of discrimination in Article 12 of the EC Treaty. Accordingly, the discriminatory admission fees to Breitenbrunn beach depending on whether the person in question has his or her primary residence within the municipality are unjustified.

Finally, the State government of Burgenland stated its attention to call upon the municipal council of Breitenbrunn to repeal its resolution of 18 February 1988 setting the prices for beach admission within six weeks or to modify the resolution so as to eliminate discrimination based on place of residence. If the municipal council fails to repeal the resolution in question within six weeks, the supervisory authority plans to repeal the resolution itself.