

AUSTRIAN
OMBUDSMAN BOARD



Annual Report

to the National Council
and the Federal Council

2020

COVID-19

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to the National Council and the Federal Council
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Preface

The past year has been extraordinary for the AOB too. The coronavirus pandemic changed the lives of everyone, and things that are normally taken for granted unexpectedly became something special for many months. The pandemic did not only have an effect on private life but on public life too. In both areas, the authorities were and still are involved, and thus the pandemic also left its mark on the work of the AOB.

Many persons sought the help and support of the AOB in combatting completely new problems. Even if the AOB, which was itself taken by surprise with the events, did not record complaints connected with COVID-19 systematically from the beginning, it can draw conclusions now after one year: over 1,200 persons contacted the AOB with very different problems that are attributable to the coronavirus pandemic.

The report on these complaints and appeals for help is not structured as usual by federal ministries because the pandemic and associated questions and problems are not bound by federal state borders and local authorities. It is structured according to the areas of life of the persons and the difficulties they experienced therein.

The Federal Constitution entrusts the AOB with the examination of suspected cases of maladministration and the protection and promotion of human rights. The AOB fulfilled these tasks again in 2020 and is presenting its reports as usual. However, this COVID-19 Report does not concentrate on the criticism of the administration alone, the focus is also on those problems and concerns that were and are attributable to the coronavirus measures. The AOB frequently explained the statutory regulations to persons, made issues, which were unclear and attempted to mediate between persons and the administration. It addressed topics that were reported in the media on an ex-officio basis. Creative solutions were developed to compensate for the monitoring visits by the commissions of the Austrian National Preventive Mechanism (NPM) that were not possible at all or only to a limited extent during the first lockdown.

The AOB of course also performed its work as control body and identified mistakes and failures on the part of the administration. However, it had to be taken into consideration that the pandemic also took other authorities by surprise. Structures, for example, for paying financial aid had to be set up in the shortest possible time and persons expected everything to work quickly and smoothly. It was no surprise that this was not always the case. Nevertheless, the AOB observed that all of those involved went to great pains to ensure the smooth running of – not only the new but also the existing – processes. The AOB would like to thank the employees in all authorities who had to adapt to this completely new work situation and at the same time keep the operation running.

This report gathers all of the topics with COVID-19 relevance in order to provide persons, the Parliaments and those members of the public who are interested a picture of what people were confronted with in the coronavirus pandemic and of what went well and not so well.

The AOB staff also made a substantial contribution to ensuring that the complaints and concerns of all persons who contacted the AOB during this difficult time could be handled and answered despite several lockdowns and unaccustomed working conditions. We thank them for their support



Werner Amon



Bernhard Achitz



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Vienna, August 2021

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Introduction

The coronavirus crisis made 2020 a threatening year for all persons in Austria. One of the greatest challenges for the politicians was making the right decisions in the tension between the necessary fight against the pandemic and the protection of the population on the one hand, and the protection of human and freedom rights on the other.

This was particularly difficult at the beginning of the pandemic when little was known about COVID-19 and at that time it had to be acknowledged that the politicians were not always able to make the right decisions in view of the required speed. But the more time has passed and the more scientific knowledge is available, the stricter the standards that have to be placed on all decisions and administrative actions. For every single measure be it enforced by the politicians or the administration, justification shall be provided as to why an infringement of fundamental and freedom rights is necessary and proportionate, and whether an alternative procedure that is less of a risk to human rights would have sufficed. The longer the restrictions last, the more precisely the administration shall be monitored – by the Austrian Ombudsman Board (AOB) and National Preventive Mechanism (NPM) amongst others.

Monitoring the administration in times of crisis particularly important

Laws and regulations on fighting the pandemic were enforced with very little notice. In many cases, it only became clear the day before a new regulation was to apply. What was and still is in short supply is the transparent and detailed discussion of all new measures before they come into force. This made the situation extremely difficult for those affected and the control bodies. There was no time for training, and law enforcement officers claimed to have believed what they had heard in press conferences by the government to be law and order without actually knowing what the legal source was. Poor transparency and a lack of strategies have, however, another dangerous consequence: lack of acceptance. If people no longer find the measures clear and comprehensible, they become less inclined to observe them. And then the number of infections starts to increase.

Lack of clarity with many coronavirus measures

From March 2020, drastic restrictions were imposed on the residents of retirement and nursing homes as well as institutions and facilities for persons with disabilities in particular. Whilst the curfews for the general public had several exceptions, those in many institutions and facilities were absolute, and even visits were banned or at least greatly restricted. The AOB criticised this vociferously and ultimately effected changes through the politicians. It is clear today that the same rules shall broadly apply to the residents as to all other persons. The AOB already highlighted at the beginning of the pandemic that, in addition to more legal security, the residents need particularly strong protection against infection in order to prevent the many deaths in the institutions and facilities. In concrete terms, it demanded that the retirement

Serious infringements of fundamental and freedom rights

and nursing homes should have priority for testing – and not professional footballers or the tourism industry for example.

What the AOB was specifically concerned with

Penalties by the police Many of those affected contacted the AOB with reports about cases of hardship in connection with prosecution by the police and the ensuing penalties by the health authorities, in particular during the first lockdown. On the one hand, the police were not adequately informed due to the poorly communicated legal situation, on the other, the bans were interpreted very differently throughout Austria. After the Constitutional Court of Austria had nullified some of the provisions of the COVID-19 regulations, the AOB offered those affected its support in fighting unlawful penalties.

Coronavirus aid packages for companies and families Businesspeople directed many queries to the AOB on the issue of compensation amongst others. For example, that the payment of fixed-cost subsidy I, which was provided as support for businesses, was too bureaucratic.

The COVID-19 measures also affected many 24-hour caregivers from other countries. Despite high losses in earnings, they often received no support from the established Hardship Fund (*Härtefallfonds*) due to the closed borders; in some cases, simply because they did not have an account at an Austrian bank. This is in breach of the SEPA (Single Euro Payments Area) Regulation and is thus a violation of EU law.

There were also many complaints in connection with the COVID-19 Family Hardship Fund (*Corona-Familienhärtefonds*). Families who had hid hard times through no fault of their own hoped for unbureaucratic and rapid help. But the self-employed only receive the total support payment when the loss of income can be calculated by means of a tax assessment – that is, a year too late for rapid help.

Restrictions in correctional institutions The measures for preventing the spread of COVID-19 that were set in the prisons already in the spring were severe. The Austrian NPM thus initiated an *in-itinere* monitoring as early as March. The Human Rights Advisory Council, which is composed of experts from civil society and ministries and is an advisory body of the NPM, was requested to assess the measures from the human rights perspective. These were extensive, but – as the international comparison showed – still proportionate.

Home-schooling and centralised school-leaving exam In the education area there were questions, for example, on home-schooling brought about by COVID-19 or on the way the centralised school-leaving exam could be held in view of the COVID-19 measures, on the organisation of teaching in the universities and with that the associated labour law issues that occupied many persons.

In retirement and nursing homes, many persons felt threatened and deprived of the right of decision by the COVID-19 measures. The Ombudspersons repeatedly pointed out that the very restrictive rules (visiting bans, curfews or self-isolation as a consequence of going out) are quite critical from the legal point of view.

Visiting bans and curfews in retirement and nursing homes

Preventive human rights monitoring difficult

The COVID-19 crisis made preventive human rights monitoring difficult. Even if the monitoring rights of the NPM commissions were never questioned, they temporarily stopped their monitoring visits to retirement and nursing homes in the first lockdown because it was not possible to get PPE or recommendations on avoiding infection from the Ministry of Health. Instead, the AOB conducted a survey with numerous care services in May in order to be in a better position to assess the situation in the homes. With the help of nationwide telephone interviews, the NPM commissions recorded the problems that had to be countered during and after the lockdown. One of the findings was that many problems are attributable to a lack of staff or are exacerbated by the shortage. Already in March, the NPM reported publicly what insufficient staffing in the homes means for the human rights of the residents. Based on the answers to the survey, the NPM developed recommendations for the authorities, politicians and care facilities. The politicians took up some of the points. For example, there are now provisions for retirement and nursing homes in the regulations of the Ministry of Health and the *Laender*. The monitoring visits of the NPM commissions are now carried out in the usual way.

NPM recommendations to authorities, politicians and facilities

Do not become accustomed to the restriction of human rights!

Without doubt, the COVID-19 pandemic makes it difficult for politicians to always find the right balance between the required protection from infection and fundamental rights and freedoms. However, we must always discuss this issue in detail and in a transparent way because every restriction of human rights shall remain an exception to which we as society shall not become accustomed.

1. Health care

In crises, factors that influence goals and strategies should be clearly named and the measures consistently pursued. This is a condition for the majority of the population to understand and identify with the policies made. It is easier to gain trust and credibility if you communicate how limited the knowledge and opportunities for intervention are and that the success of the decision alternatives cannot be guaranteed with one hundred percent certainty. As in all countries, the pandemic generated a substantial need for information. The associated uncertainty behind this manifests itself in the many complaints received by the AOB. At the Federal Government press conferences and reports about the same, there were frequent announcements on containing the pandemic that were not covered by the current legal situation or the full implementation of which with the goal of a gradual return to normality took far longer than originally propagated. Fears and doubts were exacerbated because health authorities and hotlines were not reachable in phases when the numbers of infections were particularly high.

There were often complaints about the chaotic approach used for officially imposed quarantine. Depending on the *Land* or even the district, quarantine notices were issued – or not. Many of those affected criticised that they did not receive a notice and were thus unable to present their employer with evidence for being unable to work. Others only received their isolation notice weeks or months after the end of the quarantine. The termination of isolation measures was also handled very differently.

Many persons contacted the AOB because their non-COVID-19-related hospital treatment, operation or stay at a health spa were cancelled or postponed due to the pandemic.

1.1. Testing and quarantine

Pandemic suitability of the principle for isolation questionable

Due to the novelty of the SARS-CoV-2 pathogen, there were a lot of open questions surrounding detectability, duration of the illness, infection risks and protection options at the beginning of the pandemic. Combatting the virus is difficult because many of those affected have not noticed that they are infected on the one hand. On the other, in addition to flu-like symptoms, the range of COVID-19 conditions also includes neurological disorders as well as serious, life-threatening or fatal organ damage. Never before was an infection researched so much and so quickly all over the world. In contrast to this, the Austrian Epidemics Act (*Epidemiegesetz*) depicts old empirical knowledge on epidemic control. The legal instruments available for containing the health crisis were expanded and fine-tuned during the year but have not fundamentally changed since the Act was enforced in 1913. Assembly and contact bans, the tracing of those suspected of being infected and the isolation

of those infected were methods applied during the plague and the Spanish flu. Despite the current amendments to the Epidemics Act, the AOB considers it necessary to ensure improved suitability for handling pandemics and to rectify deficits in legal protection.

It was clear already in March 2020 that only an efficient test strategy can counter chains of infection and clusters. Even though laboratory capacity and reagents were scarce in the beginning, the Federal Government set the goal of 15,000 PCR tests per day to be realised as soon as possible. This was only achieved at the beginning of September – that is more than five months later. Besides, all of the *Laender* failed to increase the staff in the health authorities and for the 1450 health hotline during the summer. Differences of opinion expressed in public among scientists and between political representatives on the usefulness of mass tests that are not on a recurring basis resulted in different levels of participation by the population in the different *Laender*. It is regrettable that there was not rapid and free access to the tests in all *Laender* and regions. Whilst Vienna expanded its offers of regular free tests extensively, this has only been available in other *Laender* and district capitals since January 2021. This explains why by the beginning of 2021 Vienna was able to carry out a total of 1,489,388 tests – more than Lower Austria and Upper Austria together.

Testing, testing, testing – but how?

It was also evident that the level of digitalisation of the public health system was not able to keep pace with the dynamics of the infection. The time factor is of the essence: if the analysis of tests, the recording of those affected and issue of quarantine notices take too long, this does not only make contact tracing more difficult but also the risk-based analysis of the possibilities of containing the pandemic. Rapidly available current data and epidemiological time series would be necessary in order to be able to make and transparently communicate political decisions on the basis of scientific evidence. The epidemiological reporting system of the Federal Government proved to be inadequate several times. It was and still is constantly unclear what has to be entered by whom and when. Counting methods were changed without explanation; cases were frequently reported late. These circumstances effected a loss of confidence and impeded free research.

Digitalisation not up to date

1.1.1. National test strategy

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection revised the test strategy several times during the course of the year and included new findings and methods.

It quickly became clear in the spring that the capacity for verifying the virus infection through PCR testing had to be continuously expanded. Members of the government emphasised in March 2020 the importance of increasing laboratory capacity and reagents such that at least 15,000 tests can be carried

Expansion of test capacity required

out every day. This goal was only reached at the beginning of September regardless of all assurances, that is, more than five months later.

The *Laender* set different priorities in this context. This manifested itself in different approaches and concealed the fact that the second wave spread geographically more evenly than in the spring. In the public view, Vienna and the western *Laender* were portrayed as pandemic hotspots in the spring and autumn of 2020. This ignored the fact that Vienna, Tyrol and Vorarlberg tested far more persons than the rest of Austria. Vienna also tested contact persons of category I who displayed no symptoms sooner than the other *Laender*. This increased the numbers of infections, but also facilitated a more targeted interruption of chains of infection in companies with precarious working conditions, amongst others.

Use of antigen tests The national test strategy was expanded by the use of antigen tests in October 2020. Their extensive availability and comparable ease of use made them a useful supplement to existing measures. In order for an antigen test to display a positive result, a considerably larger amount of virus is necessary compared to PCR tests. A negative antigen test result does not fully rule out infection with SARS-CoV-2. Unlike PCR tests, it can happen that a positive result is displayed although the person is not infected. This is why the national test strategy stipulates that every positive antigen test should be confirmed by a PCR test. An exception to this rule is a positive antigen test result in symptomatic contact persons of category I, which means that the self-isolation is maintained and, as a confirmed case, triggers the official contact tracing procedure.

Austria registered over 9,000 new infections on some days in mid-November 2020. That the pandemic is in no way an urban phenomenon was evident from the fact that quite a few districts in rural areas had an incidence (new cases within a week per 100,000 inhabitants) of over 1,000; the Rohrbach district temporarily held the world record with an incidence of 1,500. Health authorities in Carinthia, Upper Austria and Salzburg were unprepared and confronted with insurmountable challenges.

Slow increase in capacity A basic condition for containing the COVID-19 pandemic is a functioning test regime and the willingness of the population to take part in the same. In view of the rise in the number of cases in autumn 2020, the Federal Government announced in mid-November that it intended to carry out mass testing with rapid antigen tests. These tests were planned on the basis of Section 5a of the Epidemics Act, were voluntary and free, and aimed to identify (asymptomatic) COVID-19 cases early on. Scientists, representatives of political parties and even members of the taskforce of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection openly doubted the usefulness of testing the asymptomatic population in the media. They spoke out against implementing this or at least to embed it in a screening programme and in so doing to orientate it on the since accepted international standards such as the UK National Screening Committee. Participation in the programme fell

far short of the expectations in all *Laender*. Instead of the anticipated 60% of the population, 37.8% took part in Lower Austria, 32.1% in Tyrol and 31.3% Vorarlberg. Compared with this, there was clearly less interest in Salzburg (27.2%), Burgenland (22%), in Upper Austria (22%) and in Styria (20.7%). With 13.5%, Vienna was in last place.

One of the fears was that the considerable amount of effort required for organising mass tests would remove capacity from the already failing contact tracing programme.

Mass tests controversial

Pursuant to the decree by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection on the procedure for dealing with SARS-CoV-2 contact persons (*“Behördliche Vorgangsweise bei SARS-CoV-2-Kontaktpersonen: Kontaktpersonennachverfolgung”*), contact persons shall only be tested if there is “sufficient test capacity”. Suspected cases of COVID-19 shall, pursuant to said decree, contact the 1450 health hotline for further diagnostic clarification and any other measures (COVID-19 test, self-isolation etc.). A new COVID-19 test is only prescribed for confirmed serious COVID-19 cases (requiring oxygen). In other cases, quarantine can end once the risk of infection has elapsed after ten days and 48 hours without symptoms.

Contact tracing

The AOB repeatedly received complaints about delays when contacting the 1450 hotline and carrying out COVID-19 tests (see chapter 1.1.2).

Furthermore, several persons with suspected or confirmed cases of COVID-19 contacted the AOB and criticised that a (another) COVID-19 test with persisting symptoms was refused by the health authorities after the prescribed quarantine period had elapsed. The Robert Koch Institute assumes that patients with serious cases of the infection and with immune deficiency can be infectious for considerably longer than ten days after the outbreak of symptoms.

This was also evident in the case of a married couple from Styria. The spouses were told to self-isolate as category I contact persons. Even though they displayed relevant symptoms beyond the end of their isolation period, no COVID-19 test was organised by the authorities despite being requested by the couple. The married couple had to organise the PCR test to clarify their symptoms through their general practitioner. Quarantine was repeated after the positive result for the wife was presented.

No COVID-19 test despite symptoms

The AOB welcomes the setting up of nationwide, voluntary and free COVID-19 test opportunities in all *Laender* that was initiated at the beginning of January 2021. In Vienna in particular, where there have been different programmes of this type since the late summer of 2020, evidence shows that the resonance is high. The willingness of persons to have themselves tested regularly close to their home increases when they know that registration is barrier-free and the test centres are well organised. In addition, the Federal Government has assumed the cost of the antigen tests that can be carried out free of charge

in specialised pharmacies throughout Austria for persons with compulsory health insurance since February 2021. Supplementary to this, company tests were added to the test strategy of the Federal Government in March 2021 and a federal law on a COVID-19 subsidy for company tests – Company Testing Law (*Betriebliches Testungs-Gesetz*) – was enacted. The Federal Government, the Austrian Economic Chamber (*Wirtschaftskammer Österreich*) and industrial associations called on companies that are registered or have sites in Austria as well as certain advocacy groups to set up test lines or test centres and to offer employees but also external persons such as their customers free antigen tests and PCR tests. The state funding of the early detection of chains of COVID-19 infection at company level also serves to ensure the continuity of value added and supply chains. In order to maintain an overview of the pandemic situation at the same time, it is planned that companies with more than 50 employees will also register their test results daily to the test platform of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection.

Home tests Furthermore, the population is to be gradually provided with free coronavirus self-tests (home tests) from March 2021. In the beginning, there was only an initial batch of tests available for 600,000 persons in the pharmacies. The self-tests provide the possibility to make an initial assessment and are not valid as an “entrance test”. Up to 15 free home tests can be issued per person over the age of 15 per month. That during the initial run on the pharmacies many remained empty-handed was not the only reason for the many complaints received by the AOB. Around 300,000 of the 8.8 million owners of the e-card are entitled to free tests but cannot profit from the offer because they have deregistered from the electronic health care (ELGA) or the eMedication programme. Those affected were unable to recognise any objective justification for this unequal treatment. The AOB thus contacted the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. A statement of opinion was not available at the time of editing this report.

1.1.2. Health hotline 1450

“24/24/24” formula With the “24/24/24” formula, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and the Vice-Chancellor announced the goal that it should take 24 hours from taking up contact to the COVID-19 test, 24 hours to the test result and another 24 hours to the tracing and information of the contact persons.

The 1450 health hotline was supposed to play a central role here. This is the primary point of contact for persons with COVID-19 symptoms, which also coordinates the COVID-19 tests.

Overload of the health hotline Since the beginning of the COVID-19 pandemic, the AOB has received many complaints about the 1450 health hotline being overloaded and difficulties in reaching the health authorities.

In an *ex-officio* investigative proceeding, the AOB obtained information from the *Laender* on the reasons for the delays on the 1450 health hotline and on the measures taken to prevent long waiting times.

The 1450 health hotline and the COVID-19 tests were organised differently depending on the *Land*. The “24 hours between contact and test” and “24 hours between test and result” rule was frequently not observed. Affected persons reported waiting times of up to ten days for a test result to the AOB.

In September and October 2020 in particular, long waiting times for 1450 telephonic health advice were the subject matter of complaints. In a case received by the AOB, a woman from Vienna with COVID-19 symptoms waited five days for a test and another two days for the – ultimately positive – result. As in many other cases, she was not interviewed and her contact persons were not traced. Even establishing contact by telephone under 1450 was only possible because the woman persevered and waited in the queue for an hour. Others reported of interrupted telephone connections.

Long waiting times for tests and test results

The City of Vienna confirmed to the AOB that there had been repeated long waiting times due to the rapid increase in test requirements and staffing as well as technical problems. It countered these problems with measures such as test lines, the involvement of a logistics company for mobile home sampling and scaling up the personnel.

Staffing and technical difficulties

Vorarlberg also conceded that the waiting time between testing and quarantine was three to four days in November. There were also delays in contact tracing and testing due to the daily increase in the number of cases.

As information gathered by the AOB from all of the *Laender* shows, these reacted in the autumn to the growing number of cases by increasing staff on the 1450 health hotline and for COVID-19 tests. However, this was not enough to combat the high volume of (possible) COVID-19 cases and the rapid processing thereof.

Almost all of those who contacted the AOB due to COVID-19 quarantine reported of problems with (telephonic or electronic) contact with the health authorities. Emails were often not responded to and telephone calls not answered, or those affected had to wait for a long time in a queue. The health authorities conceded mainly that there were delays in answering emails and problems with reachability due to technical problems and staff overload.

Health authorities difficult to reach

Within the framework of the initiated investigative proceedings, the AOB thus spoke out in favour of a concrete action plan in order to ensure flawless contact with the health authorities and an answer to questions within an appropriate period of time.

1.1.3. Contact tracing

Important measure Contact tracing is the term used to depict the tracing of contact persons as well as the active identification of persons who had contact with an infected person (or with a suspected case of infection) and could be infected themselves. Contact tracing is an important instrument for controlling the numbers of infections, allocating cases to a cluster and then isolating the same. In so doing, it is of utmost importance that reliable data is quickly available in order to identify affected groups and regions and to set measures accordingly.

The condition for containing the virus successfully is effective and efficient contact person management. For this reason, a pertinent legal basis was created in order to be able to notify contact persons quickly in the event of an infection.

Contact tracers Furthermore, it also had to be ensured that the infrastructure in the health authorities was adequate, sufficient staff was available and contact tracing training was carried out nationwide. The rising numbers stretched the contact tracing employees in the health authorities to their limits. For this reason, many *Laender* set up their own contact tracer pool.

Epidemiological reporting system (EMS) The authorities are required to enter the identified contact persons in the epidemiological reporting system (EMS). This is a database pursuant to Section 4 of the Epidemics Act in which all reportable diseases are entered. The purpose of the EMS system is to monitor and combat infectious diseases. The data facilitates detection of the time-related and geographical incidence of infectious diseases and provides an overview of the epidemiological situation as well as being the prerequisite for planning preventive measures. The entire process is fully automated. Data entry in the EMS system triggers an automatic signal to the regional administrative authority. The contact persons are then isolated.

System overload and problems with data transfer The AOB noted that due to the sometimes exceedingly high numbers of cases the system was repeatedly overloaded resulting in data transfer problems. Several persons suffering from COVID-19 reported to the AOB that they were never asked about (possible) contact persons or sometimes only with a delay of several weeks. In parallel, persons contacted the AOB who had (close) contact with a person infected with COVID-19 and had also been reported as a contact person but were neither interviewed by the health authority nor advised to self-isolate.

Difficulties and delays with contact tracing were conceded in several investigative proceedings of the AOB.

Contact tracing app barely used The AOB received several questions regarding digital aids for combatting the pandemic. The voluntary use of the “Stopp Corona” app from the Red Cross should have made a considerable contribution to containing the numbers of

infection according to the Federal Government. However, it was not used as much as had been anticipated. Users reported that they had not received a single warning from the app to date. Alternatives for persons who do not have a mobile telephone (“keyrings”) announced by the Federal Chancellor were never distributed. The announced compatibility with contact tracing apps from other EU countries was not implemented either.

1.1.4. Infected persons and contact persons

In order to prevent the spread of certain diseases – to which the SARS-CoV-2 virus also belongs since 1 February 2020 – persons who are or are suspected of being infected and are suspected of being infectious can, pursuant to Section 7 (1a) of the Epidemics Act 1950, be required to observe quarantine (“self-isolate”) or to restrict their contact with the outside world. The local health authority (district authority/municipal department of the place of habitual residence) is responsible for implementing this. Pursuant to Section 2 of the Regulation regarding the isolation of persons who are or are suspected of being infected and suspected of being infectious (“Isolation Regulation”), such isolation or restriction of contact shall be for the duration of the risk of contagion.

Isolation for the duration of the risk of contagion

Persons for whom the disease has already been diagnosed, for whom typical symptoms let it be assumed that they are infected or for whom pathogens were detected but who are displaying no symptoms (asymptomatic persons) shall be isolated, and persons with a similar state of health interviewed. These infected persons who are not displaying any symptoms, i.e. persons who do not become ill, can, according to current science, transmit COVID-19.

Contact persons of an infected person shall also be isolated if, as experience has shown, they have been exposed to infection and the risk of spreading exists. In this respect, the Minister for Health differentiated between category I contact persons (C1 contact persons) and category II contact persons (C2 contact persons). C1 contact persons shall be isolated because of close contact to an infected person (physical contact, members of the same household, celebrating or doing sports together indoors etc.). By contrast, the risk for C2 contact persons is low, which is why they are not isolated.

From this, it is clear that the measures for containing the COVID-19 pandemic are caught between the right to personal freedom and the respect for private and family life. Any restriction of freedom pursuant to the Epidemics Act constitutes an extremely sensitive issue in terms of fundamental rights. This is the reason why a comprehensible and legally conformant approach by the health authorities is all the more essential.

Sensitive issue from fundamental rights perspective

The many complaints regarding COVID-19-related self-isolation received by the AOB as well as the results of the investigative proceedings highlight that the health authorities – not least due to open legal questions – did not use

Inconsistent practice by the authorities and open legal questions

a harmonised approach in the Laender. Self-isolation was imposed in some cases that did not comply with the statutory regulations.

Legal form for prescribing self-isolation

This was evident in the legal form used to impose self-isolation in particular, that is, the way in which self-isolation was prescribed by the authorities. From the wording of the Epidemics Act, the legal form to be used for imposing isolation is not clear. According to the exposition on the Epidemics Act, the legal opinion of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and specialist literature, isolation shall normally be prescribed in the form of a notice. Pursuant to Section 62 (1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*), notices can be issued both in writing and verbally – provided there are no provisions to the contrary in the administrative rules.

With the 16th COVID-19 Act, Federal Law Gazette I No. 43/2020, a special provision for issuing notices by telephone was created in Section 46 of the Epidemics Act. According to this, self-isolation can be issued by telephone for the duration of the COVID-19 pandemic. This type of self-isolation ends automatically if a (regular) self-isolation notice is not issued within 48 hours.

Telephonic isolation notice

The investigative proceedings of the AOB show that COVID-19 self-isolation is prescribed predominantly by telephone and written notices are either not issued at all or with considerable delay. Some health authorities – such as the Vienna health authority (MA 15) for example – are of the opinion that isolation can be prescribed not only by written notice but also by telephone – i.e. an act of direct administrative power and a coercive measure. Sometimes there was not even a telephonic official directive, as only the 1450 health hotline advised staying at home. But this has no official function.

Legal uncertainty

It is not surprising that this approach can only result in massive legal uncertainty but also an impeded (court) examination of these isolation notices. Without a written notice or attestation, it was difficult for many affected persons to justify to their employer why they did not go to work. They feared labour-law-related consequences or that they should use vacation time. In some cases, self-isolation imposed per telephone caused salaries or wages to be withheld. The quarantine notice is important for employers because it is necessary to assert their claim for compensation for the continued payment of remuneration.

Incorrect information on self-isolation

In some of the cases examined by the AOB, either no information or incorrect information on the duration of the isolation was made on self-isolation imposed per telephone. In the case of a woman from Vienna, there were several contradictory telephonic isolation decrees and differing information on the duration of the same within a few days. This meant that she – despite the existing risk of contagion – left her place of isolation and returned to work after her employer put her under pressure.

In another case, a woman from Lower Austria was instructed (recommendation) to self-isolate by telephone after she had contact with an infected person. After she had self-isolated for several days and had stayed away from work, the health authority told her that a written notice would not be issued, as she had only been categorised as a contact person with low risk of infection (C2 contact person). The telephonic instruction or recommendation “to stay at home” and “to go into quarantine” was merely a – ultimately non-binding – recommendation to self-isolate and not a self-isolation notice.

In both cases, the AOB identified maladministration and pointed out to the health authorities that the current practice exercised by the same of prescribing self-isolation by telephone requires explaining the circumstances of isolation clearly and unequivocally. It must also be taken into consideration in this context that most of the persons affected are not legal experts.

AOB identified maladministration

In numerous other investigative proceedings, the AOB drew the attention of the health authorities to the fact that COVID-19-related self-isolation shall be issued as a written notice as a matter of principle and demanded specific measures and steps to prevent delays in issuing these notices.

Irrespective of the unanimous legal opinion that self-isolation shall normally be issued per notice, the AOB considers an unambiguous legal basis and clarification of the Epidemics Act necessary. The current provisions of the Epidemics Act leave too much scope for interpretation, which – as the investigative proceedings of the AOB show – result in misunderstandings and a lack of legal certainty.

Unambiguous legal basis necessary

In the view of the AOB, the rationale behind the use of a telephonic notice issue pursuant to Section 46 of the Epidemics Act is quite a useful supplement to bridge the time until a clear test result is presented.

However, a look at practice in the authorities shows that the option of issuing notices by telephone pursuant to Section 46 of the Epidemics Act is rarely used, and the provision – at least in its current form – is not perceived as purposeful by the health authorities. This is, according to the information they provided to the AOB, due to short 48-hour deadline for issuing a (regular) self-isolation notice.

Telephonic issue of self-isolation notice not very practicable

In the view of the AOB, Section 46 of the Epidemics Act needs to be amended. In its present form, the current regulation on telephonic notice issue and automatic expiry of the self-isolation pursuant to Section 46 of the Epidemics Act increases the existing uncertainty on how to behave during the pandemic. A notice is not issued within 48 hours for two reasons: either there is no positive PCR test result yet or the authorities are so overworked that they do not issue the notice. In both cases, the self-isolation ends automatically by act of law even though there is still a risk of infection in the latter case.

Amendment of Section 46 of the Epidemics Act required

Delays in establishing contact and self-isolation

Within the framework of its investigative work, the AOB noticed that there is a lack of legal clarity and inconsistencies in the way the authorities determine and handle retrospective self-isolation orders. In some *Laender*, health authorities are of the legal opinion that the Epidemics Act forbids the imposition of self-isolation for time periods in the past.

Lack of clarity regarding retrospective self-isolation orders

This had very unsatisfactory consequences. Persons who were informed of their positive PCR test result had to accept all of the labour-law-related and financial consequences up to the point when the health authority became active, as they were not in self-isolation from a legal viewpoint. Pursuant to Section 32 (3) of the Epidemics Act, there shall be no claim to the continued payment of wages and salaries for the time a person stays at home that is not covered by a quarantine notice. Persons with a risk of infection who behaved as stipulated in the Epidemics Act and as is necessary to contain the COVID-19 pandemic were in a worse position than those who concealed the positive test result and continued with their private and professional lives without restriction.

A man from Graz was informed of his categorisation as a C1 contact person on 8 November 2020 and went into home quarantine. A self-isolation notice only was issued by Murtal District Authority on 11 November. Until then, the man had to take vacation or use some of his compensatory time. Murtal District Authority refused to issue a self-isolation notice from 8 November 2020. After the AOB intervened, a (retrospective) confirmation was issued enabling him and his employer to avail of the financial recourse option.

The regional government of Styria found a welcome and resident-friendly solution, from the AOB's point of view. Per decree of 27 November 2020, all health authorities were instructed to issue a (retrospective) confirmation for all of those persons who – in anticipation of a soon to be received self-isolation order – had verifiably gone into quarantine and fulfilled all of the conditions for self-isolation. This confirmation enables the holder to assert all (financial) claims in connection with the self-isolation.

Ex-officio investigative proceedings

The inconsistent handling by the authorities and lack of legal clarity on the retrospective determination of self-isolation necessitated *ex-officio* investigative proceedings. The AOB requested the Federal Ministry of Social Affairs, Health, Care and Consumer Protection to provide legal clarification. During the course of these proceedings, the AOB presented their empirical values and argued the case for conclusive clarification of the legal form for imposing self-isolation as well as the creation of a (harmonised) possibility to retrospectively determine COVID-19 self-isolation notices.

There was no statement of opinion from the Federal Ministry of Social Affairs, Health, Care and Consumer Protection at the time of editing this report.

1.1.5. Release from quarantine

The self-isolation of positive cases of COVID-19 or contact persons is only legally permissible for the time period in which there is a risk of infection. In view of this regulation, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection drafted precise criteria for how long this risk of infection and the resultant self-isolation can last.

At the beginning of the COVID-19 pandemic, the Ministry assumed that the incubation period was fourteen days, which explains why positive COVID-19 cases and contact persons with a risk of infection (C1 contact persons) were sent into self-isolation for this period. The duration of this self-isolation was reduced to ten days in July 2020 based on new scientific findings.

Incubation period

Category 1 contact persons shall thus be sent into self-isolation by the health authority until the tenth day after the last infectious contact. A time-limited self-isolation notice shall be issued in these cases.

Self-isolation for ten days

For positive COVID-19 cases, the duration of the self-isolation depends on the disease progression. Positively tested persons shall be sent into self-isolation for ten days. COVID-19-positive persons with a mild disease progression shall be sent into self-isolation for ten days starting from when the symptoms begin, whereby they shall be free of symptoms at least for 48 hours before the self-isolation can end. COVID-19-positive persons with a severe disease progression (requiring oxygen) shall be released from self-isolation at the earliest ten days after symptoms begin if they have been free of symptoms at least for 48 hours and can present a negative PCR test or a positive PCR test with a CT value of over 30 (no risk of infection).

Since the duration of the self-isolation of COVID-19-positive persons depends on the disease progression and the point in time when there are no symptoms, indefinite self-isolation notices are usually issued which are revoked as soon as the necessary criteria are met. The self-isolation thus does not end automatically but requires renewed action on the part of the health authority or the issue of a revocation notice.

Indefinite self-isolation notice for confirmed cases of COVID-19

The AOB investigated several cases where COVID-19-positive persons were sent into self-isolation without a time limit and were not revoked or terminated within the stipulated time. The delays in releasing these persons from self-isolation were apparently due to the work overload in the health authorities and the lack of staff.

Delays in releasing persons from self-isolation

Investigative proceedings by the AOB were also necessary with regard to the self-isolation of C1 contact persons because indefinite notices were incorrectly issued. An *ex-officio* nullification of these notices and the issue of the correct self-isolation notices for the duration of ten days could only be achieved due to the perseverance of those affected or after the intervention by the AOB.

The AOB found a case of maladministration in those cases in which the affected persons were not released from self-isolation in time or the self-isolation notice was imposed for too long due to an error. The AOB clearly stated that self-isolation – despite the high numbers of infections and existing staff shortages in the health authorities – shall not mean that a restriction of freedom is longer than is medically necessary and legally permissible. The AOB demanded the formulation of a precise action plan in order to avoid such delays.

1.1.6. Deficits in legal protection

Legal protection options
against self-isolation
unclear

The question as to which possibilities those affected have to proceed against such self-isolation notices based on the Epidemics Act could not be clarified conclusively. Affected persons contacted the AOB because they had received contradictory explanations on the rights of appeal open to them.

Most of the self-isolation notices are notices pursuant to Section 57 (1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*) which can be issued without prior investigation proceedings in the event of imminent danger. The legal remedy against this type of notice is the right of appeal within two weeks as a matter of principle. Proper investigation proceedings are then initiated and a notice issued if necessary.

Section 7 (1a), second sentence, of the Epidemics Act however stipulates that the detained or self-isolating person can apply for the examination of the permissibility and the nullification of the restriction of freedom at the district court.

According to the judicature of the Regional Administrative Court of Lower Austria (see for example Regional Administrative Court of Lower Austria of 29 May 2020, LVwG-AV-453/001-2020; Regional Administrative Court of Lower Austria of 28 October 2020, LVwG-AV-1050/001-2020), such a proceeding before the district courts is the only possible legal remedy against self-isolation notices. There is no legal basis for initiating an appeal (and an ensuing complaint to the Regional Administrative Court).

Based on this judicature, some health authorities (e.g. Ried im Innkreis District Authority) rejected appeals as impermissible. Other health authorities (e.g. Korneuburg District Authority) accepted and processed them and then agreed the content of the same.

Legal examination only
during ongoing self-
isolation

Conversely, applications for the examination of the legitimacy of self-isolation were rejected by the district courts because the self-isolation had ended by the time the application was submitted. In these cases, the affected persons were not able to file legal proceedings against the self-isolation.

AOB sees deficit in legal
protection

From the point of view of the AOB, this lack of clarity and the fact that a legal examination can only be applied for during an ongoing self-isolation

measure constitute a considerable deficit in legal protection that should be rectified quickly.

In November 2020, the Supreme Court also had reservations concerning the legal protection system stipulated in Section 7 (1a) of the Epidemics Act. In the opinion of the Supreme Court, the provision does not include clear regulation of the responsibility of the authorities, which is why in a conformity examination application to the Constitutional Court of Austria it applied to nullify the provision or parts thereof as unconstitutional (see Supreme Court of 2 November 2020, 7 Ob 139/20x).

Conformity examination
by the Supreme Court

1.1.7. PCR laboratory in housing complex

The owner of an apartment from Vienna who was confronted with a completely different problem in connection with carrying out tests contacted the AOB. She claimed that a laboratory, which carries out PCR tests on a commercial basis in her housing complex was operating without the necessary permit from the authorities. Hundreds of persons visited the laboratory every day. Customers waited in the communal areas and in the garden to be allowed into the laboratory. The minimum distance could not be maintained on the staircase and in the hallway. There was neither a hygiene concept nor anywhere for persons to disinfect their hands. The waste incurred in the laboratory was disposed of in the household waste.

PCR test laboratory –
persons waiting on the
staircase

The AOB was able to clarify that the woman who owns the laboratory has a valid permit for operating chemical laboratories. In October 2020, the industrial official expert found that the operation of a laboratory does not pose a risk to persons. The AOB informed the owner of the apartment that only the behaviour of the customers inside the operational facility can be attributed to this facility. What happens outside the facility such as waiting in the hallway or on the staircase is not considered when assessing the authorisation requirement for an operational facility.

The laboratory operator had, however, at the time of the examination not honoured her obligation to register the laboratory with the Federal Ministry of Social Affairs, Health, Care and Consumer Protection pursuant to Section 28c of the Epidemics Act 1950. Registration was only submitted after a request to do so by the municipal department MA 40 in April 2020. As PCR tests for evidence of COVID-19 had been carried out before the registration, the municipal department MA 40 filed charges for violation of the registration requirement. Furthermore, the municipal department MA 40 requested the Federal Ministry of Social Affairs, Health, Care and Consumer Protection to examine whether the operation of the laboratory could be forbidden on the grounds of violation of the safety regulations. In September 2020, the Police Department submitted a statement of facts to the public prosecutors' office for the possible offence of endangering persons and the surroundings.

Violation of registration
requirement pursuant to
the Epidemics Act

1.2. Risk group categorisation

1.2.1. Legal bases

Limited special regulation is agreed

Going to work in a pandemic can be particularly dangerous for persons with chronic diseases. The Federal Government therefore announced the possibility for risk groups to work from home or take paid leave through an amendment to the Social Insurance Act (*Sozialversicherungsgesetz*). The AOB received several complaints from members of the working population with existing conditions who demanded inclusion in the special regulations announced through the media and complained about the life-threatening delays in implementation thereof. From the point of view of the AOB, the announcement of the COVID-19 risk group regulation left many questions unanswered which were not clarified in the four weeks of the first lockdown. In the television programme “*Bürgeranwalt*” (“Advocate for the People”), persons with lung disease, with immunosuppression, liver damage and chronic kidney disease had the opportunity to express their concerns, particularly considering that it was not known who can issue COVID-19 risk certificates and under what conditions.

Article 2 ECHR requires the active protection of human life

The legal basis for defining the risk group, Section 735 (1) General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*), Federal Law Gazette I 23/2020, came into force on 5 April 2020. According to this provision, the allocation to the COVID-19 risk group should be derived from medical knowledge and, if possible, taking certain medication. A more precise categorisation based on the recommendations by an expert group was to follow in the form of a regulation from the Federal Ministry of Social Affairs, Health, Care and Consumer Protection in agreement with the (former) Federal Ministry of Labour, Family and Youth. The fact that the legislators did not grant the right to special risk group protection to those working in the critical infrastructure (retail, health, childcare, transport, police etc.) was criticised vehemently. The AOB, experts on the Constitution and the Austrian Medical Chamber considered this to be an un-objective and unconstitutional differentiation. Whereas the Government justified this with the argument that safeguarding the operation of the critical infrastructure “has priority”, the AOB pointed out that pursuant to Article 2 ECHR the State shall implement statutory measures to prevent risks to life and shall actively guarantee the protection of human life. The protection of the health of these occupational groups shall also take priority over commercial interests. The legislators took up this criticism quickly and enabled access to home office and paid leave exclusively based on medical grounds.

Implementation still delayed

The group of experts started working directly after the said provision came into force. However, no definition of the risk group was presented by the end of April 2020. The public social insurance carriers have no access to the medication prescribed by hospitals. Furthermore, taking medication does not

provide sufficient information on whether somebody is in the risk group or whether a combination of comorbidities and other influences is critical. At the beginning of May 2020, information was sent by the umbrella association of public social insurance carriers for the first time to employees, the marginally employed and apprentices who might be included in the COVID-19 risk group.

The COVID-19 Risk Group Regulation, Federal Law Gazette II No. 203/2020 regulates the definition of the general COVID-19 risk group and came into force on 6 May 2020. COVID-19 risk certificates could be issued for the first time effective this date. As a matter of principle, the basis could only be the precise medical indications regulated in the regulation. However, a special provision allows that other serious illnesses for which severe disease progression in the case of a COVID-19 infection could be expected can be justified and documented by the doctor issuing the risk group certificate.

Regulation only came into force on 6 May 2020

From the AOB's point of view, it is a case of maladministration that a definition of the COVID-19 risk group only appeared several weeks after the outbreak of the SARS-CoV-2 virus and thus with considerable delay.

Delays constitute case of maladministration

For the holders of risk certificates and their employers the approach used by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection proved to be extremely challenging. Five days before the expiry of the regulations for COVID-19 risk groups, there was still no clarity in summer 2020 on whether the COVID-19 Risk Group Regulation would be extended beyond 31 July 2020. The same thing happened again in winter 2020. The legislators originally limited the authorisation to extend the COVID-19 Risk Group Regulation to 31 December 2020. The high numbers of infections in November and December 2020 called for another lockdown in the view of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. It was thus to be expected that there would be an adjustment of the protective regulations as quickly as possible. The Minister of Health and the Minister of Labour who was also involved in issuing the regulation only announced in the media on 28 December 2020 that the exemption provisions for COVID-19 risk groups would be extended again – until the end of March 2021 this time. On the same day – three days before expiry – the regulation was published in the Federal Law Gazette No. II 609/2020.

Uncertainty prolonged unnecessarily

1.2.2. Early claim to maternity benefit

In spring 2020, pregnant self-employed physiotherapists, midwives and occupational therapists contacted the AOB. In view of the precautions necessary for close contact (wearing FFP2 masks and medical PPE), they saw themselves being forced by the Social Insurance Institution for the Self-employed (SVS) to decide between direct customer contact, which meant endangering the life and health of their unborn children, or closing their offices and foregoing

No early maternity benefit for pregnant self-employed women

financial support until the regular maternity leave would start. The SVS had refused them both early maternity leave and early maternity benefit.

Unequal treatment compared with employed colleagues

The pregnant women insured with the SVS felt snubbed, as their employed colleagues had been granted an early claim to maternity benefit. The Labour Inspectorates had come to the conclusion already in March 2020 that pregnant women should not work in areas where it is not possible to maintain a social distance of one metre and require wearing FFP2 or FFP3 protective masks as a matter of principle. From the occupational health and safety perspective, pregnant women are not automatically included in the COVID-19 risk group; however, it shall be ensured that wearing medical protective masks for longer periods does not pose the risk of a lack of oxygen for the unborn child. There was no evidence that women who contract a coronavirus infection in the last third of their pregnancy passed the virus on to their babies in the womb. However, it was considered proven that any serious illness with fever poses risks to the mother and her unborn child.

Higher risk of infection as “exogeneous” cause

The SVS held the legal opinion that only “internal” medical causes in the women and their fetuses are critical in assessing the necessity of early maternity leave and that these shall be documented in an expert opinion by a public medical officer. “Exogeneous” causes that can be a risk for the life and health of the pregnant woman or the embryo do not suffice. COVID-19-related difficult working conditions and also a regionally high risk of infection shall be assessed as such “exogeneous” causes.

Despite the obvious unequal treatment of self-employed compared with employed pregnant women working in professions with close contact, the SVS was not prepared to change its legal opinion. Those affected also criticised the way they were being treated. For example, a pregnant woman reported that an SVS official sitting behind a plexiglass screen explained to her that the pandemic was without risk for pregnant women and that she should perform her freelancer work with an FFP2 mask. The official was unable or unwilling to impart the scientific data basis for this statement. There was no response to the request to present the scientific expertise upon which the SVS was relying specifically, but reference was simply made to the public medical officers from the health authorities.

Delays in issuing expert opinion by public medical officers

It was difficult for the pregnant women to get an appointment with the public medical officers at short notice. The delays in preparing the expert opinion by the public medical officers and in issuing the certificate had a direct financial impact, as the SVS only recognised early maternity benefit from the date of issue of the certificate from the public medical officers even if an earlier starting point for the necessary maternity leave was verified in the certificate. In multiple telephone calls between the AOB and public medical officers, the reports of those affected could be verified, in Upper Austria in particular. Dealing with public medical officers in the Vienna health offices was perceived as comparably unbureaucratic and customer-friendly.

The AOB initiated extensive investigative proceedings on the respective cases and the underlying problem and had written correspondence both with the General Director of the SVS and the Federal Ministry of Social Affairs, Health, Care and Consumer Protection in its function as supervisory authority. In addition, the AOB presented the problem for discussion in the television programme “*Bürgeranwalt*”.

In legal terms, the AOB argued the case for a broader interpretation of Section 102a (1) of the Commercial Social Insurance Act (*Gewerbliches Sozialversicherungsgesetz*) on the basis of an analogous interpretation of the area of application of said regulation. The AOB pointed out in particular that the legislators do not explicitly mention “internal”, individual health risks inside the respective pregnant woman exclusively for the determination of early maternity leave but also other external working conditions that constitute a risky environment, which is unsuitable for a pregnant woman. The AOB referred specifically to the last line of Section 102a (1) of the Commercial Social Insurance Act: “In addition, social assistance shall be paid for the period of a ban on employment for expectant mothers pursuant to Section 13a (5) of the Tobacco Act”.

Pursuant to Section 13a (5) of the Tobacco Act (*Tabakgesetz*), it was forbidden for expectant mothers to work in places where they are exposed to tobacco smoke. This provision, to which Section 102a (1) of the Commercial Social Insurance Act still refers, has since been suspended as part of a comprehensive revision of non-smoker protection (Section 18 (15) Tobacco and Non-Smoker Protection Act). However, this does not change the assessment of the legislators which is expressed in Section 102a (1) of the Commercial Social Insurance Act by referring to Section 13a (5) of the Tobacco Act. The legislators recognise a risky working environment as the reason for granting maternity benefit in the event of early maternity leave. In this sense, the AOB recommended using this reference as the basis for recognising COVID-19-related risks for a claim to early maternity benefit by way of analogy.

The AOB also made reference to different health risks and impediments that the affected physiotherapists and their professional association had highlighted. Even under normal physiological conditions, a pregnancy causes increased breathing frequency, shortness of breath after minimum exertion to breathlessness as the pregnancy progresses due to the elevated diaphragm and the child’s increased oxygen needs and other physiological changes. The normal working day is already associated with physical exertion for the health professions (transfer of patients, joint mobilisation, soft part techniques etc.). Wearing medical protective masks impairs breathing. The AOB was able to help in obtaining certificates from public medical officers and achieving a positive result in individual cases. However, the competent Federal Minister made no concessions regarding the basic legal question.

Risks from wearing protective masks

Ministry sees no need for action

In a letter of 28 September 2020, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection did not follow the argumentation of the AOB and did not recognise the reference to Section 13a (5) of the Tobacco Act in Section 102a of the Commercial Social Insurance Act as the starting point for an analogy but confirmed the opinion of the SVS on the basis of an *argumentum e contrario*.

To reinforce his argument, the Federal Minister explained: “The question of the need for protection for pregnant women in connection with the COVID-19 pandemic was discussed by a group of experts – outside of the question of the social-insurance-related legal claim to early maternity benefit – with the result that there is no increased health risk for pregnant women, and therefore for the group of self-employed pregnant women either, if they become infected with the COVID-19 virus. They were thus not included in the COVID-19 Risk Group Regulation, Federal Law Gazette II No. 203/2020. This basic estimation must, in my opinion, also apply to assessing the question of whether early maternity leave can be granted pursuant to Section 102a of the Commercial Social Insurance Act in such a case”.

Current medical findings reinforce the criticism of the AOB

In December 2020, the AOB contacted the Federal Minister once again with current medical findings as well as further complaints from pregnant physiotherapists and midwives. Amongst others, the AOB referred to new medical assessments regarding the COVID-19-related risk situation for pregnant women, which were communicated through the media by Chief Physician, Dr. Barbara Maier, Head of the Department of Gynaecology at Ottakring Hospital. The medical specialist explained: “Pregnant women have the same risk of becoming infected as other persons; however, in our experience they must be included in the risk group, as in approximately 10% of the cases severe disease progression requiring intensive care has been observed. And that even though in the vast majority of cases pregnant women are young, healthy persons”. Dr. Maier also drew attention to the following fact: “Working with FFP2 masks is more arduous and requires more effort. For this reason, they are not approved for pregnant women, for example”.

The AOB also pointed out that, in view of the new medical findings on the risk situation of pregnant women, a claim to special leave for employees had been added in Section 3a as part of an amendment to the Maternity Protection Act (*Mutterschutzgesetz*) and saw therein a worsening of the unequal treatment of the self-employed in the area of the medical-technical professions.

Unchanged line of argument from the Federal Ministry

In a letter of 30 December 2020, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection confirmed its standpoint and rejected a general solution in the interests of those affected. The line of argument already used vis-à-vis the AOB was essentially upheld. With regard to the special leave pursuant to Section 3a of the Maternity Protection Act brought up by the AOB, the Ministry pointed out that this is a labour-law-related claim that is not

connected to a claim to early maternity benefit in the scope of the General Social Insurance Act. There is thus no unequal treatment.

The AOB upholds its standpoint. In the opinion of the AOB, the current implementation by the authorities of the law in connection with Section 102a of the Commercial Social Insurance Act is not adequate in the context of the COVID-19 pandemic. The AOB advocates a broader interpretation in favour of those affected or a pertinent amendment of the law. During the pandemic, the health risk is the same for all pregnant women regardless of whether they are working as employees or are self-employed. The fact is that the legislators – albeit in the area of labour law – accommodated this pandemic-related risk situation for employed women whilst no adequate measures were taken for the self-employed women either in the legislature or in the implementation of the laws.

AOB advocates broader interpretation

1.3. Home care

1.3.1. 24-hour support

1.3.1.1. Reimbursement of tests for 24-hour caregivers

Many persons in need of care, their relatives and 24-hour caregivers contacted the AOB. They were uncertain as to whether the existing care agreements could be observed because they were not only confronted with the pandemic but with constantly changing overall conditions. In particular since aged persons with existing conditions were advised to reduce personal contacts to a minimum, the 24-hour care alternative at home seemed to be the safest option. However, it was unclear whether the caregivers who alternate every fourteen days would be able to travel to Austria from their home countries unimpeded, who was responsible for the protective and test measures and who would cover the cost of quarantine if it became necessary.

Around 33,000 persons are cared for at home by 70,000 caregivers as part of the 24-hour care programme. The vast majority of the caregivers are from Romania and Bulgaria and thus did not qualify for the commuter regulations in the spring, which made crossing the borders easier. In order to maintain care, many caregivers stayed longer than the customary fourteen days. The Federal Government concluded agreements with the countries of origin. Planes were chartered as well as bus and rail corridors set up. Caregivers were accommodated in substitute quarters on arrival where they had to wait for the results of PCR tests. After coming under pressure from the agencies and families, the Federal Government and the *Laender* agreed in summer 2020 on the reimbursement of the privately financed expenses incurred until then. The reimbursement came into force retroactively from the end of March 2020, was

Reimbursement of tests carried out on arrival

limited until 31 October 2020 and amounted to a maximum of EUR 60 for a test abroad and a maximum of EUR 85 for a test in Austria per caregiver and month.

No harmonised approach in the *Laender*

From November 2020, the approaches used by the *Laender* diverged once again. Some continued to reimburse the cost of tests (Carinthia, Salzburg, Styria). Upper Austria, Burgenland and Tyrol discontinued this practice and referred to the since operational screening programmes that were also open to caregivers. Other *Laender* such as Vorarlberg stated that they were only willing to cover the cost incurred for tests carried out abroad. Not one *Land* regulated in advance who would assume the cost and subsequent logistics if a caregiver working in the household of a person in need of care were to become infected or have to go into quarantine in Austria as a C1 contact person. The refund of the monies made available by the Federal Government for reimbursement was processed by the *Laender*.

In some *Laender*, only either the persons in need of care and their relatives or only the caregivers were able to submit the application even though the Federal Ministry of Social Affairs, Health, Care and Consumer Protection had clarified that neither party shall be precluded from submitting an application.

Unlawful approach by some *Laender*

Some *Laender* demanded an Austrian bank account in order to transfer the reimbursement amount. This de facto precluded many caregivers from submitting an application because they do not have a bank account in Austria. This rule is in violation of the SEPA Regulation (EU) No. 260/2012 and is thus unlawful. Pursuant to Section 9 of the regulation, the payer shall not dictate to the recipient the country in which they have their bank account. There are no exceptions for public authorities in this provision. Nevertheless, it is still not possible in all *Laender* to transfer the reimbursement to an account in a foreign bank.

AOB demands standardised guidelines

The AOB thus demanded standardised guidelines from the Federal Government for the processing of reimbursement claims and a harmonised approach by the *Laender*. Those affected were rightly displeased that in most *Laender* it was only possible to submit an application months after the reimbursement agreement had been concluded.

1.3.1.2. Delayed payment of the "stay here" bonus

Special bonus for 24-hour caregivers

Border closures and tightened travel regulations prevented many 24-hour caregivers from entering the country during the first lockdown. In spring 2020, the Federal Government and the *Laender* thus agreed a onetime payment of EUR 500 for 24-hour caregivers who had extended their regular rota by at least four weeks. The Federal Government provided the funds, and the *Laender* processed the bonus payments.

When preparing applications, terms such as “regular rota” caused uncertainty and problems in interpretation with those affected because the duration of the rotas is often erratic.

Caregivers and the families of those in need of care complained to the AOB because the *Laender* often took several months to pay the special bonus.

Payment only several months later

1.3.1.3. Tightening of travel regulations

The organisation of 24-hour care is already associated with a considerable amount of administrative effort for the families of the person in need of care even under “normal” circumstances. During the pandemic, this effort increased due to the required tests and the travel restrictions for leaving and entering the country.

Additional effort due to travel restrictions

The entry regulations were further tightened with the new COVID-19 Entry Regulation (*COVID-19-Einreiseverordnung*) in the version in the Federal Law Gazette II No. 15/2021.

Since 15 January 2021, all 24-hour caregivers shall register electronically before entering Austria. However, many caregivers do not have either their own email address or the necessary technical equipment for registering electronically. If electronic registration is not possible, the obligation can be met in exceptions by completing a form according to the regulation.

Mandatory registration when entering the country

Regular commuters are exempted from mandatory registration. This exemption expressly rules out 24-hour caregivers even though they work and are registered in Austria and enter the country regularly to perform their job.

1.3.2. Family caregivers

Family caregivers are particularly impacted by the effects of the pandemic, which for them are only plannable to a limited extent. Support such as family relief or leisure time assistance, which had often been hard won before the pandemic could not be availed of during the lockdown in the spring. Contact to the outside was reduced for fear of infection, which resulted in psychosocial effects that were described as being particularly stressful in complaints submitted to the AOB. The closure of family groups or dementia cafés but also the lack of helpful conversations with neighbours could not be compensated by shifting the contact to the telephone or video telephony. Children and grandchildren could now only be seen through the window and not being able to give them a hug on public holidays caused pain and sadness. The time during the second lockdown from November 2020 was just as unnerving. Many relatives who now had to take over caring for the very old on their own were themselves in advanced years and included in the risk group for severe cases of COVID-19. They expressed grave concern that they can no longer manage.

Little relief during lockdown

Difficult compatibility of career and caring for relatives and children For family caregivers who work outside the home, the worry of losing their job was always prevalent. For some, home office had taken the worry of becoming infected on the way to, from and at work; however, it was still difficult to cope with caring for a relative as well as working and managing home-schooling. Others said that their employer had shown no sympathy although working from home would have been possible. Occasionally in the spring attention was drawn to the fact that contact with the authorities had proven to be unsatisfactory. For example, there had been no care assessment in private households for several weeks.

Transfer of the responsibility back to the families The care of minors and adults with disabilities was transferred back to the families in spring 2020 in particular. Many day workshops were closed for longer periods of time. Care in special pedagogical centres and residential groups was not possible when members of staff became infected with COVID-19. And still the relatives were supposed to continue contributing to the costs in order not to lose the “care places”. Other families brought themselves to care for their relatives who lived in institutions for persons with disabilities at home for weeks to circumvent the limited visiting opportunities.

The situation is particularly difficult for family caregivers taking care of persons with disabilities who are in a high risk group. A single mother explained to the AOB for example that her severely impaired, immunocompromised daughter had not been able to visit the special pedagogical centre since the outbreak of the pandemic. Nobody was interested in their fate. There is only a legal claim to home-office or exemption from the obligation to work for employed persons who themselves qualify for the risk group regulation. The necessity of the permanent care of relatives who are in the risk group is not recognised.

Legal claim to special care time The AOB advocated at least anchoring a legal claim to special care time and exploring options for a more flexible work model between employers and family caregivers, to help finding individual solutions during the pandemic. From 1 November 2020, employees who fulfil other criteria have a legal claim to special care time of up to four weeks. The consent of the employer is no longer required. This also applies to persons in key positions. Employers are reimbursed 100% of the wages and salaries paid during this time.

1.4. Postponed operations, check-ups and rehabilitation stays

“Health offensive” Austria is one of the countries in the EU with the lowest share of persons who complain about unsatisfied medical needs. In 2019, the OECD had criticised – as had the EU and health economists – that the health system is relatively expensive because most of the expenses are for in-patient care. Moderated by Ombudsman Bernhard Achitz, the “Health offensive” developed suggestions for a crisis-proof and future-proof health and care system that were presented

to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection in September 2020.

At the beginning of the pandemic in spring and also at the end of October 2020, there was great concern that there could be situations in which decisions on who be given an ICU bed or a lung ventilator device would have to be taken. In spring 2020, this fear proved to be subsequently unjustified. The capacity necessary to care for those with severe cases of COVID-19 in November 2020 could be provided to a great degree despite the clearly worsened situation while still maintaining acute care. Unlike in the spring, there were postponements again in autumn 2020 but not an almost complete stop of all deferrable operations. The in-patient rehabilitation could also be maintained.

In the middle of the first wave of the pandemic, it took some time until possible direct, health-related side effects of the coronavirus crisis were also addressed. The entire health system had focussed on the treatment (and at the same time the prevention) of COVID-19 in those weeks in spring 2020. Out-patient departments were closed as a precautionary measure, all non-vital operations deferred, examinations and treatment temporarily cancelled, and rehabilitation centres closed. Weeks thereafter, the AOB received complaints that it was not clear when these appointments would be rescheduled or routine, check-up, preventive and follow-up examinations would be able to take place again regularly. Patients and their relatives were particularly anxious that despite the clearly falling numbers of infections neither the hospitals nor rehabilitation centres were able to provide reliable plans. As there had already been waiting times in scheduling operations and out-patient appointments before the coronavirus crisis, some groups of persons were particularly affected: chronically ill persons, patients suffering from chronic pain as well as patients and persons who were worried that illnesses such as cancer would be diagnosed late and therefore not treated as well. The AOB was also told that the mental condition and quality of life of these persons clearly worsened during the waiting time. In some cases, the AOB was able to help directly, particularly in the case of rehabilitation centres.

Medical collateral damage?

The Minister of Health announced in August 2020 that an assessment of the consequences of the coronavirus on health was being prepared, which would explain what COVID-19 and the lockdown meant for the health of the population overall. The Austrian National Public Health Institute (*Gesundheit Österreich GmbH*) presented initial results of the effects of the COVID-19 measures on the mental health of children, adolescents and adults. It concluded that care programmes that rely heavily on personal interaction (e.g. prevention programmes for adolescents, low threshold programmes for those suffering from addiction, daily structure programmes) shall be redesigned using new concepts that help to continue reaching the target group (<https://goeg.at/publikationen>; Strizek/Busch/Priebe/Puhm/Uhl (2020): *Sucht(behandlung) in der Krise. Erster Kurzbericht*). A current study from the Danube University

Assessment of the effects on health necessary

Krems shows that young adults between the ages of 18 and 24 are particularly affected by mental illness due to the pandemic (<https://www.donau-uni.ac.at/en/news/news/2021/mental-health-continues-to-deteriorate.html>). The AOB does not have the means to conduct such analyses. However, it would be desirable to observe these aspects more closely.

2. Social and health institutions and facilities

Institutions and facilities for those in need of care and persons with disabilities but also hospitals were most affected by the COVID-19 pandemic. These are places where many particularly vulnerable persons are located and where care requires close bodily contact. This makes protective measures especially important in these institutions and facilities. The AOB interviewed very many of these institutions within the framework of its preventive human rights monitoring work (NPM mandate). The result was that the institutions were not adequately equipped with PPE and the politicians and the administration failed to provide them with clear information and unambiguous regulations.

In response to this uncertainty and lack of support from the health authorities, visiting bans and curfews without a legal basis were imposed. A large number of residents and their relatives complained to the AOB about this. The relatives of persons with disabilities had to take care of their family members alone because the otherwise responsible institutions and facilities were closed without notice.

2.1. Retirement and nursing homes

Monitoring visits by
NPM commissions

The NPM commissions visited a total of 109 public, non-profit or profit-oriented short- and long-term nursing homes in the year under review. Most of the visits were cancelled between the middle of March and the end of May. However, even during this time, evidence of maladministration was examined, and strategies developed to stay in contact with the institutions (see the following chapter 2.1.1).

Recognition and thanks
to those employed in
the care sector

The COVID-19 pandemic highlighted the system relevance of long-term care for the health care system in a dramatic way. The attention of the media and politicians was nevertheless focused primarily on the hospital sector and the capacity of normal wards and intensive care both after the pandemic broke out in spring and during the most difficult phase in autumn 2020. The AOB thanks all those who worked in care institutions and facilities with a high level of personal dedication under particularly difficult conditions. Even though they were largely unprepared for the pandemic and at times were themselves only inadequately protected and supported, they made a considerable contribution

to preventing substantially higher numbers of cases and deaths. The scenes of residents left alone and the dead uncared for as seen in care facilities in Spain and Italy in the spring did not materialise in Austria. Greater appreciation on the part of society and financial recognition for the work of employees in the care sector are urgently required.

2.1.1. Online contact and telephone interviews

The AOB maintained contact with care facilities via video conferences when most of the visits were stopped. These took place particularly when concrete complaints from residents, their relatives or the staff gave grounds for concern. During the first lockdown in particular it was evident that combining the preventive and ex-post control mandate of the AOB as an Ombudsman institution was a contributory factor when immediate action was required by the authorities in certain situations.

Video conferences with care facilities

Commission 3, for example, contacted the employees of a home in Styria by video conference because there were indications that several of the residents were showing symptoms of a COVID-19 infection and half of the staff might also have been infected. It became clear during the conversation that the operator had neither forwarded information from the health authorities to the care service and the staff nor had they implemented other measures to get the situation under control. Staff who were on sick leave were listed in the shift plan. The alarming conditions were immediately brought to the attention of the office of the Regional Minister of Health. Commission 3 was informed a few hours later that substitute personnel from other facilities would be recruited to carry out an evacuation. All of the residents were moved to hospitals in Hartberg and Weiz due to the risk to their life and limb confirmed by the official expert. The continued operation of the home was made subject to compliance with several conditions. The home has since been closed down. Legal proceedings have been opened against the operators.

Between 4 and 15 May 2020, the commissions held 166 telephone interviews with care services throughout the country. These interviews, which lasted at least half an hour, were conducted using a questionnaire especially developed for that purpose. The objective of these structured interviews was to obtain information from the source on the problems that had to be addressed during and after the lockdown. The focus was on the following topics: How did the institutions and facilities prepare for the pandemic? What kind of support were they offered? What do they need? What have they learned and what do they want to tell political decision-makers above all?

166 telephone interviews

The results of the survey were presented via the media by Ombudsman Bernhard Achitz on 2 July 2020 and published on the AOB website. It was strongly emphasised that politicians should draw conclusions from the survey when preparing for a possible second wave of infection.

Insufficient concrete information From mid-April 2020, the care services found it frustrating that they received documentation from different authorities, associations and expert groups which turned out to be sometimes highly complex and some of the recommendations were impossible to implement. Great pains had to be taken to firstly translate much of the information into checklists using a language that both care staff, residents and their relatives could understand. The need for concrete regulations and recommendations was addressed repeatedly.

The responses showed that the lack of state support coupled with the absence of help in procuring PPE and delays in evaluating PCR tests in the early stages of the pandemic were perceived as extremely frustrating. In many cases, there were only PPE reserves because there had been an outbreak of influenza or the norovirus at the beginning of 2020. In March 2020, a pandemic box was available in 25% of care facilities in Burgenland, 33% in Salzburg, 42% in Lower Austria and Tyrol, 45% in Carinthia, 47% in Upper Austria, 54% in Vorarlberg, 66% in Vienna and 69% in Styria.

Personnel reserves were inadequate and there were no pools to fall back on in crises. This was the case in particular when experienced staff became ill, were no longer allowed to enter the country from abroad or had to go into quarantine. The staff shortages could not be fully compensated despite the deployment of additional persons performing community service. The 2nd COVID-19 Measures Act (*2. COVID-19-Maßnahmengesetz*) made it possible to deploy persons without care training or qualifications as well as persons who have completed their training abroad but whose qualifications are not yet recognised. These options were used as a consequence of the staff shortages.

Employers' duty of care Employers are required to look after the health of employees working in long-term care as part of their duty of care. It was already clear from the legal provisions existing before the coronavirus crisis that employees must be protected from harm to their lives and their health in particular and that chronic stress must be prevented. Unilateral last minutes changes to the shift plan are only permissible in emergencies and special circumstances, but they were often necessary during the pandemic. The staffing levels were not increased however: on the contrary, in some *Laender* the existing tight minimum staffing and specialist ratios were lowered until March 2021.

Very high workload The workload for qualified staff intensified particularly in those homes in which there were outbreaks of the infection. In some cases, there were and still are no separate rooms for employees in isolation areas to change their PPE or wet masks or to take breaks. Fortunately, however, it was emphasised in many homes that cooperation, communication and mutual appreciation had increased during the crisis. The constantly changing need for action also helped increase the preparedness of those involved to adapt to a new situation every day.

The preparatory measures taken by the medical facilities for treating seriously ill COVID-19 patients also proved to be a strain. They meant that persons living in care facilities could not be examined and taken care of or only to a very limited extent for several weeks. This affected residents with cardiovascular, oncological or chronic illnesses who prior to that had been examined regularly in hospitals or been visited by the home's medical officer. In long-term therapy and isolated cases, doctors therefore delegated the administration of medication to qualified care staff under Section 15 of the Federal Act on Healthcare and Nursing Professions (*Gesundheits- und Krankenpflegegesetz*) more often than before. This delegation also included medication containing addictive substances or sedatives that can be administered by qualified staff without harm. Telemedicine programmes in some homes also unearthed enormous potential for care without the risk of infection. Consequences for regular care should be drawn from this after the pandemic has been overcome.

Limited medical care

Since the outbreak of the pandemic, the Austrian Healthcare and Nursing Association had been endeavouring to at least grant the competence for autonomously carrying out COVID-19 antigen tests as well as issuing the test confirmation to persons with health care and nursing qualifications. However, this did not materialise in 2020 despite the extensive training of the nursing staff. Whilst in December 2020 paramedics were allowed to swab the nose and throat and perform point of care COVID-19 antigen tests for diagnostic purposes and to take blood from the capillaries to detect antibodies in the context of the pandemic, no consideration was given to care facilities. Yet obtaining a doctor's prescription before testing in care settings in particular is neither practicable nor medically required due to time restrictions and the anyway limited resources. The legislature only reacted to this at the end of February 2021. By amending the Epidemics Act (*Epidemiegesetz*), it was ensured that senior health and nursing staff as well as assistant nurses among others can also swab without prior doctor's prescription when screening to stop the spread of the SARS-CoV-2 pathogen, pursuant to the Federal Act on Healthcare and Nursing Professions.

79% of basic medical care was guaranteed in mid-May 2020 according to the care services surveyed. The limited presence of some medical officers and waiting times for appointments in medical facilities were strongly criticised as were the different approaches used by the health authorities with isolation directives. Both the staff and residents also criticised having to wait several days for the results of PCR tests in suspected cases.

2.1.2. Requirements of COVID-19 prevention concepts from a human rights perspective

Most of the residents of homes are much older than 80 years of age, often have multiple diagnoses, and over half of them are suffering from dementia. Cramped conditions coupled with close physical contact with different

caregivers generally pose an increased risk of the rapid spread of infectious diseases. In view of the risk of life-threatening complications after SARS-CoV-2 infections, the compatibility of increased virus prevention with the fundamental and human rights of the residents was a core issue for the AOB. The foundations for evidence-based, legally responsible and coordinated action were anything but clear early on.

“Health offensive”

Figures from the Austrian Agency for Health and Food Safety (*Agentur für Gesundheit und Ernährungssicherheit*) and the Austrian National Public Health Institute (*Gesundheit Österreich GmbH*) indicate that during the first wave in spring 2020 0.3% of all residents of nursing homes died of or with COVID-19. In line with the considerably higher number of infections in the general population, during roughly the ten times stronger second wave in the autumn, both the number of infections and deaths in nursing homes rose sharply. Shielding nursing homes from the outside world proved to be problematic from an ethical point of view, laden with conflict and unenforceable in practice. Thousands of scientists engaged in research all over the world emphasised in a memorandum in October 2020 that no country had yet succeeded in protecting high-risk groups of individuals in homes when the numbers of COVID-19 new infections were on the increase (<https://www.johnsnowmemo.com/>).

State’s duty to protect

Despite the announcements and promises made by politicians and the authorities to guarantee more protection for high-risk patients, smaller care facilities in particular were quickly stretched beyond their limits to even read the nonstop flood of information and non-binding recommendations. The lack of effective help and possibility to test the staff regularly was a critique frequently voiced to the commissions. That looking out for symptoms of COVID-19 and only testing residents who were symptomatic is not an adequate strategy for containing the infection in nursing homes was also clearly evident in those homes that had already been affected by outbreaks in spring 2020.

In the view of the AOB, the proactive obligation to protect life is not only the duty of those responsible in the homes but also of the health authorities on federal and regional level entrusted with combatting infection. It is even more incomprehensible that there was a lack of medical PPE for several weeks after the pandemic broke out and there were no concepts based on valid risk analysis for the use of PPE.

Restricting fundamental rights requires objective justification

In all of the decisions it has made on the pandemic so far, the Constitutional Court of Austria has also made it clear that only soundly documented evidence can legitimise the proportionality of serious infringements of social life, fundamental rights and right to freedom. Therefore, it is not the exercising of constitutionally guaranteed rights by elderly residents that needs justification but every restriction of the same – even temporary – requires a legal basis as well as a verifiable objective justification.

In television programmes, expert presentations and in the media, the NPM emphasised that it does not suffice when the restriction of fundamental rights pursues a legitimate goal – which is without any doubt the case in protecting the life and health of the population when there are high numbers of COVID-19 infections. Moreover, the measures taken to achieve this goal must be suitable, necessary, appropriate and proportionate. The sooner a suspected case of COVID-19 is detected, the better the staff can adjust to the situation and react correctly so that nobody else becomes infected. In the care services, it turned out that caution regarding clinical symptoms (taking temperature, cough etc.) displayed by the staff and residents could not prevent the spread of infection. What is also important with those in need of care in epidemiological terms is the high number of asymptomatic, infectious virus carriers. Furthermore, infected persons are contagious before they develop symptoms. In both scenarios only a properly developed test strategy can halt the uncontrolled transmission of COVID-19. There are now far more instruments available to this end than in the spring.

Protection of fundamental rights still applies during pandemics

In spring 2020 the NPM emphasised in written and personal exchanges with the Federal Ministry of Social Affairs, Health, Care and Consumer Protection that nursing home operators need evidence-based instructions on the one hand and legal security on the other in the greatest health crisis in recent history. The dialogue with the Ministry was preceded by meetings with operator organisations, umbrella associations and the representatives of the residents. In this context, there was consensus that during the pandemic supplementary and normatively binding standards are required for effective infection prevention. Nursing homes and the employees who work there should not have the impression that in practice they can only choose between being accused of the criminal deprivation of liberty or the gross negligence of human life. The head of a nursing home expressed the dilemma to Commission 5 in the following words: “It is an intolerable situation. When there is a COVID-19 outbreak everything is inspected even though there are no infection prevention standards. But then it is easy for everyone to blame supervisors for having done things wrong.”

Dilemma of contradictory requirements

From 1 November 2020 the Minister of Health issued nationally binding directives through several short-notice amendments (COVID-19 Preventive Measures Regulation – *COVID-19-Schutzmaßnahmenverordnung* as well as COVID-19 Emergency Measures Regulation – *COVID-19-Notmaßnahmenverordnung*). These stipulate amongst others the number and frequency of regular tests for employees of nursing homes, the FFP2 mask obligation, the required content of hygiene concepts (especially for a possible outbreak of SARS-CoV-2 infection), but also regulations for managing visits by relatives and the admission and re-admission of residents.

Progress through standards

For the AOB it is an improvement that the operators of retirement and nursing homes and homes for persons with disabilities are compelled to observe specific

precautionary measures to minimise the risk of infection. Unlike in the spring, health and social collateral damage as a consequence of social isolation and the complete shielding of residents can thus no longer be accepted.

The way in which the NPM observed and legally assessed the restriction of personal freedom in retirement and nursing homes is explained in detail in chapter 2.1.3.

Infection prevention binds human resources

The regulations of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection for infection prevention (COVID-19 Preventive Measures Regulation and COVID-19 Emergency Measures Regulation) increased the workload in the facilities enormously. However, the existing staffing ratios do not even come close to covering this additional work, for example the demanding hygiene concepts, visiting management, the regular testing of residents as well as the staff or the organisation and implementation of the COVID-19 vaccinations. There are increasing levels of exhaustion among those who repeatedly pushed themselves beyond their own limits in recent months to protect the residents or to nurse them in the best way possible after infection. The Federal Government assured in December 2020 that any increased cost for additional staff would be covered. Not in every *Land* and region there were permanent testing facilities by the end of 2020 where staff and relatives could be tested quickly and in an uncomplicated way before starting work or entering the building.

Federal Ministry of Social Affairs, Health, Care and Consumer Protection

The AOB considers it positive that the Ministry has been inviting representatives from in-patient and mobile care services, professional and umbrella associations and the Austrian National Public Health Institute to a dialogue – recently in weekly video conferences – since autumn/winter 2020. The Ministry thus receives feedback on problems and requirements from the source and can provide information on planned changes. The AOB is also involved in this dialogue.

2.1.3. Precautionary infection prevention through deprivation of liberty impermissible

In spring 2020 restrictions on entering public places were enforced in Austria. Persons living in private households, however, were allowed to buy groceries and things necessary for everyday life themselves, go out for a walk or go to the bank or post office. The management of nursing homes imposed far stricter preventive curfews to minimise the risk of transmitting the SARS-CoV-2 virus and strongly recommended residents not to go outside. Both the Federal Ministry of Social Affairs, Health, Care and Consumer Protection as senior health authority and the home supervisory authorities of the *Laender* condoned residents being isolated from the outside world and their right to freedom being restricted without official directive and against their will.

The telephone interviews conducted by the commissions showed that 48% of the care services interviewed still considered briefly leaving the grounds of the home as too dangerous in mid-May. Care services in regions that had hardly been affected by infection to date expressed reservations as to whether this was really necessary. However, they complied with information that stipulated using “security barriers” to counter the risk of infection that could be “imported” into the nursing home from the outside.

Initial reactions justifying these regulations explained that as an illness posing a danger to all risk groups COVID-19 is highly contagious and that there are also asymptomatic cases as well as times when the SARS-CoV-2 pathogen cannot be detected.

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection contributed to guiding nursing homes in the wrong direction with recommendations that were published on its website from 21 April 2020. Residents suspected of being infected with COVID-19 must be isolated in their room or in other suitable accommodation – in compliance with reporting obligations. Because of this, the management of homes assumed that they shared responsibility for implementing the Epidemics Act and were also empowered to use coercive measures.

Recommendations of
the Federal Ministry

Information to this effect was given to the residents and their relatives. Commissions 4 and 5 found notices in several homes of one operator with the following content: “Persons who nevertheless leave the pensioners’ residential building must go into mandatory quarantine for 14 days upon their return”. One resident who despite curfew and a warning rebelled against being isolated in her apartment by leaving the grounds of the home to quickly buy something was threatened with termination of her contract. The AOB was able to avert the unilateral termination of the home contract.

Curfews in several
homes

In a home in Lower Austria, all of the residents were told not to go outside but to stay inside all of the time. Entrances and exits were not actually locked during the day. However, a crowd barrier was placed between the road and garden entrance to prevent anyone from leaving the home. Furthermore, there were fears that some relatives could use the ground level terraces adjacent to the rooms to circumvent the visiting ban. One home in Tyrol reacted with a written warning and threatened to terminate the home contract of a woman confined to a wheelchair who spoke to her son in the garden of the nursing home while observing social distancing.

The commissions also observed “preventive” isolation of residents on monitoring visits to homes in Burgenland, Styria and Salzburg. This had not been imposed by the health authorities, that is, there was no evidence of contact with them. The predominant cases were not only limited to residents leaving the grounds of the home to go outside or visit relatives. Isolation was frequently imposed after release from hospital or on new admissions even

14 days quarantine in
their room

when a negative PCR test had been made in advance and a certificate had been presented. Up to 14 days “precautionary” quarantine (from August 2020 usually ten days) in isolation was the reaction when residents had to undergo out-patient treatment and it could not be ruled out that they had become infected during organised ambulance transport or during the treatment. The situation was particularly dramatic for dialysis patients who were not allowed to even leave their rooms for several weeks and had no personal contact with relatives or other residents.

Recommendations
of the Human Rights
Advisory Council

Infection prevention that results in massive restrictions of freedom and social isolation for those in need of care condones damage to their physical and mental health and contributes to a deterioration of (dementia) illness (see Nebois-Zeman/Jaquemar, “COVID-19 aus Sicht der Bewohnervertretung nach HeimAufG” – “COVID-19 from the perspective of representatives of the residents pursuant to the Nursing and Residential Homes Residence Act”, ÖZPR 2020/100, issue 6, p. 180 et seq.). A Human Rights Advisory Council working group provided the NPM with recommendations depicting a target situation. This thesis was published on the AOB website). The NPM too considers restrictions to freedom for observing hygiene measures or preventing infection that go beyond the Epidemics Act as massive infringements of human dignity, and continuously questions the legality of the same.

Coercion allowed only
in certain cases

Virological and epidemiological requirements that call for sharply reducing contact do not justify partially circumventing laws and the rule of law as a guiding principle of the Federal Constitution even during a pandemic. Mere recommendations from the health and supervisory authorities and advisory bodies that gave rise to extensive quarantine measures have no normative effect. Restrictions of the freedom to move based on this, which are applied indiscriminately to all residents, were however likely to massively infringe their guaranteed protected areas pursuant to Sections 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms as well as Section 1 of the Federal Constitutional Law on the Protection of Federal Freedom (*Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit*). Care facilities are compelled to immediately report residents who are suspected of being infected or contagious to the competent sanitary authority pursuant to the Epidemics Act. Only this authority shall issue directives but also to enforce mandate and isolation notices in the event of imminent danger. In such cases, the staff shall support the residents in implementing the measures set by the health authorities. The exercising of coercion by members of the health professions is not the intention of die Epidemics Act. On the contrary: if a resident refuses to isolate, the applicable legal situation stipulates accommodation in a medical facility pursuant to Section 7 (2) of the Epidemics Act or isolation using coercive measures by the police pursuant to Section 28a of the same Act. The legality of each of these measures must be verifiable according to due process. In the majority of the cases observed

by the commissions, curfews and quarantine measures were not based on any official directives.

Bans on leaving the grounds of the home or their rooms imposed on residents who observed normalised hygiene standards, contact restrictions, social distancing and wore a mask during the pandemic are always impermissible because they have no legal basis. Furthermore, threats of 14 days of isolation or the termination of the home contract in the event of violation of directives issued by the home management fulfil the criteria for coercion. Without a positive COVID-19 test result or concrete grounds for suspected contamination, freedom-restricting measures for the prevention of infection may only be set pursuant to the provisions of the Nursing and Residential Homes Residence Act. There are usually high-risk patients among the residents and only staff who are protected from the risk of infection can guarantee the operation of the homes. As a consequence, measures that restrict freedom can be applied as a less severe and last alternative pursuant to the said Act to residents who are cognitively severely impaired and not fully capable of controlling their faculties. Such measures shall be reported to the representatives of the residents and persons of trust.

Threats of isolation and termination of the home contract

The AOB contacted the Federal Ministry of Social Affairs, Health, Care and Consumer Protection several times from mid-May 2020 and drew their attention to the legally highly questionable practice. It sought to inform the home operators about the legal situation and to point out that the preventive deprivation of liberty can be avoided through risk management. Due to the large numbers of complaints, the difficult topic was discussed also on the television programme "*Bürgeranwalt*" ("Advocate for the People"). The objective here was not to criticise the management of homes who themselves are stretched to their limits with the emergency situation. Rather the idea was to give an impetus to learn from the experience of the last few months and look for alternatives that are commensurate with human rights guarantees. This was understood in many cases – but not consistently. The Ministry – probably due to the substantial decrease in the numbers of new infections – revised the originally misunderstood recommendations in June 2020 and clarified in a reissue that the restrictions on spending time outside of the home shall not be stricter for the residents than those for the rest of the population.

AOB informs Minister of Health and the public

On the instigation of the residents' representatives associations, there have since been several legally binding court decisions pursuant to the Nursing and Residential Homes Residence Act, which declared the restrictions to freedom to which the residents of retirement and nursing homes were subjected illegal at least in part.

The commissions did not observe any indications of general curfews during the summer but also during the second and third lockdown in autumn and winter 2020.

Autumn and winter 2020

Tests on returning to the home Finally, in the end of December 2020 it was also decreed that after leaving the home for more than two hours an “obligatory explanatory talk shall take place”. It is still not clear in how far this can be implemented in practice.

2.1.4. Strict visiting rules

For persons living in long-term care facilities being able to converse with and touch people with whom they have an emotional bond is a welcome change. In addition to those who want to reassure themselves of the wellbeing of their relatives at least once a month, there are many who offered their support in doing everyday chores several times a week, some of them on a daily basis. For residents with cognitive or mental impairments, the presence of trusted persons alone can give them a sense of security and belonging. If their ability to communicate by speaking gradually deteriorates, it is very helpful if those close to them know how to interpret their facial expressions and gestures and translate them to the nursing staff.

The subject matter of many complaints submitted to the AOB shortly after the pandemic outbreak was visiting bans and restrictions in retirement and nursing homes. Whilst families at home were able to agree on whether and in how far they would practice social distancing with a view to the risk of infection with COVID-19, the residents of care facilities and their relatives were confronted with a *fait accompli*.

Unclear legal basis for visiting bans Between the end of February and the end of April 2020, visits to care facilities in Austria were almost completely banned or conditional on special permit from the home management. Whether the legal basis for these restrictions was appropriate is more than questionable. In most cases, the requests for visiting bans were issued by the respective regional government which justified their actions with existing written recommendations of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. Vienna was the only *Land* to stipulate visiting restrictions in temporary regulation thereby removing the pressure from those facilities that had to implement the same.

New media not a complete substitute for human relationships In the first few weeks of the pandemic, relatives were only allowed to say goodbye to the dying in person. In all other cases, strict measures were enforced to avoid the risk of infection and forbid visitors from entering homes. Only palliative and hospice wards were barely affected by these restrictions. To the credit of those responsible in the homes, it must be acknowledged that in the first few weeks after the outbreak of COVID-19 in Austria there was little knowledge of the already active regional spread of the SARS-CoV-2 virus and there was not enough PPE even for the staff. Much time and creativity were used to compensate for the negative effects somewhat. Residents were helped in using social media and video telephony to an extent never seen before. The staff often had to help out with laptops, tablets and smartphones. It became quite clear that digital media cannot replace physical closeness for those with

poor eyesight or who are hard of hearing as well as those who are cognitively impaired. This is why a home in Vorarlberg encouraged meeting in the garden or through a window from the gym into the garden while observing social distancing at a very early stage. Some permitted visits from a distance, for example, on adjacent balconies or in the form of “fence visits”. One home in Tyrol organised postcards with enclosed reply envelopes for the residents to make easy contact. Regular caregivers in a home in Lower Austria wrote letters together with the residents and enclosed photos for the relatives.

The longer the restrictions lasted, the more criticism was expressed at isolating the residents and shielding them from the desired social contacts. Furthermore, it quickly became clear that this did not help prevent outbreaks of infection and deaths in homes. At the AOB, the numbers of complaints increased from persons who missed their spouse, mother, father or grandparents and feared that they would suffer emotional harm and pass away alone. The management of some homes joined the criticism and demanded political support in carefully reopening their doors without being subject to criminal investigation in the event of COVID-19 infections.

The AOB took up and supported this appeal. The Austrian National Public Health Institute was tasked by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection with developing possible solutions, to which the AOB also contributed content. Due to the considerable fall in cases of new infections, the Ministry issued recommendations for the gradual easing of visiting restrictions in retirement and nursing homes from 4 May and 6 June 2020. There have been no more nationwide visiting bans since then.

Restrictions eased during the summer

The manner in which visits are managed is at the discretion of the individual homes. Appointments for visits in dedicated areas – preferably outside – were possible again from May 2020. Visits in rooms, however, were only allowed in most cases in critical phases of life or supporting dying persons. Commissions observed that inside the homes visitor boxes or berths partitioned by Plexiglas in open areas or cafés had been set up. Many relatives found wearing a mask and maintaining social distancing difficult because they felt that those in need of care who have cognitive impairments or poor sight or are hard of hearing could not be reached emotionally. In some cases, commissions complained that confidential conversations were not possible in the cramped visitor areas. Some visiting regulations reminded the relatives more of a “prison situation”, as the staff was constantly in sight to monitor whether social distancing was being maintained or people were touching. The time allowed for visits also varied greatly depending on the *Land* and home operator. In many cases, the fact that visits by appointment for only one member of the family respectively were allowed and limited to 15 to 30 minutes gave grounds for conflict. In some homes it was clearly noticeable to the commissions that the staff dedicatedly supported the residents allowing them to have contact with their relatives. In this way, around 32 visits were possible per day in a home in Tyrol with the

Regulated visiting

help of volunteers; in another home over 60 visits were possible per day.

Commission 6 criticised that visiting times in a home in south Burgenland were only possible between 12.30 p.m. and 3.00 p.m. Commission 4 questioned why visiting times in a home in Vienna were only possible on weekdays, thus being a barrier to the working population. The management of homes justified this with having to organise visits in such a way that risks are mitigated. They said that advance registration, checks on the day of the visit and disinfecting surfaces after every contact from outside already bound more staff than is currently available. It took quite some time until relatives but also volunteers who had relieved the therapeutic and nursing staff before the pandemic were once again gradually perceived as a supportive pillar in the everyday running of the homes. Reports by the commissions on monitoring visits from July 2020 onwards showed that generally speaking “normal” visiting by advance appointment with registration as well as hygiene standards and obligation to wear a mask was possible in the summer.

Hygiene requirements in the legal standards of the *Laender* not fit for purpose in a pandemic

Strict compliance with hygiene-related preventive measures gained in importance with the sharp rise in the numbers of infections in autumn 2020 and the shifting of opportunities to meet to the indoors. Commissions noted critically in their feedback to those responsible for the homes that compliance with the preventive measures could be better. Commission 3 visited a home in Carinthia in October 2020 in which neither the staff nor the residents and their relatives were wearing masks on the day of the visit. The staff appeared not to be adequately trained in the use of PPE and some did not know where it is stored. The Commission saw a structural deficit in the fact that the provisions set forth in the Carinthian Nursing Home Act (*Kärntner Pflegeheimgesetz*) and in the regulation enacted therein allow that one hygiene officer from the operator organisation is responsible for a total of nine care homes. The AOB noted that a legal comparison of the applicable standards in the individual *Laender* showed that there was little emphasis on infection prevention and hygiene-related regulations (with the exception of Vienna) before the pandemic. Regulations were enacted in Vienna and Burgenland in the late summer that stipulated who is allowed to enter care facilities under compliance with what conditions.

The COVID-19 Preventive Measures Regulation (*COVID-19-Schutzmaßnahmenverordnung*) that came into force on 1 November 2020 (Federal Law Gazette II No. 463/2020) contained binding, nationwide applicable standards for the operators of retirement and nursing homes for the first time. These were tightened with the second lockdown on 17 November 2020 through the COVID-19 Emergency Measures Regulation (*COVID-19-Notmaßnahmenverordnung*) (Federal Law Gazette II No. 479/2020). In December 2020, amendments were added in the 2nd and 3rd COVID-19 Preventive Measures Regulations (Federal Law Gazette II No. 544/2020 and

Federal Law Gazette II No. 566/2020) as well as the 2nd COVID-19 Emergency Measures Regulation (Federal Law Gazette II No. 598/2020).

These regulations from the Federal Government increased infection prevention in view of a number of clusters in care facilities. Furthermore, stricter visiting management as well as test strategies for the nursing staff, the medical and therapeutic staff and also the residents were enforced. Exceptions for specifically defined situations were permitted for relatives and persons who regularly perform supporting and care tasks. The regulations from the Minister of Health expressly state: “The measures for retirement and nursing homes shall not be disproportionate or cause unreasonable cases of hardship”.

Operators must present prevention concept

Temporary visiting bans were imposed in Upper Austria, Burgenland and Carinthia in view of the numbers of new infections being far in excess of the Austrian average. The Upper Austrian regulation (Provincial Law Gazette No. 104/2020) included several broadly formulated exceptions and ceased to be in force again from 6 December 2020. Burgenland made supplementary regulations for the duration of the visits (maximum one hour), conditions for visits in the resident’s room, for coma patients as well as tests after leaving homes (Provincial Law Gazette No. 7472020). The Carinthian regulation (Provincial Law Gazette No. 94/2020) stipulated a complete visiting ban with exceptions for palliative and hospice care. The AOB drew the attention of the Minister of Health and the Carinthian Governor to the fact that the legality and conformity with fundamental rights of the additional restrictions in the regulation are called into question. For example, it was planned from 12 to 21 November 2020 that home operators have to refuse admission to residents if they have spent more than an hour outside the home and were unable to present a negative COVID-19 test result. The AOB is of the legal opinion that residential units in retirement and nursing homes and homes for persons with disabilities are private living quarters, which is why it is not permitted to prevent returning there by means of a regulation.

FFP2 mask and obligation to test

The rapid succession of increasingly restrictive requirements from the Federal Government and individual *Laender* made it almost impossible for the homes to prepare and provide information about the new visiting regulations. From the beginning of December 2020, wearing an FFP2 mask was sufficient for all those who did not have the result of a current antigen or PCR test to be allowed see their relatives in care. From the middle of December, visitors had to present a negative test result and wear an FFP2 mask during the visit.

The tense relationship between infection prevention that is proportionate to the health risk and the right to privacy and family life exists and still has potential for conflict. At least during the nationwide lockdown in Austria from November 2020 there was little scope for extensive easing of restrictions. All of those involved in the care sector but also the general public, the media and relatives must be aware that outbreaks of infection with fatal consequences cannot be 100% avoided in care facilities despite all the efforts made and

precautions taken. In light of restrictive hygienic measures it is even more necessary to accommodate the needs of the residents for comfort, occupation, inclusion and bonding. When it will be possible to supply residents and employees working in long-term care with vaccinations was not foreseeable for the AOB at the time of editing of this report.

2.1.5. "First lane" test strategies for care facilities

As a COVID-19 infection is often asymptomatic, the personnel working in homes is not safe from becoming infected unwittingly. The mandatory regular precautionary testing of the employees of retirement and nursing homes was introduced nationwide from as late as 1 November 2020 with the COVID-19 Preventive Measures Regulation, Federal Law Gazette II No. 463/2020. Prior to that there was no harmonised nationwide strategy. Three million tests for a closely meshed test network in the retirement and nursing homes were secured by the Federal Government for the purpose of expanding the screening programmes focussed on protection of the retirement and nursing homes.

Increase in test frequency

Whilst an antigen or molecular biological test for SARS-CoV-2 was required once a week in the beginning, the prescribed test frequency has since increased. The operators of retirement and nursing homes are only allowed to admit employees who are screened every three days at the latest. Feedback from the personnel to the commissions shows that the willingness to contribute to the increased infection prevention is quite high. However, the nasal swabs used for the antigen tests are perceived as unpleasant and very painful for some. Even if these tests are correctly performed by qualified staff, the nasal mucous membrane reacts very sensitively particularly if there is inflammation. Furthermore, the anatomy in the nose is not the same for everyone and can make inserting swabs up to the nasopharynx problematic.

This is why care facilities in Vienna now use other test methods that do not require medical personnel and are not painful: the gargle test. Unlike the rapid antigen swab test, the gargle test is a PCR test and must be analysed in a laboratory. Another advantage with this method is that it also enables testing for specific virus mutations. The method used to extract sample material was developed as part of the Vienna COVID-19 Diagnostics Initiative (VCDI) and financed through the funds of the Mayor of Vienna and the Vienna Science and Technology Fund amongst others. The screening in the pilot project was conducted on the basis of the Epidemics Act and supported by the medical crisis taskforce of the City of Vienna which also decides on the inclusion of additional operations.

Long waiting times for test results

The rapid execution and analysis of PCR tests is also essential as soon as suspected cases emerge. Long waiting times for the results make implementing appropriate measures difficult and endanger the life of residents who have not been inoculated yet but might have become infected while not displaying

symptoms. In a home in Styria a SARS-CoV-2 infection was diagnosed in a woman by chance after she had been taken to hospital for out-patient treatment. All of the employees as well as the staff were immediately tested by the Red Cross. It was reported to Commission 3 that it took four days to analyse these PCR tests in a laboratory in Salzburg even though the nursing staff had been promised the results within 24 hours. The management of the home had to resort to rapid tests in the interim, of which there were not enough available and some of which produced false negatives. It gradually emerged that 35 out of 73 residents as well as 15 members of the care staff were infected. Twelve persons in need of care died of or with COVID-19 in the home within 14 days.

The AOB requested the Minister of Health and the regional government of Styria for a statement of opinion on how a prioritisation of the analysis of PCR tests from care facilities can be implemented and which concrete steps are being taken to give these facilities the best possible care – in particular, in regions affected by a sharp increase in number of cases. If care facilities have to wait several days for laboratory results, the risk increases that the residents who are not infected cannot be physically separated from those who have been tested positive quickly enough. This also puts the staff at risk – and not least the entire care system.

AOB demands faster analysis of PCR tests

In a nursing home in Mürztal, 90% of the residents were tested positive for SARS-CoV-2 in November; 75% of the nursing staff were also infected or in quarantine (as 1st contact person). The Federal Army had to help out.

In its statement of opinion to the AOB, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection pointed out that test capacity is reserved according to a prioritisation within the limits of the available overall capacity. In the event that there is a bottleneck due to increasing numbers of infections, it is incumbent on the Governor to define an alternative test sequence. Other suitable laboratories can be commissioned for these analyses if the available laboratory resources within the scope of the regional administration are not sufficient. The regional government of Styria requested an extension of the deadline meaning that the content was not clarified at the time of editing this report.

In January 2021, the AOB initiated ex-officio proceedings because according to reports in the media several persons who are not in the high-risk groups managed to receive their first vaccination. In contrast, the residents of care facilities and those over the age of eighty are waiting for an appointment. The AOB rejects the argument that individual persons were vaccinated prematurely because surplus vaccine on-site would have had to be disposed of. It is uncontested that all doses of the vaccine left over at the end of the vaccination day have to be used. But there have to be rules in this situation too. Where there is insufficient vaccine in particular, there shall be waiting lists in place to ensure that the available vaccine is administered only to the prioritised groups nationwide. The goal of the most superior health

Vaccination line jumpers unwelcome

authority shall be to safeguard the implementation of the national COVID-19 vaccination strategy and to proactively prevent any preferential treatment be it due to local influence, personal connections to those responsible for vaccines in vaccination centres or due to other favours.

There was no statement of opinion from the Federal Ministry of Social Affairs, Health, Care and Consumer Protection at the time of editing this report.

2.1.6. Defective protective masks

Defective protective masks – *ex-officio* investigative proceedings

The supply of protective masks of inferior quality to retirement and nursing homes as well as to facilities for persons with disabilities drove the AOB to initiate *ex-officio* investigative proceedings. According to press reports, the masks intended for medical staff with permeability that did not comply with the necessary requirements had been procured by the Red Cross in summer 2020 and distributed to the Laender by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. After taking random samples, the Federal Office of Metrology and Surveying (*BEV*) observed that some batches were defective. The protective masks had however already been delivered and were in use at this point in time.

The AOB considered the following aspects as requiring clarification and addressed the Federal Ministry for Digital and Economic Affairs with these questions:

How many protective masks were defective? When and by whom (in any case, on whose behalf) were the defective protective masks delivered? When were the relevant batches subjected to a random material test by the physical-technical test service or the notified authority for the inspection of coronavirus pandemic protective masks (of the Federal Office of Metrology and Surveying and the OETI certification office – Institute for Ecology, Technology and Innovation) and what was the result? Did the certification office issue a certificate of the test of the masks?

When were (for the first time) quality issues with the protective masks noticed? What was undertaken to rectify this? When and by whom was the return of the defective masks ordered and has this process since been concluded? Where are the defective masks stored and what is going to be done with them? Have the defective masks since been replaced by flawless, certified masks? How much is the financial damage incurred through the return, disposal and replacement of the defective masks?

Centralised procurement process

The Federal Ministry for Digital and Economic Affairs explained that a company had purchased the masks as part of a centralised procurement process for medical products and PPE on behalf of the said Ministry. The Federal Office of Metrology and Surveying examined the delivery in accordance with the “Test principle for coronavirus pandemic respiratory masks (CPA)” and confirmed

that the masks complied with the standards. Another company then certified the masks and confirmed that they fulfilled the requirements of the shortened test procedure pursuant to the decree of the Federal Ministry for Digital and Economic Affairs of 3 April 2020. The certified CPA masks were distributed to the *Laender* in August 2020.

On 19 November 2020, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection informed the Federal Ministry for Digital and Economic Affairs about reservations on the part of a carrier from the nursing and social care sector according to which several of the CPA masks distributed in August had insufficient filter capacity. Examinations showed that in June 2020 masks with different batch numbers had been delivered and mixed. The Federal Office of Metrology and Surveying conceded that some of the masks with a certain batch number had unallowed deviations from the permeability testing principles.

Faulty permeability

The *Laender* were then requested by the *Finanzprokurator*, the statutory lawyer and legal advisor of the Republic of Austria, to put all of the masks from the delivery in question into a quarantine store. The masks were then to be examined by the physical-technical test service of the Federal Office of Metrology and Surveying. The *Finanzprokurator* was tasked with accompanying the matter from the legal perspective and asserting any claims from the procurement against the supplier if necessary.

Defective masks taken out of circulation

2.1.7. Visiting restrictions for comatose persons

Several relatives of comatose patients in a Vienna residential care facility contacted the AOB in May 2020. They were distraught because they had not been or hardly able to visit their children or spouses for over two months due to the COVID-19-related restrictions.

Physical presence and feeling closeness through touch are especially important for comatose patients in particular. They need contact to persons with whom they have an emotional and trusting relationship. Until the beginning of the pandemic, the relatives had taken care of their children or spouse for several hours every day. All of those affected emphasised that the caregivers did tremendous work; however, they naturally cannot spend as much as time or have the same bond as the relatives do. “Therapeutically caring relatives” thus play a vital role in the care of comatose patients.

Relatives are vital in care

In May 2020 in the television programme “*Bürgeranwalt*”, the AOB advocated enabling visits to persons in the coma wards again taking the necessary protective measures. The aunt of a comatose young girl emphasised that the COVID-19 protective and hygiene regulations are of course taken very seriously. She pointed out that every day on which patients experience less mobilisation and care causes a considerable deterioration both physically and emotionally.

Relatives fear consequential damage

Vienna regulation stipulates an exception

Initial easing of the measures from the beginning of June then allowed two to three visits per week for 45 minutes respectively. It was not possible to provide adequate support and care in such a brief period of time. Those affected saw a ray of hope when the regulation of the Governor of Vienna (Provincial Law Gazette No. 38/2020) stipulated that from 1 July 2020 external persons who help in caring for comatose patients shall be granted the access “for the necessary duration of the care”. However, the reality inside the residential care facility saw little change. Even in July and August only three visits per week were permitted. The AOB thus contacted the City of Vienna. The City of Vienna asked for understanding that in the particularly delicate area of the care of comatose patients the visiting restrictions could only be lifted gradually. The increased effort required to manage the visits caused by the COVID-19 protective measures should also be taken into consideration. The management of the residential care facility spoke with the relatives individually about the care of their loved ones. From September 2020, daily visits were – for a maximum of two hours respectively – possible again.

From November 2020, the regulations of the Federal Government (starting with the COVID-19 Preventive Measures Regulation – *COVID-19-Schutzmaßnahmenverordnung*, Federal Law Gazette II No. 463/2020) also declared situational, specific rules for relatives who provide care support as permissible. However, the second lockdown caused disillusionment: visits to comatose persons were only allowed twice a week again.

Solution at round-table meeting

In December 2020, the AOB initiated a round-table meeting with the relatives and representatives of the Vienna Health Association. It was agreed that the care of comatose persons shall be considered as support in critical life events in the sense of the COVID-19 Preventive Measures Regulation and that the general visiting ban does therefore not apply. Now at least four visits per week for two hours respectively or for three hours on one of the visiting days are possible.

2.2. Hospitals and rehabilitation centres

Staying in hospital is a difficult situation for people. In addition to the physical and/or mental suffering, there comes the feeling of helplessness. Visits from close persons have a comforting effect on most patients. However, visits in hospitals were not possible or only to a limited extent for a long time due to the COVID-19-related restrictions. The generally stressful situation was thus worsened for the patients.

The dichotomy between fundamental and human rights on the one hand and the protection of the patients and the health care staff on the other was a topic addressed by the AOB commissions. In the year under review, the NPM commissions visited 28 medical facilities, including 19 psychiatric

and 9 somatic clinics or departments. The observations of the commission are explained in the following chapter 2.2.1.

2.2.1. Dealing with COVID-19 measures

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection and the *Laender* agreed on visiting bans in order to maintain the operability of hospitals during the pandemic. There should only be exceptions for small children and dying persons. These bans came into effect in Vienna, Styria, Burgenland, Upper Austria, Lower Austria, Carinthia and Tyrol shortly before the shutdown imposed in March 2020. This was not the case throughout Salzburg or Vorarlberg. Written recommendations on COVID-19 preventive measures in hospitals were published by the Ministry on 31 March 2020. These did not explicitly mention visiting bans; however, the objective to keep the number of visitors as low as possible was stated. Only Vienna issued a regulation prohibiting visitors from entering hospitals, residential and nursing homes as well as nursing wards on 14 April 2020. All of the other clinics referred to board resolutions of the hospital operators or their house rules. The feared masses of COVID-19 patients did not materialise in spring 2020; all of the planned treatment had been postponed. Visiting was managed more generously with appointment systems from May, but greatly restricted towards the end of the year because of a sharp increase in the number of new infections. The AOB received many individual complaints on this topic. There was consensus in the AOB that the right to receive visits can be restricted to stop the spread of COVID-19, but a general visiting ban should never be imposed.

Strict visiting rules from
March 2020

Apart from that, commissions were mainly positive about the way in which the visited hospitals and psychiatric institutions and psychiatric departments handled the pandemic-related protective measures.

In the department for chronic patients at the Clinic Klagenfurt, the standard operating procedures for the prevention of spreading the SARS-CoV-2 virus were ideally formulated according to Commission 3. The preventive measures were well chosen, and PPE and PCR test kits were in sufficient supply throughout the first lockdown. The staff did their best to substitute services and therapies that could not be provided temporarily using a pooled approach to the therapeutic service.

A monitoring visit by Commission 1 to the Department of Child and Adolescent Psychiatry at Hall Regional Hospital indicated that the minors were well informed about the risks of spreading the virus and precautionary measures. In addition, they were still allowed to go outside.

However, Commission 1 observed on this visit to the Department of Child and Adolescent Psychiatry at Hall Regional Hospital that newly admitted patients who were not suspected of being ill were isolated until a negative PCR test

Isolation measures at
Hall Regional Hospital

could be presented. This took up to 30 hours. This is not proportionate for minors with mental issues.

Restrictions of freedom against the will of those affected are only permissible under Austrian constitutional law in the exceptions mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and the Basic Law on the General Rights of Nationals (*Staatsgrundgesetz*) for the protection of personal freedom, and then only based on statutory authorisation. The management of hospitals is not authorised to impose preventive regulations that restrict freedom.

No legal basis There is no statutory basis for the isolation of patients without medically verified suspicion of disease to be found in the relevant regulations in the Hospitalisation Act, the Epidemics Act and at most the COVID-19 Preventive Measures Regulation. Quarantine imposed by way of notification by health authorities could not be deduced from the documents viewed by Commission 1. There were also no reports to the patient advocacy of this type of isolation as a measure that restricts freedom.

Insufficient outside contacts during the lockdown Furthermore, the commission took a critical view of the existing telephone times during visiting bans and restricted visiting hours. Patients were only allowed to use their mobile phones between 11.00 a.m. and 12.00 p.m. as well as between 5.45 p.m. and 6.45 p.m. During the first lockdown, few visits were possible. In spite of complaints, the telephone times were not extended.

From the point of view of the AOB, telephone times for minor patients should be extended especially when visiting had to be limited due to the pandemic, in order to ensure that contact to trusted persons remains intact.

IT equipment inadequate The AOB took a critical look at the IT equipment on a monitoring visit to the Department of Neurology and Psychiatry in Childhood and Adolescence at Clinic Klagenfurt. The availability of electronic devices and internet access were inadequate, which is why it was not possible for the patients to have video contact with their relatives. It was not even possible to hold proceedings under the Hospitalisation Act per video conference in a timely manner.

Court cases on involuntary hospitalisation were expressly exempted by the legislators from the waiver of legal proceedings deadlines (Section 1 (1) First judiciary law accompanying the COVID-19 Law (*1. COVID-19-Justizbegleit-Gesetz*) (see Barth, *COVID-19 und die Folgen für familienrechtliche Angelegenheiten und den Gerichtsbetrieb*, iFamZ 2020, issue 2, p. 68 et seq.). The possibility of using video telephony or other forms of communication was expressly defined in the legislation in order to facilitate the rapid and risk-free participation in and holding of the proceedings without personal attendance.

The recommendation of the AOB for an immediate improvement of the technical equipment was followed by enabling the department to hold all assistants conferences, work meetings and also patient contact online.

Based on the observations of the AOB commissions as well as of some of its members in a working group, the Human Rights Advisory Council also dealt with the COVID-19 preventive measures to be set, and provided a basis for discussion. This was considered suitable for publishing and is available on the AOB website.

2.3. Institutions and facilities for persons with disabilities

Within the framework of preventive human rights protection, the AOB commissions carried out a total of 93 monitoring visits in institutions and facilities for persons with disabilities in 2020. The way in which the challenges posed by the pandemic were dealt with was made the focus of these monitoring visits by the commissions due to the many individual complaints received by the AOB on the topic.

Persons who live in institutions and facilities and/or work in day-care centres were particularly affected by institutionally imposed COVID-19 protective measures. Not all of these persons are in risk groups due to existing chronic conditions per se, meaning that they would be expected to experience a serious case of COVID-19. That “higher safety standards” should apply to persons with disabilities and their rights to freedom have therefore to be more severely restricted than those of the general population is an expression of a paternalistic attitude that must be overcome, especially in times of crisis, according to the UN Convention on the Rights of Persons with Disabilities (CRPD). The fact is that for a long time information on infection and protective measures was not available in simple language as well as in barrier-free forms for those who have hearing problems, poor eyesight or both. From March 2020, rigorous curfews and visiting restrictions were imposed nationwide and many day-care centres closed as a precautionary measure, which was tolerated by the politicians. The loss of meaningful activity and occupation, the loss of all counselling, contact and leisure programmes outside of the institutions and facilities as well as the restrictions of the freedom to move resulted in massive disruptions in the routine of many persons with disabilities, which in some cases included availing of therapeutic support.

Persons with disabilities in institutions and facilities particularly affected

The view that social contacts as well as care and therapy programmes have to be maintained even during a serious health crisis gradually prevailed, although the vulnerability to disorders in the psychiatric area for persons with disabilities under existing environmental conditions already results in up to four times higher rates and an earlier outbreak of illness than in the general population. This poses a special risk in an emergency situation such as during a pandemic. All restrictions of freedom and measures that isolate physically and socially pose a serious risk factor for persons with disabilities. They accelerate the loss of competence in practical everyday life and can cause physical and mental disorders, in particular depression and anxiety. Even if there are no

Isolation leads to mental complications

health problems, conflict with other residents and staff can escalate more easily. Furthermore, negative feelings such as sadness, irritability or anger foster problematic behaviour and can cause an intensification in stereotypes as an expression of inner distress and uncertainty.

Persons with disabilities under-represented in crisis management groups

As early as April 2020, the Monitoring Committee of the Federal Government as well as the offices in the *Laender* that are entrusted with comparable tasks, the Austrian Disability Council, self-representation organisations and the AOB unanimously pointed out that it must be possible for persons with disabilities to participate in the COVID-19 crisis management groups set up by the Federal Government and the regional governments. If this is not the case, these advisory bodies will not have the expertise required to accurately estimate and balance the effects of measures on persons with disabilities. The request for real participation was only fulfilled hesitantly and only in some *Laender*.

All of the AOB commissions were aware in the spring that the pandemic situation would be challenging for residential institutions and facilities – particularly in the first few weeks after the outbreak of SARS-CoV-2 infection in Austria – where there was no “template” for the correct approach. It would have been all the more important to use the self-determination and the rights of persons with disabilities as the starting point for all considerations and actions. Some institutions and facilities were more successful at this than others.

Great dedication of the care staff

According to observations made by the commissions, the staff made remarkable achievements thanks to their extraordinary personal dedication during this unprecedented time. Confronted with a crisis situation scarcely imaginable and without preparation, the employees had to react quickly to changing circumstances, often improvise and expose themselves to an increased risk of infection after outbreaks in the residential institutions and facilities. Furthermore, they had to compensate for absenteeism due to quarantine directives. The AOB would like to express the highest regard and respect for all of the employees.

It is undisputed that clear legal and practical rules for proportionate measures are necessary to overcome crisis situations. Neither the departments of the regional governments set up for facilities for persons with disabilities nor the health authorities approached the operator organisations to offer target-group support in residential homes and groups and discuss general conditions (infection protection, PPE supply, potential emergency care, quarantine measures).

Diverse challenges

There was already emphasised in the NPM Report 2019 (pp. 98 et seq.) that persons with disabilities are exposed to an increased risk of violence due to their greater vulnerability. This was highlighted as the result of a research study as well as the many years of observations by the commissions. The risk

most certainly did not decrease with the (mental and physical) challenges to the care situation during the pandemic.

The AOB points out that the failures of recent years can have an even stronger impact during the pandemic. The AOB would thus like to emphasise once again the importance of violence prevention, supervision to relieve the staff, and the safeguarding of medical care even in more isolated institutions and facilities, and the exploitation of all expedient communication channels.

2.3.1. No clear guidelines for institutions and facilities

To obtain detailed information on the situation in the individual *Laender*, the AOB carried out an *ex-officio* proceeding in summer 2020. A detailed questionnaire was sent to the *Laender* subject to its monitoring mandate. The objective was to learn which hygiene and protection regulations were recommended for the residential institutions and facilities and day-care centres, how the appropriateness of exit and visiting regulations is ensured, which guidelines were applicable in relation to suspected cases and what support was provided to enable the clients to have more contact with their social environment. The AOB called for an improvement in information, in particular for persons who are intellectually challenged. Some complaints from several operator organisations were also taken up, who feared being unable to continue running their operation because of a lack of clarity regarding short-time work regulations or the limited availability of staff due to being in a risk group.

The feedback from the *Laender* showed a wide range of different measures. It became clear that the institutions and facilities had been given a large number of non-binding recommendations but hardly any clear guidelines for preventive concepts and for dealing with suspected cases. Initially, it was not clear to the management and the employees of the institutions and facilities how they should proceed in this emergency situation and which standard of due care had to be complied with for infection prevention measures. This is extremely problematic in the view of the AOB. Within the framework of the general duties of protection and due diligence, measures shall be set by both the State and the institutions and facilities for persons with disabilities in order to avert risks to the life and the health of the residents as well as of the customers of partial resident services – while observing human dignity and the right to self-determination. Fundamental rights theory in Austria calls for a situational weighting. In this context, the value of the purpose of the severity of an infringement must be compared with the degree of goal achievement. It is necessary to compare different courses of action with each other and choose the option with the least harm. When authorities or operator organisations simply impose blanket recommendations on care institutions and, in addition, subordinate all other fundamental and human rights to the protection of health, care institutions are inevitably forced into critical dilemmas of a

Lack of binding directives

constitutional, liability-related and criminal nature (see Klaushofer et al., “Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus”, 2020, in *Zeitschrift für Öffentliches Recht*, volume 75, p. 120).

The AOB and its commissions already made clear before the end of the first lockdown that there is no objective justification for isolating persons with disabilities for their own protection – whether they want it or not – as a precautionary measure and to uphold curfews when public life is gradually returning to normal for the rest of the population. The idea that one simply has to isolate risk groups and minimise their personal contacts during the pandemic in order to be able to continue with economic and social life faster was also rejected.

Persons with disabilities
not automatically high-
risk group

In early summer, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection issued two recommendations for institutions and facilities for persons with disabilities in the *Laender*, to which the AOB also contributed. These emphasised that persons with impairments shall not be assigned to a risk group simply because they have disabilities; this shall be examined individually as with all persons. They also stipulated that measures for the protection of residents of institutions for persons with disabilities shall not be excessive (Recommendations of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection of 29 May 2020 and 18 June 2020).

Obligatory risk-based
prevention concepts

Several AOB interventions on different levels were necessary before the competent ministry, as part of the COVID-19 Preventive Measures Regulation (*COVID-19-Schutzmaßnahmenverordnung*) from November 2020, standardised a legal obligation to develop and implement COVID-19 prevention concepts for the owners and operators of institutions and facilities for persons with disabilities, which are based on risk analyses and reflect leading-edge science.

2.3.2. Massive curfew and visiting restrictions

The core of the lockdown in spring was the instruction by the Federal Government to the population to reduce personal contact as much as possible with persons who do not live in the same household. Entering public space was – with a few exceptions – forbidden. (This ban was subsequently nullified by the Constitutional Court of Austria as unconstitutional). This of course also applied to persons with disabilities who live in institutions and facilities. The lockdown regulations allowed going for a walk, taking care of important errands or visiting doctors’ surgeries, for example.

The residential institutions and facilities for persons with disabilities were faced with problems due to these exceptions to the curfews. Additional qualified staff was not available; in the beginning, there was a lack of PPE – as there was in the nursing homes. The winding down of medical services as part

of the COVID-19 crisis management in the hospitals increased the concern that a crisis could become unmanageable and both symptoms of COVID-19 infection and signs of deterioration could be overlooked. In conversations with commissions, the fear was expressed that outbreaks of infection starting with individual residents of large institutions would be more difficult to bring under control than those in small, closed residential groups. There was doubt that these persons could move in the public area without being a risk to themselves or others. The staff that performs care close to the body for clients with multiple disabilities should also be protected from an increased risk that could have brought the existing care system to its knees. On the other hand, it was already clear in spring 2020 that staying and meeting outside supported by other precautionary measures such as social distancing and wearing a mask bear a lower risk of infection than larger groups of persons staying inside only.

A number of institutions and facilities decided to take the drastic step of minimising the risk of infection by imposing curfews. Residents were not allowed to leave the buildings during the lockdown. Visits from families or friends were not possible.

The freedom of persons with disabilities restricted in particular

This extreme situation could be alleviated in institutions with gardens that were available for outdoor exercise. Other institutions allowed talking accompanied walks outdoors. However, this was not always the case.

Decision-makers overlooked in many cases that they bore the responsibility for the safety of the clients, but not only the general lockdown regulations had to be observed. The (constitutional) legal provisions under which measures that restrict freedom are allowed to be set still apply during a pandemic.

Legal requirements not fulfilled

Restrictions of freedom against the will of those affected are only permissible in the constitutionally defined exceptions and only on the basis of a legal authorisation (see Klaushofer et al., *„Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus“*, 2020, in *Zeitschrift für Öffentliches Recht*, volume 75, p. 118).

For the justification of curfews during the COVID-19 pandemic, the Nursing and Residential Homes Residence Act (*Heimaufenthaltsgesetz*), the Epidemics Act (*Epidemiegesetz*) and at most the COVID-19 Measures Act (*COVID-19-Maßnahmengesetz*) can be considered. The above-mentioned guidelines are executed by the administrative authorities. If there are no such official guidelines (by decree or regulation), there is no basis for a measure that deprives liberty. The application of the Nursing and Residential Homes Residence Act on the other hand can only be considered for persons with mental disabilities or mental illness. According to this Act, a curfew could only be justified if the affected person is at risk of harming themselves or someone else and there are no other milder, expedient alternatives available. But even if these conditions were fulfilled – which is doubtful in most of the cases where curfews were

Legal basis for measures that restrict freedom is requirement

imposed, a procedure shall be complied with: the measures shall be reported to the representative(s) of the residents without delay. If this does not happen, they are illegal for this reason alone.

Forbidding persons from leaving their place of residence or making it impossible for them to do so constitutes a measure that restricts freedom and can only be applied under the conditions mentioned above. That staff are trained in this matter – regardless of COVID-19 – should be obvious.

Measures that restrict freedom often not justified

Regrettably, the NPM commissions observed several times where no careful consideration was made of whether a measure that restricts freedom is proportionate. In some cases, the measures were also not reported to the representative(s) of the residents. This means that the affected persons were subjected to measures that restrict freedom which were not legally justified.

Even if institutions and facilities had the best of intentions and no experience with such a pandemic and their staff were stretched to their limits, diverging from the legal framework for serious infringements of fundamental rights is unacceptable. In many cases, the measures constituted a disproportionate restriction of fundamental and human rights, in particular the right to personal freedom pursuant to Article 5 of the European Convention on Human Rights (ECHR). This was also confirmed in court decisions according to which residents of institutions shall be given the opportunity to leave the shared accommodation accompanied by one person up to six times per.

The drastic curfews and visiting restrictions in the residential institutions and facilities meant that many younger persons with disabilities in particular left their residential institutions during the first lockdown and were taken care of at home by their families. This meant not only enormous strain for the relatives. The subsequent return to the institutions turned out to be difficult because in the beginning many institutions only consented to a return if the affected persons agreed to several days in quarantine. They were not even allowed to leave their room to eat during this time.

Some institutions made visits possible

It should not be left unmentioned that some institutions and facilities also reacted flexibly during the first lockdown and allowed visits. It was thus possible to meet relatives in the garden and in the garage observing the hygiene guidelines in a facility in Lower Austria, for example.

Easing of restrictions

The visiting regulations were eased gradually from May 2020. Table visits with masks were possible and, from the summer, staying the night with relatives was allowed again in some cases. That the lifting of restrictions after the first lockdown took too long was conceded even by several representatives of institutions in conversations with the commissions.

The AOB and its commissions urgently recommended the institutions and facilities to plan concrete measures in time for the event that the number of cases increases and with it the risk of infection as well as the re-introduction

of stricter measures. These should facilitate an individually appropriate and proportionate way of dealing with curfews and visiting restrictions in the future.

Examples of such measures could be: the personal definition of individual liberties or restrictions based on the competence of the respective person in handling the prescribed social distancing and hygiene measures; for those residents who are unable to comply with the prescribed safety measures without help, a programme for regularly going outside accompanied 1:1 should be set up.

Define protection measures individually

The Human Rights Advisory Council demanded the creation of dedicated visiting areas in which an adequately secured meeting for “high-risk groups” should be possible. Visiting times should be flexible, the duration of visits not too short and visits of at least two persons (e.g. both parents, siblings etc.) should be facilitated. PPE should be provided and registration for contact tracing carried out. The Human Rights Advisory Council also emphasised the necessity of a sense of responsibility on the part of the staff (incl. those doing civilian service) in order to prevent the infection being carried into the institutions and facilities where possible.

Persons with disabilities also have the right to make their own decisions. It would be discriminatory to ascribe persons with cognitive impairments a higher probability of risk for “wrongdoing” as a matter of principle. Experience has shown that there is no difference in how persons with and without disabilities abide by or disobey orders and recommendations. After the progress made in the area of inclusion, the pandemic shall not provide any justification for isolating persons with disabilities more than the general population. They too miss social contact, leisure, sports and shopping trips.

2.3.3. Closed day-care centres

Curfews in residential institutions and facilities were also due to the fact that day-care centres remained closed in the first weeks and months of the lockdown. This meant that important care programmes during the day were missing. For persons with cognitive impairments in particular these occupational opportunities are very important and provide a structure and bring stability to their daily routine. The discontinuation of these programmes can have a more severe mental impact than with persons without such impairments.

Loss of daily structure

But the challenges also increased for all of those who provide care – whether professional staff in residential institutions or family members providing care at home. In many cases, basic care that was broken by the daily structure had to be changed to 24-hour care. This caused considerable strain that was difficult to alleviate.

Examples of good practice The day-care centres dealt with this situation very differently. Whilst some institutions and facilities had only little to no contact with their clients during the closure, others went to great pains to maintain contact during this time. The manager of a day-care centre thus had regular contact to the clients and their relatives. She reported that after a few weeks the strain on some families with the 24/7 care of their relatives became increasingly evident. For this reason, she offered her advice to the relatives. Letters to the relatives were written regularly in another facility.

The commissions had very positive reports of cases in Lower Austria where the daily structure staff came to the respective residential institutions and facilities to provide support service. Personal contacts could be maintained and the staff relieved in this way.

Maintaining contact with caregivers The NPM shares the view that the temporary closure of day-care centres should not result in the complete break in contact with the clients and their families. Those affected need a minimum level of contact with their familiar caregivers. In addition, relatives who now have to shoulder the care of their family members alone need help and support. To this end, all of the technical channels available should be used to maintain contact and inform those affected about further steps in such unprecedented situations.

Some day-care centres remained open In isolated cases, day-care centres remained open during the first lockdown. For example, the shop was closed at a daily structure in Salzburg, but the adjoining day-care centre remained open from mid-March to the end of May 2020. Residents of the adjacent residential building and external clients were divided up in the day-care centre in the residential building and the shop. Mingling of the groups should be avoided as much as possible.

The change of group brought about by the COVID-19 measures also had positive aspects. Thanks to the change it was possible for the clients to become familiar with other work areas and some were delighted to perform new jobs.

Another day-care centre in Salzburg was also open during the first lockdown to give at least one client care during the day. The parents of the man both worked in system-relevant jobs and were not able to take care of him during the day.

Difficulties with re-opening The approaches to re-opening the day-care centres also varied greatly. Whilst some institutions and facilities developed their own concepts for the gradual scaling up of the day-care centres and informed the affected persons, other institutions re-opened in an unstructured manner. In any case, it is clear that many persons with disabilities had to stay at home or in their residential facility for too long.

One day-care centre was praised for setting up an isolation station. In this way, operation could be taken up again while minimising risk at the same time.

It was not understandable for many of those affected that they had to continue paying fees during the lockdown and only a credit was announced.

Commissions reported very positively that day-care centres continued to pay pocket money during the closure, so that there was no drawback for the clients at least in this respect. (e.g. Vienna 2020-0.508.811, Lower Austria 2020-0.505.268)

The imminent loss of his place in a day-care centre for a young man evoked complete consternation. His day-care centre had been closed during the first lockdown and after the gradual re-opening the centre advised him not to return, as members of his family are in a risk group. The day-care centre informed his parents in autumn 2020 that in accordance with the guidelines of the Land he is not allowed to return, as he had lost his entitlement to care. This was justified with the argument that the care expires automatically according to the statutory provisions if it – for whatever reason – is not availed of for more than six months. That this should also apply to the situation in which the centre was closed due to the coronavirus pandemic and was not visited for safety reasons on the recommendation of the facility was fully incomprehensible for the affected family and the AOB. The *Land* announced that it would endeavour to get the man his place back in the day-care centre when it is possible for him to visit it again. However, this uncertainty is unacceptable for those affected.

Imminent loss of place
in day-care centre

Although the day-care centres were open during the lockdown in autumn 2020 – unlike in the spring – several relatives raised complaints. They reported that they or the clients had been requested to voluntarily forego the care programme until the rate of infection eases. In particular, elderly parents of persons with disabilities but also larger families thus felt they were under pressure and subjected to overloading their resources.

On the other hand, day-care centres showed flexibility when planning their programmes in the face of an increasing risk of infection. For example, morning and afternoon groups were formed in a facility in Burgenland in order to reduce the number of persons present simultaneously and thus the risk of contagion. In other facilities in Burgenland, groups were divided up and thus had the opportunity to maintain the existing daily structure on Mondays, Wednesdays and Fridays or on Tuesdays and Thursdays. The days were then alternated the following week.

2.3.4. Round the clock in the shared accommodation

During the first lockdown, the day-care centres were closed from mid-March to mid-June 2020 and only opened gradually thereafter. However, reports from the commissions indicated that in autumn 2020 too some day-care centres were closed again. In addition to the curfew and visiting ban, this meant that

persons with disabilities who live in residential facilities had to spend all of their time in their facility without exception.

The closure of the day-care centres was particularly problematic in institutions and facilities with little space. There was nowhere else to go, which caused increased tension between the residents. Where available, gardens were of course used. In other cases, facilities organised 1:1 walks.

Efforts to plan diverse activities during the day

In some cases, more intensive care was possible because some of the residents were living with their families again. This meant that fewer persons had to be cared for thereby freeing up staff resources. However, this was not the norm.

Commissions reported that the residential institutions and facilities tried to adapt the daily planning, to intensify activity programmes and individual care, and thereby to compensate the absence of day-care centres. The commissions reported of individual daily plans which served to address specific wishes and needs of those affected.

However, not only the cramped conditions but also the “social distancing” in general created problems for many persons with disabilities. They perceived the restricted bodily contact as difficult in particular. This is, above all, problematic because many persons in residential institutions and facilities do not live with a partner but at the same time have a great need for bodily contact.

Adequate information imperative

Persons can usually orientate themselves better in emergency situations if they understand what is going on around them and how they should behave. This applies to persons without disabilities in the same way as it does to persons with disabilities. It is thus imperative that persons with disabilities in care are informed in an adequate way about the pandemic, what behaviour is expected of them and what next steps are planned. The AOB has repeatedly criticised in the past that too little attention is paid to expedient communication in many institutions and facilities. In particular, non-verbal persons with multiple disabilities in some institutions are barely informed about activities, events or news in their surroundings. This problem was exacerbated during the pandemic.

Examples of good practice

At the same time, there were quite a few positive examples of institutions and facilities that dealt with this topic very well. In one facility, the residents received daily “Corona News” in simple language. In other institutions, hygiene measures in the form of pictures were displayed in the hallways. Training sessions on how to wear a mask properly and on other protective measures were held. Numbering systems for washing hands or traffic light regulations with behavioural rules were observed by the commissions.

Loss of social contacts

The opportunities to meet up with people outside the institutions during the lockdown were very limited or in some cases completely ruled out. Commissions reported that many cared for persons were not able to meet their families for

three months. Other social contacts that are possible in everyday situations such as when shopping, visiting a bar or events were sorely missed by those affected too. Many institutions tried to use electronic media to maintain contact with families and friends as much as possible. This worked very well in some cases, in others less so.

The additional activities also required staff resources, however. In some cases, the staff in residential institutions and facilities were supported by colleagues from the closed day-care centres. In other cases, fewer clients had to be taken care of than usual because some spent the lockdown with their families. This even facilitated improved, more individualised care.

More staff – better protection of fundamental rights possible

But there was not always sufficient staff available. The residential institutions and facilities were often supported by staff from the closed day-care centres. But this was not the case everywhere. In addition, there were staff shortages when employees were in a risk group and could not work.

In one residential facility for example, all twelve elderly residents were cared for by a single caregiver from 8.30 a.m. to 1.30 p.m. The commission emphasised that this precarious staffing resulted in an unacceptable strain on both the care staff and the cared for persons. They need adequate relationships and activity programmes to compensate for the absence of external contacts. Furthermore, they often need more support in coping with everyday situations because of their age. These requirements cannot be fulfilled with one person working alone.

The operator of the facility argued that they had consciously avoided support from day-care centres at the beginning of the pandemic for fear of infecting this particularly vulnerable group of persons. Both knowledge of the pandemic and awareness of the rights and freedom of persons with disabilities have since improved, which is why the operator would act differently in the future.

It is positive that there was a change of awareness during the pandemic. However, it is also important to take precautions in good time in order to avoid care gaps in the event of new crisis situations.

2.3.5. Lack of PPE and too little information

According to many institutions and facilities, they did not have sufficient PPE at the beginning of the coronavirus pandemic. “We always worked with the fear that it would run out”, said the manager of a residential facility for persons with disabilities. This improved over time. In many cases not enough PPE could be organised. Some institutions received no FFP2 or FFP3 masks until the summer. Some of the batches of protective masks delivered in the summer proved to be of inferior quality. The AOB thus initiated *ex-officio* proceedings (for more details see chapter 2.1.6).

Some institutions and facilities were very flexible and innovative. They tried to sew masks themselves when there were problems with supply, in order to guarantee a minimum level of infection prevention.

Rapid availability of PPE imperative

In order to be able to ensure the standards of hygiene necessary to reduce infection in crisis situations in the future, the rapid availability of PPE should be guaranteed. Some owners and operators of institutions and facilities have since started to build up central stores. This, however, is easier for larger service providers than for smaller operator organisations. The public administration should support owners and operators of institutions and facilities in crisis situations accordingly.

Clear information on protective measures necessary

But not only the procurement of hygienic PPE posed great challenges for the institutions. The information on using the PPE and on other hygiene and protective measures was perceived as insufficient by the staff in several facilities. In some cases, there was no hygiene training at all.

Some institutions and facilities saw the responsibility for inadequate information management with the respective *Laender*. They felt abandoned in the beginning. They complained that there was merely information on statutory provisions available but that they had received no concrete directly applicable guidelines or support. For example, a COVID-19 guideline for psychosocial and addiction-oriented institutions and facilities written by a *Land* was only presented in October 2020.

Examples of good practice

The commissions, however, also reported about very positive cases in which institutions recruited a hygiene specialist or organised hygiene training to be able to deal with difficulties in the best possible way.

According to the commissions, hygiene training at least should be guaranteed nationwide. Moreover, the owners and operators of the institutions and facilities should be given clear instructions on how to deal with suspected COVID-19 cases and sufficient tests should be provided for the residents and staff. This is also relevant for future crises.

Excessive protective measures in some cases

However, even when there was sufficient PPE there were grounds for criticism. Some protective measures were generally perceived as excessive by those affected. For example, in one facility residents had to wear a mask when going outside, even for a walk on a lonely country path.

Some institutions and facilities responded to criticism by the commissions and the AOB merely with the remark that particularly high safety precautions are important because persons with increased health risks live or work in the facilities.

The obligation to wear a mask by the staff was perceived as obstructive in care work. The cared for persons are thus barely able to read the facial expressions

of their caregivers which means that an important means of communication was lost.

2.3.6. Access to medical care

Persons with disabilities shall have the same access to medical care in the event of COVID-19 infection as persons without impairments. Disability shall not result in being at a disadvantage when it comes to medical care. In no way shall a disability be an exclusion criterion in the event of a possible triage system. More specialisation and under certain circumstances a higher allocation of resources can be necessary to enable equality here.

Ensure equal access

For persons with considerable and complex assistance needs, the trusted persons who support them should also be allowed into the hospital. Needless to say, the desire and willingness to receive treatment shall be respected. The AOB follows the relevant requirements of *Lebenshilfe Österreich*.

The commissions reported that residents had different experiences with medical care during the pandemic. Whereas in one of the facilities visited in Vienna a general practitioner held surgery hours in the same building and was therefore available at all times, others reported that doctors' visits were stopped completely. General practitioners were often reachable by telephone, there were, however, few house visits.

Medical and therapeutic care limited

In this context, the AOB would like to point out that there were problems with medical care in some institutions and facilities even before the pandemic. There was an extreme case of a facility in which a doctor prescribed all of the psychotropic medication once a year for twelve months and made no further house visits and had no other contact with the patients after that. It cannot be satisfactory if the availability of medical care continues to decrease during a pandemic. The public administration has to develop concepts here to provide persons who live in such facilities equal access to medical care.

What complicated the situation further during the pandemic was the fact that external therapies had to be cancelled or postponed. In this context, the AOB would like to refer to a recommendation of the Human Rights Advisory Council which emphasised that during the COVID-19 pandemic health care includes therapeutic programmes such as physio, logo and psychotherapy. A pandemic plan must thus include how these programmes can best be maintained while observing hygiene standards.

2.3.7. Prevention of violence

The lockdown was extremely difficult for persons who have aggressive outbursts and display particularly challenging behaviour because of their disability. The residents experienced great uncertainty due to the continuing

emergency situation, the almost complete loss of social contacts and being “locked up” in the facility.

Increased potential for aggression due to emergency situation

Several institutions and facilities reported that some of the residents’ potential for aggressive behaviour increased during the lockdown. Persons became increasingly nervous, displayed stereotypical behaviour and shouted a lot. There were also reports of physical violence towards other residents and the staff. The situation was exacerbated by staff shortages in some facilities.

Since 2012 commissions have been regularly highlighting that persons with disabilities are at a greater risk of being subjected to violence due to their vulnerability. The AOB reported last year about the representative results of a study on violence experienced by persons in facilities for persons with disabilities.

According to the study, almost eight out of ten of the persons with disabilities interviewed had experienced violence and four out of ten had been subjected to severe violence. One out of ten persons had been subjected to serious physical violence in the last three years, whereby the risk is particularly high for persons with increased assistance needs, for example, with body hygiene. Analysis shows that this is attributable to care-relevant types of violence. More than eight out of ten persons with disabilities had experienced emotional violence in their lives.

Violence prevention measures more important than ever

The study also identifies a wide range of risk and protection factors specifically for girls, women and men. Analyses show amongst others that there are reports of experiencing violence far more frequently in institutions and facilities with fewer care staff. If there is little time for person-centred care, the risk of violence is evidently high.

Particularly important for preventing violence are social contacts, trusted persons, person-centred care concepts and support forms that enable the cared for persons to participate in and lead a self-determined life.

Most of the risk factors identified in the study increased during the lockdown. The commissions did not observe a significant increase in incidents of violence on their monitoring visits; however, the reduction in risk factors in “normal times” shall be pushed more fervently in the future in order to be better prepared for emergency situations.

2.4. Child and youth welfare facilities

Pandemic stresses children and adolescents in particular

Children and adolescents were and continue to be particularly affected and stressed by the measures taken to counter the COVID-19 pandemic. Their rights to social contact, social participation, playing as well as pre-school and school education were and still are severely restricted due to the closure of schools, playgrounds, sports grounds, clubs and societies and due to curfews.

Unlike adults, their development is impeded and they suffer additional deficits that are difficult for them to compensate. All of this applies even more to children and adolescents in the custody of child and youth welfare services, as they cannot grow up in the security of a family.

The NPM commissions visited 102 child and youth welfare facilities in 2020. As on the visits in previous years, major differences in quality in the individual facilities were noticeable. There is a very clear connection between the staffing ratio and the quality of care. Structural deficits caused by understaffing can only be compensated by the high level of dedication of the staff for a short period of time. This was clearly evident during the first lockdown in spring 2020 as well as when there was a considerably higher risk of infection in autumn 2020. Facilities with a low staffing ratio found it far more difficult to overcome the crisis. Existing weaknesses worsened as a result of the increased effort required during the pandemic.

Existing structural deficits exacerbated by coronavirus crisis

2.4.1. Challenges of the COVID-19 pandemic

The frequent school closures resulted in the pedagogical staff in the child and youth welfare facilities having to provide learning support in addition to their care work. This, in itself, already major challenge of providing learning support for an average of ten children and adolescents was exacerbated by the fact that in many shared accommodations the full team could not be scheduled for work. Many employees were excused because they are at risk or were temporarily unavailable because they were in quarantine or on sick leave. The rest of the team was thus under considerable strain. Furthermore, it was difficult to organise a daily structure for the children and adolescents. This resulted in increased media consumption by many children and adolescents which was difficult for them to stop once the schools re-opened.

Learning support with less staff

Several major owners and operators who, in addition to full residential care, also offer non-residential family support or daily structures, were able to transfer the personnel, as these services were closed due to the lockdown. Some shared accommodations provided an additional member of staff to take care of home-schooling. In Burgenland, covering the cost for this was initially approved by the specialist department but then not paid. Many shared accommodations then decided to continue sending the minors to school to be looked after. In shared accommodations in other Laender, there was help from persons doing civilian service or on internships. This had little effect on the high workload for those performing the work.

Promise to bear cost not kept

The situation was particularly bad in facilities where the staffing was already tight. Facilities operated by the *Land*, in which the employment plans do not permit creating positions at short notice, were badly affected. The situation was problematic in the facilities of municipal department MA 11, in which only four social pedagogues are responsible for eight children and adolescents

Pandemic exacerbates existing problems

on an alternating basis. In some shared accommodations, sometimes only two persons could be deployed because of sick leave and quarantine measures.

Extremely high workload for the staff

The staff spoke of an extremely high workload and a lot of overtime. The social pedagogues who could still be deployed had to work double shifts repeatedly, so that they were in the shared accommodations for 48 hours. Shared accommodations were grouped together at the weekend due to the lack of staff, which meant that the children were cared for by social pedagogues they did not know in an environment that was unfamiliar to them. Municipal department MA 11 provided replacement staff from the pool. This did not work well in all groups, as the new persons can have an unsettling effect on an existing group. One of the shared accommodations visited did not avail of pool staff for this reason.

Only one instead of two caregivers per shift

In another shared accommodation operated by the City of Vienna, which takes care of adolescents, the shifts which were usually staffed with two persons were changed such that only one person was working at any given time. This meant a considerable strain for the caregivers who were working alone and posed a challenging situation for the team. The staff reported that it was not possible to offer the adolescents effective learning support and properly check the homework during home-schooling. Not all of the minors were able to absorb the material on their own.

An additional strain for social pedagogues was that they had to cook and clean themselves, as the housekeeping staff were excused due to being at risk to COVID-19. There was no supervision and no team meetings were held for several months in many facilities in 2020. Quite a few employees complained that they experienced many restrictions by having to wear a mask at work but had no breaks. Other facilities waived the obligation to wear a mask inside buildings in the interest of the children.

No trips home at the weekend

Another major challenge was that the travel taking the minors home for the weekends was stopped completely during the first lockdown, meaning that it was not possible for all of them to go home. This meant that all of the children were in the facility over the weekend when there is normally only one person working. Additional personnel could be provided for this by some private owners and operators whereas this was not possible in other shared accommodations and took its toll on the quality of care. In addition to this, the children and adolescents were very sad at not being able to see their families for weeks. The loss of positive relationships to the family and the daily structure exacerbated behavioural disorders in groups that were not stable. Unlike in spring 2020, personal contacts and trips home were barely affected during the second and third lockdowns from November 2020. Instead, different measures were used in all of the *Laender* to keep the risk of infection as low as possible.

Insufficient staff was also the reason why in some shared accommodations the children were not or seldom taken out for a walk and the house councils and team meetings did not take place. As a result, the atmosphere in these shared accommodations gradually deteriorated and was very tense.

In addition to the staff shortages, inadequate technical equipment created problems during the school closures. Even though the owners and operators had purchased additional laptops and tablets during the summer months, there were not enough devices in some shared accommodations for the subsequent school closures. The internet connection was not stable enough in some shared accommodations when all of the children had home-schooling at the same time, or it was unsuitable for this purpose.

Inadequate technical equipment

The isolation of ill and positive tested asymptomatic children and suspected cases was not possible in all shared accommodations due to a lack of space. In a facility of one private operator, children with a positive test were moved to an isolation shared accommodation at the head office. The rooms in an external residential group in Lower Austria were used to house infected children and adolescents. The minors who normally live at this location had to move to a house on the grounds of a home many kilometres away from the shared accommodation. This was extremely stressful for them because the shared accommodation is their home. It was particularly problematic for children and adolescents whose care setting has been changed several times. One adolescent whose former shared accommodation had been closed down just a few months previously refused after returning to the external residential group to go on summer holidays because he feared losing his place in his group.

Children had to vacate their shared accommodation

In a crisis centre in Lower Austria, children and adolescents were made to shower and change their clothes after a weekend at home or receiving family visits in order to prevent the spread of COVID-19 infections even though there is no evidence that COVID-19 infections can be transmitted from clothing. External persons were not permitted to enter the shared accommodations meaning that visits could only take place in the visiting room or in the garden. In crisis centres in Lower Austria, the clinical psychologists had to work from their home office during the first lockdown in March 2020 with the result that diagnoses could not be made for the children and adolescents. For this reason, their stay in the crisis centre was extended unnecessarily.

Excessive precautionary measures

The medical care of the children and adolescents was severely restricted in some regions of Austria. Almost all hospital appointments even for planned treatments were cancelled during the spring lockdown even in urgent cases. Medical specialists treated emergencies only during this phase. Psychotherapies for minors were also cancelled. Some therapists switched to video therapy, which was not accepted by all children and adolescents, meaning that they received no therapeutic care for a long time. In some facilities there were frequent problems with PPE, as it was not delivered on time.

Lack of medical and therapeutic care

Positive examples However, the commissions reported about examples of best practice during the pandemic. These residential facilities managed to cope very well during the curfews and school closures. It was perceived that group cohesion increased and there was clearly less conflict and escalation in the crisis. In some facilities, the children and adolescents even had better grades due to home-schooling and in some cases progress was made with children who have a fear of school. Some teams were very creative in using the time in the best possible way. Daytrips, workouts on the terrace or ballgames with school friends over the fence helped the minors to cope with the curfews. In one facility, the pedagogical head built a climbing frame out of wood with the children and planted a raised flowerbed for each child together with the minors.

Shared accommodations #are part of system-relevant infrastructure Several operators expressed their concern to the commissions that the social pedagogues working in child and youth welfare facilities could be at a disadvantage in the drafting of the national vaccination strategy in the same way they were with testing and supplies of PPE. In the view of the AOB, the personnel working there should be given the opportunity to be vaccinated at the same time as the pedagogical staff in schools. Since the beginning of the COVID-19 pandemic in Austria, the question has been discussed how often healthy children contract the virus and just how infectious they can actually be without becoming seriously ill. The assumption persisted for a long time that in particular children under ten years of age only contribute to infection in schools to a limited extent. However, a growing number of studies indicated towards the end of 2020 that children under ten years of age are infected with SARS-CoV-2 almost as frequently as children between the ages of eleven and fourteen or their teachers. The risk of transmission to care staff in socio-pedagogical and socio-therapeutic facilities is thus existent.

3. Family, youth and education

Many persons lost their jobs or suffered and are still suffering a decrease in their workload because of the COVID-19 pandemic and the measures set by the Federal Government. The consequent loss of income is a threat to the livelihood of families and single parents in particular. The politicians introduced several instruments to support them. In this context, the AOB received a large number of complaints, which, in the case of the Family Hardship Fund, resulted in unanimously adopted multiple cases of maladministration. As with other coronavirus measures, the family benefits showed a disparity between the expectations awakened by the government through announcements in the media and the actually implemented regulations.

The complaints on the education area received by the AOB reflected the great uncertainty of the parents and children. Schools were opened and closed. Depending on the type of school, there were child care opportunities which were used to a lesser degree in some Laender but intensively in others, in Vienna for example. When schools were opened, they operated a shift model. Pupils preparing for the school-leaving exam had in-person teaching.

Home schooling was the companion of all pupils and students from the very beginning as was the issue of COVID-19 tests and the necessary measures in the schools and universities. Parents spoke out in favour or against the measures, as they feared too strict restrictions for their children on the one hand, and because they were afraid of infection in the family on the other. There were also queries and complaints because universities, public and private schools and kindergartens still demanded the payment of fees despite the closures.

3.1. Benefits for families

3.1.1. Family Hardship Fund

Many complaints about the Family Hardship Fund (*Familienhärteausgleichsfonds*) reached the AOB. This fund should provide fast and unbureaucratic help to families with children who had hit on hard times through no fault of their own due to the COVID-19 pandemic. However, this goal was not achieved in many cases. Many families had to wait several months, some of them up to six months, before they received their money.

Some applicants complained that they only received information on the status of their application after calling several times. For example, one family was still not able to find out from the hotline three months after submission whether their application had been received and was being processed. They were advised to submit the application again and to wait for confirmation per email – which never arrived. The applicants were in a financial emergency and

Criticism of the length of the procedure

were disappointed because “fast, unbureaucratic” aid had been announced in the media.

The Federal Ministry of Labour, Family and Youth conceded to the AOB that there had been teething problems, which in addition to the large number of applications had been attributable to incomplete information, multiple applications and IT problems. However, work had been continuously done on improving the application process. To this end, an application database had been set up, an online form with instructions for completion provided and transaction numbers issued in order to be able to assign documents to the families better.

As depicted by the department, 62.6% of more than 130,000 submitted applications had been approved by the end of 2020, in which case the average amount approved was EUR 1,320. A total of 20.8% of the applications had been rejected for not fulfilling the requirements, in particular due to exceeding the income thresholds defined per household size. The remaining applications had been incomplete. In such cases, an automatic reminder email is sent to the applicants every two weeks. Most of the cases addressed to the AOB were ultimately approved.

Additional problem for
the self-employed

The self-employed were affected by an additional problem. Although they were confronted with a massive loss in income in the same way the employed were, they did not receive the full benefit. According to the guidelines, families can – depending on the family size, the loss of income suffered and an income threshold – receive a maximum of EUR 1,200 per month for a maximum of three months that is a total of EUR 3,600. This applies to the self-employed and the employed according to the guidelines.

Nevertheless, the self-employed only received money for a maximum of two months. They received neither an explanation nor information on how they could receive the full benefit. On the contrary: in the letter from the Federal Ministry of Labour, Family and Youth, they were informed not only of the amount of the approved benefit but also that this was a one-time payment and further payments from the COVID-19 Family Hardship Fund are precluded.

The AOB confronted the Federal Ministry of Labour, Family and Youth with this and presented the problem in the television programme *Bürgeranwalt* (“Advocate for the People”). The Ministry justified the low amount paid to the self-employed with the argument that – unlike the employed – the actual loss of income can only be calculated on the basis of the pending income tax assessment. If the loss of income is higher in the 2020 income tax assessment, which is only available in 2021, those affected could, according to the Federal Ministry of Labour, Family and Youth, apply for the difference to the benefit paid to date. Information on the promised difference payment was only to be found in the FAQs, which were changed in August 2020, on the Ministry website.

The approach described in the television programme *Bürgeranwalt*, however, contradicts not only the letter sent by the Federal Ministry of Labour, Family and Youth to the applicants but also the guidelines for the COVID-19 Family Hardship Fund that said Ministry stipulated together with the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. The members of the AOB thus unanimously identified cases of maladministration on 3 November 2020 and recommended guaranteeing the self-employed quick, non-discriminatory access to the Family Hardship Fund. Families who had received low benefits should be informed of the opportunity to apply for the remainder of the total amount.

Members of the AOB identifies cases of maladministration

The Federal Ministry of Labour, Family and Youth did not see any grounds for changing the approach used to date and did not edit the guidelines even though several items in these were changed effective 1 January 2021. The Ministry merely announced to the AOB that the recommendation for improved information of the self-employed would be included in further considerations regarding communication.

Federal Ministry of Labour, Family and Youth upholds approach

A further case of maladministration was that payments from the COVID-19 Family Hardship Fund were only made if the applicants wanted the money transferred to an Austrian bank account. Several families were fully eligible but their application was still rejected because, due to the proximity of the borders, they only had accounts in foreign banks. Persons resident in the Kleinwalsertal region were particularly affected as they have always held accounts with a German bank. They did not understand why payments were refused even though other payments are made to this account from Austrian authorities, for example family allowance. In this case too, the members of the AOB identified a case of maladministration, as the refusal to provide financial support is a violation of mandatory EU legal standards.

Further case of maladministration: payment to an Austrian bank account only

The Federal Ministry of Labour, Family and Youth followed the recommendation of the AOB and enabled the payment of the benefit to any SEPA account including those held abroad with a change to the guideline effective 1 January 2021.

Recommendation of the AOB implemented

On 1 January 2021, the fund was increased to a total of EUR 150 million, and the application deadline extended to 31 March 2021. This enabled persons whose application had initially been unfairly rejected and also those whose circumstances had worsened in the meantime to receive correct payments.

3.1.2. Family Crisis Fund

Affected persons also complained to the AOB about the Family Crisis Fund (*Familienkrisenfonds*). In addition to the amount paid, which was subsequently corrected, the complaints had above all to do with the exclusion of ill persons from this support.

The Family Crisis Fund is a pandemic-related support measure from the Federal Ministry of Labour, Family and Youth for low-income families. Parents who were unemployed on 28 February 2020 and received unemployment benefits or emergency financial aid are eligible for EUR 100 per child from the fund. This benefit was paid automatically in July 2020; an application was not required.

However, several affected persons contacted the AOB because even though they had been unemployed for a long time they did not receive this benefit. The reason for this was that they were not receiving unemployment benefits on the effective date but temporary sick pay. Some examples include a single mother or sole earner for a family of six who had been relying on receiving this benefit.

Arbitrary ban The AOB contacted the Federal Ministry of Labour, Family and Youth because the exclusion of previously unemployed parents who were ill on the cut-off date from this benefit did not seem objectively justifiable. The principle of equality standardised in Section 7 of Federal Constitution Law forbids arbitrary subjective differentiations in the area of defining and implementing standards. It is incomprehensible for the AOB why the Federal Government uses one-time payments for those who are particularly at risk of poverty and vulnerable and then fails to recognise the social crisis experienced by those parents who, in addition to unemployment, were faced with health problems shortly before and after the outbreak of the pandemic.

Federal Ministry of Labour, Family and Youth sees no need for change The Federal Ministry of Labour, Family and Youth refused to make any changes and pointed out that those affected are not unemployed pursuant to the Austrian Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*) if sick pay interrupts the payment of unemployment benefits and emergency financial aid. Furthermore, as the Ministry explained, every fixed date regulation and demarcation is perceived as a hardship by individual persons.

The AOB begs to differ. The objective of the Family Crisis Fund is to provide low-income families support who are experiencing financial difficulties in coping with everyday living in the greatest economic crisis since the Second World War. The exclusion of benefits to persons who were temporarily unable to work on the cut-off date due to illness but who otherwise fulfilled the conditions for the benefit is not justified in the opinion of the AOB.

3.1.3. COVID-19 Child Bonus

Special payment of EUR 360 In September 2020, parents received – regardless of their financial situation – a special payment of EUR 360 per child. However, parents at risk of poverty were uncertain as to whether they would receive this benefit. A single mother of two children and recipient of needs-based minimum benefits thus contacted the AOB. She feared that the COVID-19 Child Bonus could be deducted from state benefits and she would have de facto received nothing. This fear could be

abated, as the federal legislators took precautions that social assistance shall not be reduced by this measure.

The amount of the COVID-19 Child Bonus is not the same for all children for whom family benefits are paid. EUR 360 are not paid for children living in other countries but an amount adjusted to the price level in that country. This so-called indexing of family benefits for children living abroad was criticised by the AOB due to reservations regarding EU law. The European Commission thus filed a lawsuit against Austria at the European Court of Justice in May 2020. The reduction of family benefits paid to caregivers working here to the lower Eastern European level discriminates these persons in an impermissible way compared with all of those working in Austria whose children live here. The EU regulations on the freedom of movement for workers is, in the opinion of the AOB, violated when it comes to family benefits, child tax credits and other tax breaks for families – and, as can be seen, the COVID-19 Child Bonus.

Unallowed indexing of family benefits

3.2. Schools and kindergartens

3.2.1. Home-schooling

Very different positions were taken in the population regarding home schooling. Whilst some were in favour of home schooling for safety reasons, others pointed out the deficits in the learning progress of the pupils. Members of risk groups who feared becoming infected by their children who were attending in-person class in particular spoke out in favour of home schooling. Generally speaking, there were few complaints about home schooling up to the time of compiling this report. However, it cannot be concluded from this that there was overall satisfaction with the situation.

Relatively few complaints

3.2.2. Protective measures

Protective measures taken by schools against the coronavirus were the main subject matter of the COVID-19-related complaints whereby the issue was the obligation to wear a mask in most cases. Some parents also articulated fears in connection with COVID-19 quick tests, which were carried out in school.

At the beginning of the pandemic, those affected were sceptical about the usefulness of masks. Over time, however, the positive voices came to the fore. In autumn 2020, the mask became increasingly mandatory, most recently – before the second lockdown – for all secondary school pupils as long as they were on the school premises.

Obligation to wear a mask

The scientific discussion of this topic has continued, and the opposing viewpoints are reflected in the numbers of complaints. The subject matter of these are headaches, dizziness and concentration problems, which the protective masks cause in children.

Objective justification required Shortly before Christmas 2020, the Constitutional Court of Austria published its findings on the protective measures for schools, which had been applicable up to the end of the school year 2019/20: division of the classes into smaller groups and the obligation to wear a mask inside the school building when outside of the classroom. The Constitutional Court of Austria judged these measures to be unlawful because the Federal Ministry of Education, Science and Research was unable to reasonably present to the Court why it considered the disputed measures to be necessary (line V 436/2020).

For the AOB this ruling provided the grounds for examining the objective justification of the current school measures in detail. In view of the situation at the beginning of the pandemic in particular, the AOB recognised a broad margin of discretion on the part of the school administration. However, now is the time to examine the scientific basis in more detail. Relevant scientific findings should now – from accompanying research too – be available and evaluated by the Federal Ministry of Education, Science and Research.

No discrimination in exemption from the obligation to wear a mask

In this context, there is also the question as to how persons who are not obliged to wear a mask for medical reasons are guaranteed non-discriminatory participation in school life. There are sometimes suggestions to open up the opportunity of voluntary home schooling during the pandemic. In this way, children who are unable to deal with the measures or are in risk groups could be offered an alternative. There are similar suggestions to operate a shift model without masks and/or with greater distance (also for the protection of relatives who are particularly at risk).

Regarding these questions, the AOB was in dialogue with the Federal Ministry of Education, Science and Research and the locally responsible persons. The examination was not complete at the time of compiling this report.

“Suspected case” not clearly defined

After being requested for clarification of when a school-relevant suspected case of COVID-19 is given, the AOB found a discrepancy in the definition. According to the homepage of the Ministry of Social Affairs, Health, Care and Consumer Protection, a suspected case is any form of acute respiratory infection (with or without a temperature) with at least one of the following symptoms for which there is no other plausible cause: cough, sore throat, sudden loss of the sense of taste/smell. By contrast, the applicable version of Section 9 (5) of the COVID-19 School Regulation (*COVID-19-Schulverordnung*) 2020/21 stipulated that a suspected case shall be assumed in any case from a body temperature of 37.5°C or the sudden loss of the sense of smell and taste.

Experienced parents can often attribute colds to their children’s behaviour, for example from not wearing warm clothes outdoors. This would therefore constitute a “plausible cause” according to the definition of the Ministry of Health or the Austrian Agency for Health and Food Safety and thus not be a reportable suspected case of COVID-19. According to the definition pursuant to the COVID-19 School Regulation at the time, the existence of plausible other

causes of respiratory illnesses would also have to be reported to the school as soon as a higher body temperature was taken.

This discrepancy was destined to cause even more uncertainty among the parents. After intervention by the AOB, the Federal Ministry of Education, Science and Research removed this uncertainty and adapted the definition in the Regulation to that of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection.

Uncertainty removed

The teaching staff were also affected by wearing masks. The AOB did not receive many queries but noticed a case published in the media about the principal of several primary schools in the Grieskirchen district of Upper Austria. The school principal had been seen without a mask at an anti-coronavirus demonstration and did not wear a mask at school either. The Board of Education of Upper Austria had thus taken legal consequences and suspended the principal. In an interview, the principal justified his behaviour by claiming that he was exempted from the obligation to wear a mask for health reasons and taking part in the demonstration was a fundamental right that he had exercised in his private life. The AOB initiated *ex-officio* investigative proceedings regarding the lawfulness and proportionality of the labour-law-related measures. A result was not available at the time of editing this report.

The issue of testing in the schools became particularly virulent in February 2021. With the coming into effect of the COVID-19 School Regulation on 8 February 2021, the pupils returned to in-person teaching in the schools. Many parents complained about the associated tests. Only children who let themselves be tested were allowed to take part in class. In the media, this test was called the “nose picker test”. A complaint pointing out that according to the product description these tests shall only be carried out by medical staff was grounds for the AOB to initiate *ex-officio* investigative proceedings, the result of which was not available at the time of editing this report.

“Nose picker tests”

3.2.3. School-leaving exam

The school year was also very different for those taking the school-leaving exam (*Matura*) in 2020. The Federal Ministry of Education, Science and Research presented the schedule for a “streamlined” school leaving exam 2020 in the spring. Three weeks of dedicated preparation started for the school-leaving classes after the first lockdown in the spring. The written tests were only taken in three examination subjects. The mandatory school-leaving oral exam was cancelled. For the school-leaving exam in academic secondary schools this meant a mandatory written test in German, a foreign language and maths.

Avoiding the “feared subject” of maths

On the other hand, maths did not have to be chosen for the written school-leaving exam at most of the vocational schools. There was a mandatory oral maths test instead. This choice was made before the new rule had been

announced, which removed the oral exam. Thus, those in vocational schools who had deferred maths to the oral test were able to avoid this subject, which is feared by many pupils. One girl complained that a subsequent change of subject choice was not possible. She felt that it was unfair for her not to be able to circumvent the most difficult subject unlike some of her classmates.

No change for external examinees External examinees also felt unfairly treated. They only found out at the beginning of May 2020 that there was no exception regulation for them for the oral school-leaving exam. In addition to the written test, they also had to prepare for the oral exam.

High failure rate in maths One girl alleged that the maths school-leaving exam was particularly difficult this year. More than half the class had been graded negatively. There were reports of high failure rates in the other cases too. Those who received “unsatisfactory” were able improve their grade at a compensation exam in June. In this respect too, several persons contacted the AOB. All of them complained about the disproportionately difficult exams contrary to the announcements made by the Federal Ministry of Education, Science and Research. Nine out of 13 persons had failed in one school. Some of those affected brought legal remedies against these decisions.

3.2.4. Suspension of sports classes

Plans indicating that sports classes would no longer take place became known to the AOB in connection with the reopening of schools after the coronavirus-related closure in the school year 2019/20. The AOB initiated *ex-officio* investigative proceedings.

According to the WHO, physical inactivity is one of the greatest health problems worldwide. Sports class is one of the most important subjects for the four to 12-year olds in particular. An exercised and trained motor function fosters the desire to learn and has positive neurological effects on young people.

Suspension revoked in early summer 2020 The Federal Ministry of Education, Science and Research subsequently revoked the suspension of sports classes. The subject of “exercise and sports” could thus be offered voluntarily and held at the discretion of the school as a complement to the existing timetable. Exercise units could be organised as supplementary class and held after the regular class in the afternoon. This approach was chosen in order not to change the timetables again. Participation was voluntary. The AOB considered this to be a reasonable compromise.

The situation worsened in the current school year 2020/21, as the schools were almost fully closed during the long lockdown from November 2020.

3.2.5. School and day care fees

Educational facilities under financial pressure Educational facilities operated by municipalities or private parties suffered financial losses under the coronavirus-related closures. This resulted in

requiring parents to continue paying the fees even though the children were not or only able to use the facilities to a limited extent due to the lockdown. For their part, the parents were worried that the facilities they loved would have to close.

In one case, a municipality decided to continue charging parents the fees for childcare facilities despite coronavirus-related closures. A type of “advance payment obligation” was thus imposed on the parents for the childcare whereby the fees would only be offset later – without naming a specific date.

In another case a municipality refused to continue funding a private childcare facility despite coronavirus-related closure. Most of the parents could not afford to continue voluntarily paying the care fees due to their own financial problems. Financial difficulties and even closure for the popular childcare facility were thus feared.

The parents wondered if the State – in this case the *Land* Lower Austria or its municipalities – were willing to assume (interim) financing for childcare facilities during the crisis. It must be taken into consideration in this context that parents and private day care facilities in particular often had financial problems themselves in the COVID-19 crisis due to unemployment and the loss of fees.

Support from the State

The AOB succeeded in finding positive solutions. In one case, the *Land* Lower Austria assumed deficit cover during the COVID-19 crisis. In another case, the parents whose children were not able to avail of chargeable care service due to the coronavirus pandemic did not have to pay fees.

3.2.6. Contingent liability for assistance staff

During the first lockdown, the *Land* Styria had amongst others apparently assumed the cost of covering the loss of pay for persons who were working as school assistants in facilities for children with disabilities. A school assistant complained to the AOB during the lockdown in the winter that this loss of pay was no longer covered. She had learned from others who perform the same work that they were still receiving the cover. In her opinion, the Land was making subjective differentiations. The AOB attempted to clarify the facts of the matter. The investigative proceedings were not completed at the time of editing this report.

3.3. Universities

3.3.1. Tuition fees – “neutral semester”

Students who study for longer than the planned study duration are obliged pursuant to Section 91 of the Universities Act (*Universitätsgesetz*) to pay tuition

Tuition and examination processes impaired

fees. The AOB was requested to generally classify the summer semester 2020 as a “neutral semester”. It was claimed that excessively long study duration was often attributable to the pandemic-related changed tuition and examination processes. The ability to learn had also been impacted by the stressful overall situation.

The Federal Ministry of Education, Science and Research explained that the higher education institutions had predominantly offered their courses of study digitally and by distance learning in the summer semester 2020. Pursuant to the COVID-19 University and Higher Education Institution Ordinance (*COVID-19-Universitäts- und Hochschulverordnung*), the lecture-free period was cancelled in the summer semester 2020 and lectures and exams could also be held during the summer months. Students were thus able to continue and complete their studies during these months.

Tuition fees
can be waived

Furthermore, the presidency of the educational institutions was able to determine that students could take leave from their studies for COVID-19-related reasons. The obligation to pay tuition fees was not upheld for the duration of this leave. The Universities Act also authorises the universities to autonomously define the facts required for waiver and reimbursement of tuition fees. For this reason, a general tuition fees waiver is not planned. Should supplementary measures be required to solve acute problems, these would be made in agreement with the universities.

3.3.2. Tuition fees despite the closure of the University Clinic of Dentistry Vienna

As part of the measures taken to prevent the spread of the coronavirus, the Medical University of Vienna stopped access for students to the University Clinic of Dentistry for about three months in the summer semester 2020.

Completion of studies
not possible

One student complained that the completion of her studies was thus extended through no fault of her own. And yet she still had to pay the full tuition fees for the summer semester 2020 and the same would apply for the winter semester 2020/21. Many students are affected by this problem. The studies department of the university had informed her that reimbursement or a waiver of the tuition fees is not planned.

University waives
tuition fees

The Medical University of Vienna informed the AOB that it was possible to find an “individual solution” with those affected. This entailed waiving the tuition fees for the winter semester 2020/21. The AOB recommended applying this approach to all comparable cases.

3.3.3. Loss of student grant through voluntary civil service

A medical student reported for voluntary extraordinary civil service because of a call from the Federal Government in March 2020 and was allocated to the

association of Tyrolean hospitals tirol kliniken from 6 April to 30 June 2020. His work was remunerated. He continued the course of study for which he had received a student grant until the time when he started the extraordinary civil service.

The grants office in Innsbruck stopped payment of the student grant for the duration of the extraordinary civil service for reasons that were not understandable to the affected student. The grants office referred to Section 49 (1) of the Student Support Act (*Studienförderungsgesetz*). This provision stipulates suspending the claim to a student grant amongst others during those months in which students perform “in-person, educational or civil service” over more than two weeks.

Student grant suspended

The Federal Ministry of Education, Science and Research explained that the rule does not distinguish between ordinary and extraordinary civil service. Furthermore, persons performing in-person and civil service have a comprehensive entitlement to maintenance from the State for the duration of their deployment. It is not objectively justified for the State to pay twice for persons performing in-person and civil service work.

Even if the student volunteered, the extraordinary civil service is mandatory for persons obliged to perform civil service up to their fiftieth birthday as a matter of principle. There is no legal basis and objective justification for placing persons performing extraordinary civil service above those performing ordinary civil service with respect to suspending the entitlement to a student grant.

Extraordinary civil service mandatory according to Federal Ministry

The student argued that voluntary extraordinary civil service is not comparable to the mandatory alternative national service – as set forth in Section 49 (1) of the Student Support Act. If he had not worked at tirol kliniken within the extraordinary civil service framework but under a “regular” contract of employment, he would have earned an income up to the yearly additional earnings threshold of EUR 10,000 and been able to receive a student grant for continuing his studies at the same time.

After weighing up the arguments presented, it is difficult for the AOB too to see an objective justification for the funding-related distinction between earned income and remuneration for voluntary extraordinary civil service. This distinction should thus be reconsidered.

Distinction difficult to understand

3.3.4. Student grant – deferral of examination date

The grants office in Vienna rejected the application of a student for a grant because he had not taken an exam on time in the second phase of his studies. The student pointed out that he was not able to take the exam on time because it had originally been planned for April 2020 and then deferred due to the measures for containing the coronavirus pandemic. If

Examination date deferred

this circumstance were to place him at a disadvantage, this would contradict the objective of the COVID-19 Regulation on Student Support (*COVID-19-Studienförderungsverordnung*). He has since taken the exam.

Proof deadline extended According to the statement of opinion from the Federal Ministry of Education, Science and Research, the student grants authority assumed that the extension of the deadline for providing evidence of having passed the exams defined in the Regulation on Student Support does not apply to those cases in which the term for claiming a grant for the second phase of studies in the winter semester 2019/20 had already elapsed. The Federal Ministry of Education, Science and Research however is in favour of the extension option. The student grants authority then announced a positive decision for the student.

3.3.5. Reimbursement of course fees

Distance learning reasonable? The AOB was contacted regarding the request to have fees reimbursed that were charged for courses at the Language Center of the University of Vienna. Teaching institutes were closed due to the pandemic. Those affected were not able to or did not want to avail of the alternative offer of “distance learning”. However, the Language Center has not refunded the course fees and has not credited them to other courses, as the change in course arrangements has not been such that it would have been unreasonable for the participants to comply with the contract. The AOB explained that the Language Center of the University of Vienna does not fall within the mandate of the AOB. A refund of the course fees could only be demanded by taking legal action.

3.3.6. Organisation of admissions procedure

Authorisation by the Federal Ministry to make regulations The AOB received a complaint that there was still not sufficient information available at the beginning of May 2020 on the organisation of the admissions procedures for the medical universities. The student was concerned that it would not be possible to commence studies in autumn 2020. As the organisation of admissions procedures is the autonomous responsibility of the universities, the AOB could ultimately only explain the general legal framework stipulated in the Universities Act. Furthermore, the AOB informed the student that the Federal Ministry of Education, Science and Research was authorised in the COVID-19 Higher Education Act (*COVID-19-Hochschulgesetz*) to define special regulations for the summer semester 2020 and the winter semester 2020/21 including for the admissions procedures.

3.3.7. “Risk groups” – exclusion from in-person lectures

A student wanted to attend an in-person lecture at the Karl-Franzens University of Graz on 10 July 2020. However, this was not possible because he would have had to confirm with his signature on a form required by the university that he was not in a COVID-19 “vulnerable risk group”. As “older persons (65+)” were

explicitly mentioned in the form and the affected person was over 65, he was not able to submit the required declaration.

Excluding healthy persons from in-person lectures because they have passed a certain age limit is a case of age discrimination. If there are access restrictions to in-person lectures due to the pandemic situation, these shall only refer to infected or ill persons.

Discrimination based on age?

The University of Graz explained that there have only been concrete recommendations from the Federal Ministry of Education, Science and Research on contact person management since mid-August 2020. With the declaration, the university in no way had the intention of excluding students from participating in in-person lectures. Rather, persons from a certain age group as well as those with specific underlying conditions were to be given the opportunity to participate on a voluntary basis and to make them aware of the known risk situation regarding the coronavirus at that time. The university regretted that this was “formulated ambiguously” on the form. There are no restrictions for risk groups on attending in-person lectures.

In the opinion of the AOB, the intention alleged by the university regarding the “COVID-19 risk groups” was not reflected in the declaration form. On the contrary, the formulation implied that the mentioned “risk groups” shall be denied participation in in-person lectures albeit “voluntarily”. The criticism of the requirement of such a declaration, which infringes the right of the freedom to learn, was thus justified.

Criticism justified

4. Work and the economy

The COVID-19 crisis paralysed large sections of the economy. Shops, restaurants and tourism-related businesses had to close for many weeks; the orders and sales of SMEs fall. The employment market is under considerable pressure; the livelihood of an increasing number of persons is at risk through no fault of their own. The Federal Government passed aid packages worth billions and promised quick help.

This aid did not always actually reach those who need it. And it was not always fast enough. The AOB received many complaints in this connection. They had to do predominantly with short-term work, the Hardship Fund and the Fixed-cost Subsidy. Bureaucratic obstacles, delays in payment and the lack of opportunities for appeal were criticised. Many of those affected received no support despite a considerable loss of income because they did not fulfil certain eligibility conditions.

The following reports in this chapter highlight the difficulties that the companies, the working population and the unemployed had and some still have with these benefits. They illustrate the gaps and weaknesses of the aid packages.

4.1. Aid packages for companies, the working population and unemployed persons

4.1.1. Short-term work subsidy

Focus of the complaints Generally speaking, the AOB was confronted with two problems in the area of short-term work. On the one hand, employees contacted the AOB, who had an employment contract with an employer without a registered office or site in Austria (predominantly field sales employees) and therefore were unable to profit from the Austrian short-term work model. On the other, businesspeople complained that they received no short-term work subsidies for employees who had not received a full calendar month's salary before the short-term work began.

4.1.1.1. Short-term work subsidy in the absence of a domestic site

Short-term work subsidy requires a domestic site Regarding the question of the short-term work subsidy for companies without a registered office or site in Austria, the AOB was of the opinion that the rejections by the Public Employment Service Austria (*Arbeitsmarktservice*) are conformant with the law. The AOB informed the affected persons about the legal situation and recommended them to clarify with their respective employer whether participation in a short-term work model in the country

where the company is registered (e.g. Germany or Czech Republic) would be possible.

In the view of the AOB, it shall be noted that the short-term work subsidy from the Public Employment Service Austria is not granted to employees but is a financial benefit for employers. Up to a specific limit, the Public Employment Service Austria remunerates the wage expense for hours that are paid but do not have to be worked. A connection to the registered office of the company or the location of the site is thus adequate and in conformity with the law.

AOB assesses rejection as legally conformant

The applicable statutory provision on short-term work (Section 37b of the Public Employment Service Act – *Arbeitsmarktservicegesetz*) does not expressly mention the criterion of a registered office or a site in Austria as a condition. However, Section 37b (1) (3) of said Act stipulates that the short-term work subsidy amongst others shall only then be recognised if an agreement covering the detailed arrangements of the short-term work is concluded “between the bodies of the employers and employees that come into consideration for collective agreements in the economic sector in question”. Companies without a registered office or site in Austria are not members of the Austrian Economic Chamber (*Wirtschaftskammer Österreich*), which also confirms the lack of entitlement.

The registered office or site requirement first came in the procedural responsibility rules in the federal directive decreed in the execution of Section 37b of the Public Employment Service Act on “short-term work subsidies” (Federal Directive on Short-Term Work Subsidies (*COVID-19 Kurzarbeitsbeihilfe*) of the Public Employment Service Austria). An unambiguous clarification on the territoriality principle was achieved with a new version of the directive.

Subsequent amendment of Public Employment Service directive improves legal certainty

It should also be pointed out that labour-market-related allowances for employers are not included in the European legal standards for the coordination of social insurance systems (EC Directive No. 883/2004) meaning that there is thus no “exportability” of such allowances on a European legal basis.

No exportability of European legal basis

4.1.1.2. Short-term work subsidies for new hires

On the issue of the short-term work subsidy for new hires, in the beginning phase of the COVID-19 short-term work the Public Employment Service Austria provided unclear information on the requirement for a regular fully paid calendar month’s salary before the short-term work started. In addition, diverse reports in the media and press conferences caused confusion by suggesting that immediate short-term work was open to all employees. Short-term work subsidies were initially paid also for new hires but claimed back later.

Unclear information situation at the beginning of the first lockdown

In legal terms, reference is made to the provision in Section 37b (5), second sentence, of the Public Employment Service Act. According to this, the basis

No legal basis for “immediate start” to short-term work

for the subsidy as well as for the assessment of social insurance during short-term work is equal to the last full subsidy and assessment basis before the beginning of short-term work. It can thus be deduced that there shall be a full regular paid calendar month, as there is otherwise no basis for the assessment of the short-term work subsidy.

Great time pressure in introducing and implementing short-term work

The COVID-19 short-term work was negotiated by the social partners at short notice and under considerable pressure after the nationwide lockdown and ultimately on the basis of Section 37b (7) of the Public Employment Service Act. The Public Employment Service Vienna, for example, was confronted with over 25,000 applications for short-term work in addition to the massive increase in unemployment and had to train several employees in processing this new subsidy within a few days – during the strict curfew.

Revision of the Public Employment Service Austria directive and amendment

In view of this, the Public Employment Service Austria conceded to the AOB that there had actually been unclear information in the beginning. Ultimately, clarification was implemented as part of the revision of the Federal Directive of the Public Employment Service Austria on COVID-19 Short-Term Work (*AMS-Bundesrichtlinie zur COVID-19-Kurzarbeit*). An amendment to Section 37b (8) of the Public Employment Service Act stipulates that the non-fulfilment of the condition of a fully paid calendar month's salary before the short-term work begins does not constitute grounds for a claw back if the short-term work was started in the period between 1 March to 31 May 2020.

4.1.2. One-time payments for unemployed persons

One-time payment for the unemployed – legal bases

Many persons lost their job due to the coronavirus through no fault of their own. The Federal Government had announced support for them in the form of a bonus of EUR 450 in addition to unemployment benefit. With the Federal Law Gazette I No. 71/2020 of 24 July 2020, the financial “one-time payment” benefit was anchored in Sections 6 (1) and 66 of the Unemployment Insurance Act. Section 66 of said Act entitles persons who had received unemployment benefit or emergency financial aid for at least 60 days between the months of May and August 2020 to a one-time payment of EUR 450 to cover the special needs due to the COVID-19 crisis, which the Public Employment Service Austria paid in September 2020.

Hardship when receiving sick pay

The AOB was confronted with many submissions from citizens who did not fulfil the conditions for the one-time payments due to long-term illness. They perceived the restrictive conditions as “punishment” for their sick leave, which was due to no fault of their own. They criticised that the sick pay payment periods pursuant to Section (41) (1) of the Unemployment Insurance Act do not count for fulfilling the conditions for entitlement to the one-time payment. In some cases, there was considerable hardship. For example, Mr N.N. from Styria who was seriously ill with cancer and thus had to switch to receiving

sick pay was only able to prove 59 days instead of the required 60 days of unemployment benefit.

The AOB contacted the competent Federal Ministry of Labour, Family and Youth and recommended a change in the law with a differentiated regulation. The topic was also addressed in the television programme *Bürgeranwalt* in order to underline that persons with health restrictions in particular have severe difficulty in financing their life and health expenses with the financial benefits from the Unemployment Insurance Act.

AOB recommends change in the law

The Federal Minister at the time justified the regulation criticised by the AOB with the argument that the objective had been to make a fast and as unbureaucratic as possible payment to those affected, which was why she had decided on as clear and simple a regulation as possible. Because the Public Employment Service Austria has no electronic access to sick pay payment data, only unemployment benefit and emergency financial aid had been used to fulfil the conditions for the one-time payment. In addition, a certain budgetary framework had to be observed.

The Federal Ministry of Labour, Family and Youth ruled out a retrospectively favourable change to Section 66 of the Unemployment Insurance Act, promised the AOB however to formulate conditions for a further one-time payment in an amendment to Section 66 of said Act more fairly. The criticism of the disadvantage of recipients of sick pay would be considered by way of a change to Section 41 of the Unemployment Insurance Act. The National Council adopted the relevant amendment on 20 November 2020.

Legislators adopt revision for second one-time payment

A second one-time payment was stipulated to support persons who had received unemployment benefit and/or emergency financial aid from September to November 2020. In defining the conditions for the second one-time payment, interruptions for example due to receiving sick pay were better considered. A staggering of the one-time payment based on the number of days for which payments were received within the relevant period was stipulated.

In concrete terms, persons who received unemployment benefit or emergency financial aid for at least 45 days between the beginning of September and the end of November 2020 were granted a bonus of EUR 450, for a minimum of 30 days unemployment benefit or emergency financial aid EUR 300, and EUR 150 for a minimum of 15 days. A one-time payment from public health insurance was planned for January 2021 for those persons who were not entitled to a full bonus due to longer term illness. To be eligible, persons had to provide evidence for at least 47 days of receiving sick pay for EUR 150, 62 days for EUR 300, and at least 77 days for EUR 450.

In the opinion of the AOB, the differentiated definition of the legal situation facilitates the avoidance of hardship for the second one-time payment and increases acceptance on the part of those affected.

Problems for recipients of subsistence allowance

Many participants of Public Employment Service Austria courses did not receive a one-time payment. They receive a subsistence allowance (*Deckung des Lebensunterhalts*) that is granted when attending Public Employment Service Austria courses or participating in measures for professional rehabilitation under certain conditions. According to the diction of the law, the subsistence allowance does not count as a condition for the one-time payment. Here again, there is the question of the equality of the time in which unemployment benefit and emergency financial aid are received.

The AOB contacted the competent Federal Minister with this problem too and recommended an adequate solution in favour of equal treatment.

Amendment effects equal treatment

The problem could be ultimately solved in favour of the affected persons by way of an amendment (2nd Social Insurance Amendment Act 2020 – *2. Sozialversicherungs-Änderungsgesetz 2020*). This facilitated a switch from subsistence allowance to emergency financial aid retrospectively from May 2020 without financial drawbacks. The Public Employment Service Austria could subsequently pay the respective one-time payment pursuant to Section 66 of the Unemployment Insurance Act.

4.1.3. Hardship Fund

Numerous complaints about Hardship Fund

The Hardship Fund is a support programme for self-employed persons who are affected by the coronavirus crisis. Those eligible to apply are sole traders including self-employed caregivers, micro-companies as well as the “new self-employed” and freelancers. The support is granted in the form of a subsidy (Section 1 Hardship Fund Act – *Härtefallfondsgesetz*) and serves to provide support for personal living expenses.

Processing by the Austrian Economic Chamber

The Federal Ministry of Finance decreed a directive for processing the Hardship Fund on 27 March 2020. An amendment to the directive for the second payment phase ensued on 3 June 2020. The Austrian Economic Chamber (*Wirtschaftskammer Österreich*) was entrusted with the processing of the support programme in accordance with the directive. The Economic Chamber cannot be directly examined by the AOB. Where erroneous, incomprehensible or inadequately justified decisions were the subject matter of complaints, clarification was nevertheless possible thanks to the support of the Federal Ministry of Finance.

4.1.3.1. Directive contradicts EU law

Domestic bank account required

Several representatives of 24-hour caregivers contacted the AOB because it is only possible for persons who have a bank account in Austria to avail of support from this fund. However, the majority of foreign caregivers do not have an account with an Austrian bank but in their home country. Due to the pandemic-related travel restrictions, they were unable to perform their work

in Austria and thus suffered a considerable loss of income. However, they were not able to apply for support from the Hardship Fund, which is designed to compensate this loss – due to not having a domestic bank account.

The “Method of payment” section in item 6.3 of the directive (item 7.3 of the directive for payment phase 2) stipulates that domestic bank account details shall be forwarded to the Austrian Economic Chamber when completing the application. In the opinion of the AOB, this contradicts the SEPA Regulation (EU) No. 260/2012 of the European Parliament and the European Council of 14 March 2012. This regulation governs the technical requirements and business requirements for transfers and direct debits in euro. Pursuant to Article 9 of the regulation, the payer making a transfer to a recipient who is the holder of a bank account inside the European Union shall not prescribe in which Member State the account shall be held. Exceptions to this provision for payments through regional authorities, public bodies etc. are not stipulated in the regulation.

“Method of payment”
contradicts EU law

Regulations of the European Union are acts of law with universal applicability and direct enforcement in the Member State. In Austria, they are on constitutional level.

The Federal Ministry of Finance justified the criticised condition of payment to the AOB with the argument that only in this way “a swift, simple, and unbureaucratic payment” would be guaranteed. Furthermore, payments from the Hardship Fund are state support for which considerable amounts of tax revenue are used and for which certain restrictions shall thus be stipulated.

Several fruitless
attempts at justification
by the Federal Ministry
of Finance

That payment should be more complicated or take longer if the IBAN in the application did not start with “AT” but a country code for another Member State was not understandable for the AOB.

The Federal Ministry of Finance argued further that an Austrian bank account is necessary in order to provide a minimum level of control during execution.

No convincing
explanations from the
Federal Ministry of
Finance

However, the control mechanism set forth in the regulation on the Hardship Fund is exclusively limited to the information obligation of the person applying for support and the right of the Austrian Economic Chamber to obtain access to their books and documents. The control mechanisms have thus nothing to do with a domestic bank account.

In the television programme *Bürgeranwalt*, the ultimate argument presented was that the Austrian support could be subject to tax abroad when money is transferred to a foreign bank account.

In a subsequent statement of opinion, the Federal Ministry of Finance explained that with respect to the diverse double taxation agreements it is of no consequence whether income is paid to a domestic or foreign bank account.

Directive not subject to appeal
 None of the arguments brought forward by the Federal Ministry of Finance were qualified in the view of the AOB to justify a violation of an EU regulation. As the criticised directive had not been enacted in the form of a regulation, it was not possible for the AOB to appeal it in the Constitutional Court of Austria.

4.1.3.2. Long waiting time for the multiple marginally employed

Group of eligible persons extended
 With the 17th COVID-19 Act, the Hardship Fund Act was amended and the group of eligible persons extended. With the coming into force from 5 May 2020, persons who are marginally employed in more than one job (Section 471 of the General Social Insurance Act – *Allgemeines Sozialversicherungsgesetz*) and occasionally employed pursuant to Section 33 (3) of said Act and whose total income therefore exceeds the monthly marginal earnings threshold can apply for benefits from the Hardship Fund.

Directives are not adapted
 Two affected persons contacted the AOB in autumn 2020. As marginally employed persons who had lost their jobs due to the pandemic, they received neither unemployment benefit nor were they eligible for other COVID-19 support measures (for example, short-term work). However, the Federal Ministry of Finance did not amend the directive. Their applications for assistance from the Hardship Fund were therefore rejected by the Austrian Economic Chamber.

The Federal Ministry of Finance explained to the AOB that the directive was only designed for businesspeople. Persons who are multiply marginally employed or occasionally employed are however considered employees under tax law. The legal amendment is linked to the General Social Insurance Act, which is within the remit of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection. The implementation of the amendment to the law requires founded legal social insurance expertise and could therefore not be completed (note by the AOB: even after five months).

Which “legal social insurance expertise” was allegedly required was not clear to the AOB. The amount of the benefit from the Hardship Fund is based on the last income tax assessment. The applicant receives a flat sum of EUR 500 if income was negative.

Serious effects for those affected
 Despite the serious effects for the affected persons, the Federal Ministry of Finance failed to implement the amendment in the directives.

Legislators provide clarity
 With a resolution of the National Council of 10 December 2020 and of the Federal Council of 17 December 2020, the Hardship Fund Act was renewed by way of amendment within the framework of the COVID-19 Transparency Act (*COVID-19-Transparenzgesetz*). The competence for enacting such directives on the Hardship Fund for an extended group of persons was thus transferred to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection.

4.1.4. Fixed-cost Subsidy I

The Fixed-cost Subsidy I was initially set up to maintain the solvency and bridge liquidity problems suffered by companies in connection with the spread of the COVID-10 pandemic and resulting economic impact. The fixed costs of relevant companies were to be covered by payment of the subsidy in two or three instalments on a pro-rata basis depending on the loss in revenues.

The relevant directives were decreed by the Federal Ministry of Finance on 25 May 2020 in the Federal Law Gazette II No. 225/2020. The COVID-19 Federal Funding Agency (*COVID-19 Finanzagentur des Bundes GmbH, COFAG*) was entrusted with the processing of the subsidy, which was founded by setting up a federal wind-down management company for this purpose on the basis of federal law. Even though the COFAG company does not fall within the mandate of the AOB, clarification was possible thanks to the support of the Federal Ministry of Finance.

Processing by COFAG

Even before the directives were published, a draft was available on the website of the Federal Ministry of Finance. This stipulated that information on the amount of lost revenues and fixed-cost had to be confirmed by a tax advisor or accountant in the applications.

This would have been a major obstacle for small enterprises, which often do not have an accounting department. They would have been forced to find and commission tax representation to complete the application.

An exception was included in the changed version of the directive that was ultimately published in the Federal Law Gazette II No. 225/2020. The mandatory involvement of tax representation for the application was dropped in the event of a subsidy totalling a maximum of EUR 12,000 (item 5.3 of the directives). This is only required for a higher Fixed-cost Subsidy I.

Application without tax representation possible

However, for applications for the second and, if applicable, third instalment of the Fixed-cost Subsidy I the COFAG company required the involvement of a tax advisor, an auditor or an accountant to confirm the information from the businessperson.

Payment only with tax representation

This was criticised to the AOB by many (small) enterprises who had taken hitherto care of their tax affairs themselves. The cost incurred for commissioning tax representation to complete the application was far in excess of the EUR 500 allowable pursuant to the directives. The support from the Fixed-cost Subsidy I – communicated repeatedly in the media – was thus considerably reduced or was to no avail because the payment received could not be used for paying fixed costs but had to be used for paying the invoice of the tax representation. The owner of a small business thus explained that the second and third instalment of the Fixed-cost Subsidy approved for him amounted to (a total of) EUR 3,400. However, in order to effect the payment of this figure,

Subsidy to no avail

he would have to pay the tax advisor – commissioned for the first time – a fee of EUR 3,500. Even if the allowable cost of EUR 500 for consulting were considered, a mere EUR 400 would thus remain for him to cover his fixed cost, and not the approved EUR 3,400.

Approach not covered by the directives In the view of the AOB, the mandatory involvement of tax representation for the applications for the second and/or third instalment for subsidies totalling no more than EUR 12,000 is not covered in the directives from the Federal Ministry of Finance. Item 5.2 of the directives stipulates that the application for the approval of the Fixed-cost Subsidy I shall contain the estimated or actual loss in revenues for the respective period. Furthermore, the amount of the lost revenue and the fixed cost shall be confirmed by a tax advisor, auditor or accountant and be included. However, item 5.3 contains the above-mentioned exception for low subsidies.

Argumentation of the Federal Ministry of Finance The Federal Ministry of Finance considered the approach used by the COFAG company to be justified and held the opinion that for low subsidy amounts in the first instalment a simplification of the payment conditions could be stipulated, because at this point in time only an estimated loss in revenues has to be provided. This would thus guarantee quick payment.

However, for the second and/or third instalment these estimated values shall be confirmed or corrected based on qualified information from the accounting system in which case the commissioning of tax representation shall be required. Only in this way can the careful use of tax money be guaranteed and the abuse of subsidies prevented.

Improvements in Fixed-cost Subsidy 800,000 The concerns of the AOB were thus taken into consideration, as, according to the directives on the “Fixed-cost Subsidy 800,000”, which could be applied for from 23 November 2020, tax representation is no longer necessary when applying for a flat sum subsidy totalling a maximum amount of EUR 36,000. The amount of appropriate tax representation cost that can be considered as fixed cost was increased to EUR 1,000.

However, a solution for the Fixed-cost Subsidy I was still rejected. This was justified with the argument that a subsequent amendment would constitute unequal treatment of those who had already commissioned a tax advisor, auditor or accountant for the application.

4.1.5. Fixed-cost Subsidy 800,000

Family business succession Even Fixed-cost Subsidy I stipulated that newly founded companies are only eligible if they, by way of universal succession, take over or continue a previously existing operative company after 16 March 2020 (first lockdown). Singular succession was not considered, not even in family businesses.

This applies to the Fixed-cost Subsidy 800,000 too. Only companies that have already made sales before 16 September 2020 could apply from 23 November

2020. Singular successors of family businesses are still excluded from the full fixed-cost subsidy, as the sales made by the former business owner in the same period of the previous year cannot be used in the calculation.

The Federal Ministry of Finance promised an amendment. The changed directives were published on 16 February 2021.

4.1.6. Lockdown revenue compensation

Lockdown revenue compensation was set up to help those companies in sectors directly impacted by the official closures due to the 2nd and 3rd COVID-19 Preventive Measures Regulation (*COVID-19-Schutzmaßnahmenverordnung*) and the 2nd COVID-19 Emergency Measures Regulation (*COVID-19-Notmaßnahmenverordnung*) in November and December 2020. This support is also managed by the COFAG company, which cannot be directly investigated by the AOB.

Suppliers

The amount of the assistance is a percentage based on the revenue from the same period in the previous year.

Those companies, which were not directly affected by the standard closures but which earn most of their revenue from companies that had to close due to the regulations mentioned above were not included. This was the subject matter of complaints from several persons to the AOB.

The Federal Ministry of Finance promised to develop a solution to the problem. The directives amended by way of regulation from 16 February 2021 stipulate that now the companies indirectly affected by the second lockdown are eligible to apply for the lockdown revenue compensation.

4.1.7. Subsidy for renting out private guest rooms

In mid-March 2020, most accommodation businesses were closed. Renters of private guest rooms who did not have to close but often suffered substantial losses in revenue were initially unable to receive benefits from the Hardship Fund if they did not have a farming and forestry operation. The criticism of this unequal treatment was taken into considered in an amendment to the Hardship Fund Act. From 16 April 2020, renters of private guest rooms with a maximum of ten beds who are not subject to the Austrian Industrial Code (*Gewerbeordnung*) could apply for the subsidy from *AgrarMarkt Austria* on the basis of the “directive pursuant to Section 1 (4) of the Hardship Fund Act for loss of revenue for agricultural and forestry operations as well as the rental of private guest rooms” of the Federal Ministry of Finance.

Renters of private guest rooms at a disadvantage

Those affected could not understand that subsidies were only planned for persons who rent out guest rooms or holiday apartments “in their own household that is their main place of residence”. There is no objective justification for this

Rental at main place of residence

condition particularly considering that this does not apply for the rental of guest rooms as part of an agricultural and forestry business.

According to the Federal Ministry of Agriculture, Regions and Tourism, the rental of private guest rooms as set forth in the directive requires that this is exercised by the “usual members of the own household as a domestic additional occupation”. The rental of private guest rooms thus requires that the renter lives in their own household. Offering accommodation outside of the main place of residence is either a business enterprise (e.g. B&B) or the mere rental of residential space, which however is not considered a case of hardship requiring support by the Federal Government.

The rental of holiday apartments by farmers within the framework of holiday on the farm in turn is in close cooperation with the farm work and is thus ancillary to this in commercial terms. It serves to preserve the agricultural structures.

Offering accommodation to tourists that goes beyond the limits of the rental of private guest rooms constitutes a business enterprise with business licence according to the Federal Ministry of Agriculture, Regions and Tourism. Renters of holiday apartments without a commercial business would enjoy tax benefits compared with businesspeople. For example, social insurance contributions would not have to be made and they would not need a business licence. The Federal Ministry of Agriculture, Regions and Tourism did not consider an initiative to change the legal situation necessary.

However, on 24 February 2021 the National Council adopted an extension of the group of eligible persons in accordance with the Hardship Fund Act. Not only renters with a maximum of ten guest beds in their own household can receive payments from the Hardship Fund in future, but all renters to tourists who generate an income from the rental pursuant to the Income Tax Act (*Einkommensteuergesetz*) and pay visitor tax per overnight stay.

4.1.8. Subsidies for young beekeepers

Case of force majeure *AgrarMarkt Austria* refused a man from Burgenland a starter subsidy because he had already purchased the bees and the necessary equipment before completing the required training courses. This contradicts the applicable subsidy directive of the Federal Ministry of Agriculture, Regions and Tourism. The applicant claimed that he had not been able to complete the courses on time because all of the dates in Burgenland had been cancelled due to the coronavirus pandemic. As he had assumed that the booked courses would take place, he had ordered the necessary equipment at the same time, some of which he received before the courses were completed instead of thereafter as planned. An instruction from the Federal Ministry of Agriculture, Regions and Tourism, who had been contacted by the AOB, to *AgrarMarkt Austria* clarified that cases in which completion of the training was not possible shall

be deemed force majeure in the sense of procurement regulations. Contrary to the stance taken by *AgrarMarkt Austria*, the subsidy would thus have to be granted in such cases.

4.2. Business interruption insurance

Not least due to a case addressed in the television programme *Bürgeranwalt* about the problems with business interruption insurance, the AOB was repeatedly confronted with similar cases. There was criticism of the fact that the insurance companies did not recognise the COVID-19-related business restrictions and resulting loss of revenue as an insurance case.

No business interruption insurance indemnity for damages

In a statement of opinion, the Austrian Insurance Association (*Versicherungsverband Österreich*) pointed out that business interruption insurance is not suitable for covering a risk of this magnitude in the event of a pandemic. The essence of every insurance company is that a large insurance community covers the damages of each and every insured party. An insurance company cannot cover the eventuality that all of those insured will suffer a loss in advance. Furthermore, the business interruption insurance only covers an actual loss incurred being the difference between the revenues, which would have been earned without the official closure of the business and the income that was actually earned. In the event of a pandemic such as COVID-19, which had caused a collapse of the entire market, there is no such loss because there was anyway no opportunity to earn revenue. The association concluded by emphasising that it is naturally at the discretion of individual insurance companies to voluntarily offer support in the form of *ex-gratis* solutions.

It remained for the AOB to merely point out that these cases are not within the AOB's remit and referred those affected to the complaints office of the Austrian Insurance Association.

5. Private and public life

The Government enacted a large number of curfews and bans to prevent the completely uncontrolled spread of the virus. These mean massive restrictions in the daily life of all citizens: meeting privately, visits or travel are suddenly not possible or only to a limited extent. The much-debated closures of restaurants, accommodation, swimming pools, gyms, museums and public parks have drastically curtailed social life.

Great uncertainty in the population regarding curfews

The measures were flanked by numerous newly enacted laws and regulations. Frequent changes to these regulations, unclear legal terms and scope for interpretation caused considerable uncertainty in the population. The communication from the Government contributed to the confusion with contradictory statements on the curfews in the first weeks of the lockdown. Many persons no longer knew what was allowed and what was forbidden.

The AOB received many queries on the specific meaning of the restrictions and bans. The penalties imposed by the police for violating the curfews were perceived by many as excessive and gave reason for complaint. The necessary cancellation of holiday trips caused problems and led many to seek support from the AOB. Many complaints also concerned the entry regulations and implementation thereof.

5.1. Bans and curfews

5.1.1. Legal bases

COVID-19 caused a health, economic and social crisis, the overcoming of which posed and still is posing extraordinary challenges for the legislature, the public administration and the population. Those who enacted, executed and sanctioned such measures had a key role in 2020. However, all decisions taken to contain or slow down the spread of the virus also require the support of those who are affected by the same and of whom it is expected that they orientate their behaviour accordingly.

Infringements of fundamental rights shall be in conformity with the constitution

As presented by the Constitutional Court of Austria in the fundamental ruling of 14 July 2020, V 363/2020, crises are characterised by the fact that statutory measures for overcoming a pandemic have to be set under time pressure and amid uncertainty. Great efforts are being made worldwide to intensify the research of COVID-19. According to a study by the OECD, around 75,000 scientific publications appeared by the end of November 2020. It is very difficult to keep an overview of the enormous amount of new studies and changing scientific findings. Even in such situations, the Federal Constitution leads the legislature and administration by the principle of legality in particular as well as by the fundamental rights framework, which is formed

by a system of constitutionally guaranteed laws. These fundamental rights restrict the options the State has to take action even in a pandemic. A liberal constitutional order always requires a careful weighing up of public interests and the conflicting interests of each individual. This still applies when the interest in maintaining health and the right to life are even based on interests anchored in fundamental rights, which compel the State to act. According to the European Court of Human Rights, the right to life is the condition for all other fundamental rights and shall be interpreted such that the associated warning and protective function is actually “practical and effective” (ECHR, U 27.9.1995, McCann v. the United Kingdom, No. 18984/91 amongst others).

A few weeks after the first outbreak of COVID-19 in Austria, the COVID-19 Measures Act (*COVID-19-Maßnahmengesetz*), Federal Law Gazette I No. 12/2020 (amended by Federal Law Gazette I No. 23/2020), was adopted, certified and announced within just 26 hours – with minimum parliamentary attendance, without review and without detailed final debate and preparation. This transferred extensive powers to act to the Federal Minister of Health.

Power to act for Minister of Health

The Federal Minister made use of the legally granted powers to ban entering restaurants on the one hand and entering “certain places” on the other to prevent the spread of the infection by way of the regulations in Federal Law Gazette II No. 96/2020 and Federal Law Gazette II No. 98/2020 in the version of Federal Law Gazette II No. 108/2020. With a few exceptions, “entering public places” was banned from 16 March 2020 with the regulation pursuant to the Section 2 (1) of the COVID-19 Measures Act. From 17 March 2020, entering the customer area of businesses was banned; here too, there were specific exceptions. The resulting lockdown was then adjusted and eased several times. It was foreseeable that these massive infringements of many fundamental and human rights would occupy not only the Constitutional Court of Austria but the AOB as well. This involves restricting the right to personal freedom, the right of free movement and residence, the freedom to work, freedom of religion, the right to assemble, the right to privacy, the right to a family life, the right of ownership and the right to education amongst others.

Bans and curfews

Just a few days after the regulations mentioned came into force, it was evident from the numbers of incoming calls to the AOB that even the ministries had reached diverging views on the scope and content of the curfews. For example, the ministries for justice, family affairs and health needed several days until they unanimously clarified that children are allowed after all to be taken to and collected from the parent with whom they do not or not predominantly reside.

Right of contact to minors disputed

Problems arose already in the first few weeks fuelled by the contradictory information in the regulations and the government communication about the curfews and the fact that violations were threatened with substantial fines. The majority of the population relied on the publicly communicated information on what was allowed and what was forbidden. Some members

Uncertainty fuelled by contradictory government communication

of government emphasised in the media that persons shall only leave the home for “four reasons” and, if need be, shall “get some fresh air or go for walks or do sport” even though the text of the regulation permitted entering public places “outdoors alone, with persons from the same household or with pets” completely without any purpose limitation (see more under Blaßnig, *Staatliche Desinformation in der Corona-Krise*, Juridikum 4/2020, p. 433).

Legal norms that infringe everyday life to such an extent must always be comprehensible and transparent. It is not surprising that criticism of the interpretation preferred by some members of government was not long in coming. The AOB received many queries asking about the implications of the reasons for exceptions and whether this regulation is even conformant with the law or the constitution. The AOB provided comprehensive information on the relevant legal framework and legal protection options (stance taken by individual carriers, legal remedies against imposed fines etc.). It should be noted that within the framework of abstract judicial review the AOB can only challenge valid regulations before the Constitutional Court of Austria and that this requirement for the case shall be given, according to the permanent jurisdiction of said court, not only at the point in time when the application is submitted but also at the time of the ruling by the Constitutional Court. As the criticised curfews and bans were time-limited, it was evident that they would no longer be in force at the time of the ruling by the Constitutional Court. Any applications from the AOB would have had to be rejected by the Constitutional Court as impermissible due to the loss of the legitimation for appeal.

Record viewing of
television programme
Bürgeranwalt

In order to reach large sections of the population, the Ombudspersons answered legal questions on COVID-19 that go beyond their area of responsibility in the television programme *Bürgeranwalt* during the first lockdown. Viewers were requested by the editors to send in short video clips with a description of their problem. The programmes in spring 2020 regularly reached more than 600,000 viewers.

Constitutional Court
of Austria determines
unlawfulness of
COVID-19 Measures
Regulation

With the ruling of 14 July 2020, V 363/2020, the Constitutional Court of Austria decided that there were no constitutional concerns regarding the legal powers to issue statutory regulations but that most of the COVID-19 Measures Regulation (*COVID-19-Maßnahmenverordnung*) by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection were unlawful. This was justified with the argument that Section 1 of the Regulation stipulates a general ban on entering public places and thus, contrary to the legal provision of Section 2 of the COVID-19 Measures Act (*COVID-19-Maßnahmegesetz*), does not forbid entering certain places but constitutes a general curfew. If, however, Section 2 of the COVID-19 Measures Act only stipulates bans on entering certain places within the framework of the existing freedom to move, the Act does permit imposing a general legal ban with exculpatory elements.

However, the Constitutional Court expressly emphasised that a stricter curfew could be justified in certain conditions under relevant time-related, personal and material restrictions. If such a measure should prove to be appropriate, it would require a specific and more closely defined legal base.

Curfews not unconstitutional per se

The Constitutional Court also clarified that the issuer of the regulation shall take their decision based on current information regarding those circumstances for which the law is being specifically enacted. Every decision shall also be preceded by a weighing up of interests and this shall be documented in the regulation enactment procedure accordingly in order to guarantee examination of the lawfulness of the regulation. If the law does not determine the content of the regulation such that the content basically follows the law, the issuer of the regulation shall identify the essential circumstances according to the law and document the same in the regulation enactment procedure in a transparent manner, so that it can be examined whether the specific regulation complies with the law in the concrete situation.

The Constitutional Court subsequently deemed several regulations decreed for the prevention of the spread of COVID-19 to be unlawful because the essential circumstances according to the law were not documented in a transparent manner in the regulation enactment procedure. The AOB also found cases of maladministration before the ruling of the Constitutional Court because regulations by Governors for the prevention of the spread of COVID-19 were not sufficiently justified (see chapter 5.1.1).

In response to this ruling by the Constitutional Court, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection drew up a draft bill for amending the COVID-19 Measures Act in August 2020 and sent it for review. According to this draft, the entering “of certain places” or “of public places in their entirety” could be “regulated” by way of regulation insofar as this is “required” to prevent the spread of COVID-19. The AOB submitted a critical and constructive statement of opinion for this draft and emphasised that the legal aspects and content of this regulation should be completely revised before resolution by the National Council.

Draft bill by the Federal Ministry with serious flaws

After a total of two review procedures, over 16,400 statements of opinion and an expert hearing, an amended COVID-19 Measures Act, Federal Law Gazette I No. 104/2020, was adopted that accommodated most of the reservations of the AOB. Even though it was emphasised in the plenary debate at the end of September 2020 that a second lockdown should be avoided at all costs, Section 5 of this Act stipulates the possibility of enacting a regulation that only permits leaving the private home for certain reasons. As a “safety loop”, the involvement of the Main Committee of the National Council shall precede this. Furthermore, the wording of the law clearly mentions quantitative and qualitative criteria for assessing the epidemiological situation. These cover several indicators which when looked at together enable assessing the risk of the spread of the virus and the risk to the health care system. The intended task

Broader involvement of critical voices in the COVID-19 legislature

of the “Corona Commission” was to make specialised recommendations on the risk assessment before the enactment of every regulation. However, these are provided in the form of press conferences in the best case; the Minister of Health does not have to justify if he deviates from the recommendation of the Corona Commission.

Two new regulations
on curfew rules in
November 2020

After the exponential increases in cases of COVID-19 could no longer be underestimated in the second half of October 2020 and doctors as well as caregivers from the COVID-19 ICUs addressed the public, the Minister of Social Affairs, Health, Care and Consumer Protection made use of the new powers to issue regulations for the first time and enacted the 1st COVID-19 Preventive Measures Regulation (*1. COVID-19-Schutzmaßnahmenverordnung*), or “lockdown light”, on 1 November 2020. The 1st COVID-19 Emergency Measures Regulation (*1. COVID-19-Notmaßnahmenverordnung*) announced on 15 November 2020 served shortly afterwards to address the issue that only a tightening of the measures could counter the imminent collapse of the health care system.

With Christmas business in mind, there was a return – with somewhat lower numbers of infections – to “lockdown light” on 7 December. The 3rd COVID-19 Preventive Measures Regulation (*3. COVID-19-Schutzmaßnahmenverordnung*), valid between 17 and 26 December 2020, also included rules for meeting in private households (no more than six persons from two different households plus their children under the age of 18). Exceptions to this rule were decreed on 24 and 25 December 2020 (maximum of ten persons with no time limit, without one metre social distancing and without the obligation to wear a mask from a maximum of ten different households). From 26 December 2020, social, cultural and commercial life was curtailed to a minimum once again with a third “hard” lockdown – regulated in the 2nd COVID-19 Emergency Measures Regulation (*2. COVID-19-Notfallmaßnahmenverordnung*).

Cases pending before
the Constitutional Court
of Austria

According to the knowledge of the AOB, there are serious concerns regarding the lawfulness of these regulations, and relevant court cases were pending before the Constitutional Court of Austria.

In recent months, an increasing number of persons have lost confidence in the pandemic management, which constantly changes rules and deviates from declared yet unachieved goals. Pandemic fatigue is described by the WHO (2020) as low risk perception, little willingness to further inform oneself and be mindful of one’s own protective behaviour. For most people however it is clear that the effects of this crisis will be noticeable for themselves and their children in the short and in the long term. The consensus that prevailed at the beginning on which restrictions for overcoming the health crisis are necessary and tolerable for an open society in general is thus crumbling. Politicians and the administration are called on to shift more to a communication process on federal and regional level that reflects such limits of managing the pandemic through legislation.

5.1.1.1. Regulations by Governors

In executing Section 2 of the COVID-19 Measures Act (*COVID-19-Maßnahmengesetz*), Federal Law Gazette I No. 12/2020, many implementation regulations were decreed not only by the Federal Minister of Social Affairs, Health, Care and Consumer Protection but also by Governors. The AOB received several complaints criticising the unlawfulness of the regulations decreed by the Governors. In two cases, the AOB reached the conclusion that parts of the regulation were unlawful because sufficient grounds for the decreed restrictions could not be presented to the AOB. As the Constitutional Court of Austria stated to the AOB several times after conclusion of the relevant investigative proceedings, the circumstances that justify the restrictions in an otherwise unlawful regulation shall however be documented in the regulation themselves. This was not the case in the following two regulations.

Complaints against regulations by Governors justified in two cases

Regulation by the Governor of Burgenland of 16 April 2020 with which entering lakesides, jetties, lake huts and harbour installations on stretches of water is banned due to the outbreak of the coronavirus (Regional Law Gazette for Burgenland No. 24/2020)

The regulations banned entering lakesides and jetties, lake huts, harbour and slip installations for the purpose of launching and removing boats as well as the taking into operation of watercraft of all types on stretches of water. At the same time, (amongst others) an exception was decreed for the “purpose of regional local recreation” whereby a person with a “place of residence within a 15 km radius of the recreation area” was defined as such pursuant to Section 1 (3), first sentence, of the regulation.

Exception to bans for the “purpose of regional local recreation”

After receiving a complaint, the AOB requested the Governor of Burgenland for a detailed and informative statement of opinion with regard to the legal cover of this regulation, which should depict in particular the considerations on which this demarcation is based and why it is considered objectively justified.

Questionable demarcation of the local recreation area

The statement of opinion by the regional government of Burgenland did not include any explanation of the reason why the definition of the “regional local recreation” with “place of residence within a 15 km radius of the local recreation area” was used.

Demarcation used not transparent

In the absence of any pertinent explanations, the AOB saw no other alternative but to determine a case of maladministration.

AOB determines case of maladministration

As the Constitutional Court has stated in constant jurisdiction, (see e.g. Collection of decisions of the Austrian Constitutional Court 20115/2016), the principle of equality is also binding for the issuer of the regulation, setting limits in terms of content by forbidding them to make rules that are not objectively justifiable.

In the opinion of the AOB, Section 2 (2) of the COVID-19 Measures Act, Federal Law Gazette I No. 12/2020, can and shall be interpreted in conformance with the constitution in such a way that only regulations that meet the constitutional requirements inherent in the principle of equality are permissible.

Bans and exceptions to them shall be objectively justifiable

The AOB does not doubt that the issuer of the regulation is entitled to attempt within the given leeway to find a balance between the anticipated stampede on certain locations and imposing a complete ban. However, the relevant rules shall be objectively justifiable. An arbitrary definition of the number of kilometres inside of which a place of residence shall be located in order to have access is in any case not justifiable.

As the regulation became ineffective upon expiry on 30 April 2020, additional actions such as challenging by the AOB before the Constitutional Court were not possible.

Regulation by the Governor of Salzburg of 29 April 2020 with which entering playgrounds is regulated for the prevention of the spread of COVID-19 (Regional Law Gazette for Salzburg No. 54/2020)

The AOB also assessed parts of another regulation, which had been the subject of a complaint, as being unlawful.

Does the obligation to wear a mask in the playground violate the principle of equality?

The regulation (see Section 1 (1) and (2)) decrees that children and adolescents are allowed to enter and use public playgrounds and other specific children's play areas without wearing a mask whilst adult accompanying persons who can usually maintain a greater distance to others when accompanying adolescents were obliged to wear a mask without exception.

This distinction posed the question of the considerations on which it was based and why it can be seen as objectively justified.

The statement of opinion from the competent office of the regional government of Salzburg pointed out that small children cannot be expected to wear a mask when playing on the one hand. On the other, "it cannot be assumed that due to the care and support to be given to the children (...) persons accompanying and supervising them can always maintain a distance of one metre from the children they are looking after".

AOB identifies questionable demarcation

The AOB concedes that these explanations provide ample grounds for treating children and those supervising them differently. However, these considerations do not explain why the distinction between adolescents and those supervising them is justified. Because it cannot be disputed that COVID-19 can also be transmitted by adolescents and they were treated the same way as adults when it came to the obligation to wear a mask in many other regulations. In addition, the adult persons accompanying the adolescents even have to wear a mask when they are alone with an adolescent with whom they live

in the same household on the playground or the playground is so big that maintaining a safety distance to other persons is easily possible.

In view of this, the AOB felt compelled to determine a case of maladministration:

In the opinion of the AOB, Section 2 (2) of the COVID-19 Measures Act, Federal Law Gazette I No. 12/2020, can and shall be interpreted in conformance with the constitution in such a way that only regulations that meet the constitutional requirements inherent in the principle of equality are permissible.

The AOB does not doubt that the issuer of the regulation is entitled to attempt within the given leeway to find a balance between the anticipated stampede on certain locations (in this specific case: playgrounds) and imposing a complete ban. However, the relevant rules shall be objectively justifiable, which in turn is conditional upon demarcations being defined in such a way that they are in line with the requirements of the principle of equality. An arbitrary definition of groups of persons who are obliged to wear a mask is, objectively speaking, just as unjustifiable as the definition of such an obligation when the safety distance can be easily maintained outdoors in the specific situation.

Obligation to wear a mask shall be objectively justifiable

As the regulation became ineffective upon expiry of 29 May 2020, further actions were not possible.

5.1.2. Police checks

Since the beginning of the COVID-19 pandemic and during the first lockdown in particular, the AOB has received COVID-19-related complaints about the approach used by the police. The rationale behind the official acts such as compliance with COVID-19 protective measures was rarely the issue but rather other official acts by the police that caused dissatisfaction among those affected. The complaints were predominantly about the police behaviour at road checks, checks in the public or private areas as well as contact in the police stations. The clearly tense situation for all those involved during the first lockdown caused more discussions and arguments. When the police did not only implement the usual checks during such official actions but also checked the COVID-19 protective measures, the affected persons felt harassed. They accused the law enforcement officers of not observing the protective measures themselves.

The reasons for complaints were predominantly the failure to observe social distancing, not wearing a mask or not wearing a mask properly as well as the excessive or unfriendly treatment by the law enforcement officers when checking compliance with the COVID-19 measures, particularly with persons who refused to wear a mask.

There were several complaints about road checks. The law enforcement officers had allegedly not worn masks and performed the road check in an extremely unfriendly manner. The AOB explained the legal protection options

Road checks

(measures and directives complaint) to those affected. Further investigation by the AOB was not desired. One woman claimed that a police officer had worn the mask “half-heartedly” during a road check. She did not want investigative proceedings, as she had already contacted the police complaints office.

A woman complained about the unfriendly behaviour of a policewoman during a car breakdown and criticised that she was not wearing a mask. The investigation showed that the law enforcement officers did not wear masks as they were outdoors. According to the Federal Ministry of the Interior, at least 1.5 metres distance were maintained during the complete official act except for when the documents were being handed over (approx. 1 metre). The woman had at no point in time said that she was in a risk group or was afraid of contracting a COVID-19 infection. Rather, she had only put on her FFP2 mask after about two thirds of the official act had elapsed. The Federal Ministry of the Interior conceded, however, that the policewoman should have reacted more sensitively to the emergency in which the woman found herself. Her supervisor had had a meeting with her to clarify the situation.

Two persons complained about the failure to observe social distancing and the issuing of a penalty order due to violation of the COVID-19 rules by entering a public area. The result of the official disciplinary complaint, which the affected persons had raised simultaneously was still pending. A cyclist complained that a plain-clothes officer had almost touched him. He had responded with an “obscene gesture”. The law enforcement officers had allegedly not maintained the minimum distance during the ensuing official act. The Federal Ministry of the Interior stated that according to the officers the cyclist had failed to observe the correct distance. The AOB was not able to conclusively clarify who had not complied with the distance rule.

In two other cases, the police found persons talking to others who were not from the same household in petrol stations without wearing a mask. In one case, the affected person explained that he had already initiated legal remedies against the administrative fine, which is why there was no opportunity for the AOB to undertake any action. The affected person declined to have any unfriendly utterances by the officers examined by the AOB. In the case of the second official act, a coronavirus check at the petrol station was the grounds for a detailed vehicle check, which culminated in several complaints pursuant to the Motor Vehicle Act (*Kraftfahrzeuggesetz*). The AOB was not able to determine a case of maladministration.

Border checks A man complained about the failure of the law enforcement officers to maintain a minimum distance when examining his vehicle papers during a border check. At the time of the check, the measures, which had been decreed by regulation of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection to contain the spread of COVID-19 had been eased. This is why the law enforcement officers did wear a mask all of the time on routine checks. A distance of more than one metre could be maintained by stretching

out the arm between the officer and the person being checked. Only in the event that the controlled persons were asked to get out of the car to open the boot for example should the law enforcement officers have put on the masks they had close at hand. This rule was not observed in the case in question.

In another case, a commuter criticised that he was prevented from entering Austria at the Swiss border despite having all of the necessary documents. Another man claimed that his girlfriend was turned back at the Bavarian-Austrian border in an unfriendly manner despite having a negative test result. In both cases, the persons did not substantiate their allegations so that the AOB could not further pursue them.

There were COVID-19-relevant points of contact between the population and the police not only during road checks but also in the public area in general when implementing the curfews. The AOB received complaints during the first lockdown in spring 2020 in particular. At that time, members of the Federal Government communicated the preventive measures – such as the curfews – in press conferences in particular. That these were often mere recommendations was not clear to the public, and sometimes not even to the law enforcement officers responsible for implementing the measures.

Implementing the curfews

There was thus repeated public criticism of the inconsistent, often excessive implementation of the curfews. The AOB therefore initiated *ex-officio* investigative proceedings at the beginning of April 2020. The goal of the proceedings was to trigger a process with the police to provide consistent answers to questions of doubt. The recommendation for more intensive communication with the health authorities (the Federal Ministry of Social Affairs, Health, Care and Consumer Protection in particular) was linked to this, as the police has to intervene on their behalf also with respect to improving or clarifying the legal situation.

To this end, the AOB presented several such questions of doubt to the Federal Ministry of the Interior and referred to official acts that were excessive in the opinion of the AOB (e.g. penalising a mother who bought school supplies for her child because they were not “essential items”). The AOB wanted to pass on the desired timely response to those persons who had complained and requested information, and thereby ensure better understanding of the preventive measures implemented by the police.

Ex-officio investigative proceedings due to open implementation questions

Regrettably, the Federal Ministry of the Interior did not take up this offer of constructive cooperation. The first statement of opinion from the Ministry was only received two months after the investigative proceedings were initiated; it also did not contain any material answers to the questions of the AOB but only referred to the competence of the health authorities. The AOB thus had to remind the Ministry once again of its responsibility to the intervening law enforcement officers and repeated its request for a statement of opinion. The

AOB explicitly demanded internal instructions or explanations for questions of doubt on the level of the individual Police Departments.

Federal Ministry only willing to cooperate to a limited extent

After several reminders, the statement of opinion was sent in December 2020. A total of 5,498 pages of documents were attached, of which only a few were of relevance to the examination, however. In the meantime, a number of court rulings had been made in favour of persons who had complained about the open questions regarding the implementation of the curfews.

The arduous viewing of the documents indicated that the individual Police Departments showed varying levels of commitment to informing their law enforcement officers in the beginning phase of the pandemic. Some Police Departments seem to have given their officers no verifiable assistance. On the other hand, the Police Departments of Tyrol and Vienna, and Upper Austria in particular, deserve praise: their manager of the office for legal affairs directed a substantiated letter on questions of doubt to the Federal Ministry of the Interior at around the same time as the AOB (but independently of them). This is included in the mentioned bundle of documents.

Regrettably, this exemplary initiative appears not to have been successful. In any case, the voluminous bundle of documents provided by the Federal Ministry of the Interior contains no evidence (file memos etc.) of agreement between said Ministry and the health authorities in the interest of the consistent implementation of the preventive measures. This failure caused an – avoidable – loss of confidence of the population in the preventive measures during the pandemic.

The Federal Ministry of the Interior sent the AOB another statement of opinion several months after the examination had been completed. The Ministry made reference to close cooperation with the health authorities and provided documents. These topics had remained unanswered up to the end of the investigative proceedings despite several queries from the AOB. It was not possible for the AOB to make an assessment so far due to the deadline for editing this report. However, the AOB will of course examine the supplementary information.

People looking to relax banished from the Jesuitenwiese

A man contacted the AOB and claimed that he was relaxing on a lawn in a public park in Vienna on 16 March 2020. He was approximately ten metres away from any other persons. The other people who were there also easily observed the required safety distance of one metre. Nevertheless, law enforcement officers drove on to the lawn in six squad cars and “banished” all of those present with a megaphone, regardless of whether they were in breach of valid rules. Furthermore, a helicopter circled above this area permanently. The AOB used this incident to discuss the implementation of the then new rules in the COVID-19 Measures Act by the bodies of the police corps. The police conceded that it was difficult for them to apply these new rules but disputed that persons had been sent away. In another case, a woman contacted

the AOB and complained about the unfriendly, condescending behaviour of law enforcement officers while checking a breach of a “no dogs zone”. The allegations could not be verified in the investigative proceedings.

A man complained that two law enforcement officers had driven through the Rochusmarkt (a market place in Vienna) on their motorcycles to check compliance with the minimum distance rule. Driving into the market had put the visitors there at serious risk. The AOB determined that the police operation was justified but that driving into the market on motorcycles was dangerous and unnecessary. The law enforcement officers should have parked the motorcycles at the edge of the market and continued the operation on foot.

Police motorcycles drove through market

A man complained that the police had not helped him to regain entry to a bank after he had been sent away by security staff for not wearing a mask and not complying with the social distancing rules. He requested information on the legal protection options open to him. In another case, a man claimed that he had been issued a penalty order for shouting and swearing outside business premises and had been reported to the health authorities for not maintaining social distancing and not wearing a mask. The examination confirmed that the official act was correct.

Entering banks and business premises

A man complained that a local shop refused to serve him because he was not wearing a mask. He also criticised that the police whom he had called to his aid did not help him in implementing the, in his opinion, obligation of the local shop to do business with him – even without a mask. The AOB informed the affected person of the legal situation and explained to him that the question of whether the obligation of a local shop to conclude a contract or whether the refusal to conclude such a contract is lawful or unlawful shall be cleared before the courts in the event of a dispute.

In Vienna, the police ordered a passenger to leave the underground station because he was not wearing a mask. He was issued a fine. A man from Styria did not observe social distancing outdoors when taking a drink with several other persons outside a petrol station. The police charged all of those present. The penal proceedings were pending at the time when the complaints were made to the AOB.

Not wearing a protective mask and breach of social distancing

A man informed the AOB that after being arrested for disturbing a mass in St. Stephen’s Cathedral and not wearing a mask a woman he knows had been unjustly placed in the psychiatric department of a hospital pursuant to the Hospitalisation of Mentally Ill Persons Act (*Unterbringungsgesetz*). There was no indication of inappropriate or unlawful behaviour in the report from the Federal Ministry of the Interior. The AOB could not examine the lawfulness of the placement by the district court.

A woman complained that law enforcement officers had behaved inappropriately while checking compliance with a quarantine notice. The

Out-walking despite quarantine notice

investigative proceedings by the AOB showed that a motorised police patrol noticed two women on the pavement who were not observing one metre social distancing. The law enforcement officers stopped the women for this reason. While establishing their identity, it transpired that the two women had been served a self-isolation order by notice pursuant to Section 7 of the Epidemics Act (*Epidemiegesetz*). The law enforcement officers informed the two women that being outside was in breach of the law and requested them to return to their home. The women complied with the request immediately. They also reported the incident to the Linz *Land* District Authority.

According to the Federal Ministry of the Interior, there was reason to assume that the women could have exposed bystanders, in particular persons living in the complex, to the risk of infection especially during this intense phase of the COVID-19 pandemic. The self-isolation of all persons with the potential to infect others was thus top priority. The examination did not indicate any inappropriate or insensitive behaviour on the part of the law enforcement officers even if the desire of the women for – as they explained – “fresh air” is very understandable from a human point of view.

Deprivation of liberty in nursing home?

In one case, a woman contacted the AOB because Salzburg-Itzling police station refused to file charges for the deprivation of liberty. She explained that during the coronavirus pandemic her grandmother was held in the nursing home where she lived and was not allowed to leave the same. The Federal Ministry of the Interior replied that a report had been completed and sent to the public prosecutors’ office.

Checks in private areas

There were also complaints about the police in connection with official acts in private areas. However, the reason for the police intervention was not to check compliance with the different lockdown rules but because of noise in most cases.

In one case, the police were called at 3.25 a.m. on 15 March 2020 because of noise from a neighbouring apartment. The neighbour’s lawyer criticised that the law enforcement officers did not wear a mask and did not observe the one metre safety distance. Due to her age, Ms N.N. is a very vulnerable person. The Federal Ministry of the Interior argued that the obligation to observe a minimum distance only came into force with the regulation on the COVID-19 Measures Act on 16 March 2020. This legal directive was thus not applicable at the time of the official act. The obligation for the law enforcement officers to wear a protective mask was only valid from 1 April 2020.

A convivial group partying in the inner courtyard of an apartment building accused the law enforcement officers who had been called because of the noise of being impolite. The revellers claimed to have observed social distancing among themselves; however, the law enforcement officers had said that “they should creep away”. The law enforcement officers countered that the revellers had continued partying and had not maintained the minimum distance

despite being issued a warning due to the noise. The AOB was not able to conclude whose version of the events was true.

In another case, a man found his neighbour dead in her apartment and called the police. Both the man and the police accused each other of aggressive behaviour and non-compliance with the required minimum distance during the questioning in the deceased woman's apartment. A conclusive result to the investigative proceedings by the AOB was pending at the time of editing this report.

A man complained that during a police operation in his apartment a law enforcement officer did not wear his mask properly. The Federal Ministry of the Interior was able to verify that the officer had weighed up the situation correctly when assessing the risk of injury to body, life or health and of wearing a mask. The officer's superior nevertheless raised his awareness to the incident.

A man from Carinthia contacted the AOB because in his opinion the police did not undertake any measures to stop the noise caused by visitors to a neighbour's apartment. He also suspected prostitution in the apartment. Due to his health condition, he considered himself to be at risk from the frequent visitors in the neighbour's apartment and when the neighbour was outside. He feared that COVID-19 would be carried into the building. According to the Federal Ministry of the Interior, the man complained to the police four times, which they investigated. The law enforcement officers explained to him that the COVID-19 measures such as curfews apply to public places only. By contrast, the police had no powers for residential space. The AOB did not determine any deficits.

Curfews apply to public places only

One person sought legal representation from the AOB in ongoing legal proceedings for failing to maintain social distance. Another person wanted to initiate proceedings through the AOB for a general examination of COVID-19 measures and requested the AOB to take action. The AOB informed them that it had initiated *ex-officio* investigative proceedings on the implementation of the COVID-19 measures by the police. However, the public prosecutors' office is responsible for criminal proceedings.

5.1.3. General amnesty for COVID-19 fines not planned

Health-related decisions made as part of a policy that attempts to protect the people in the pandemic shall comply with the rules of parliamentary democracy and the state under the rule of law. This shall also be possible in a crisis. The lack of clarity in quickly formulated and then rapidly changing laws and regulations, however, were and still are the main points of criticism of legislature in Austria. In spring 2020 at least, the main source of information for many people were the Federal Government's press conferences broadcast by the media. The inherent lack of clarity or incorrect information compared to the legal texts announced later – in most cases with a preceding review procedure

Unclear legal regulations

– were accepted. The “mediatised” information about applicable law becomes a problem when the content of decrees and bans is incorrectly communicated, and the police orientate their actions on the content announced in the press conferences and reports in the media.

No penalty without legal basis

In particular, the interpretation of exceptions pursuant to Section 2 (5) of the Regulation, Federal Law Gazette II No. 98/2020, (which became ineffective on 30 April 2020) caused confusion. Fines of EUR 3,600 were imposed for violations of the bans on entering certain places pursuant to Section 3 (3) of the COVID-19 Measures Act, and individual members of the Government endeavoured to implement the curfew as restrictively as possible. This was criticised by those who referred to the wording of the announcements and did not consider the relevant explanations as binding. In view of the threat posed by SARS-CoV-2, it was not clear for those who are not legal experts, which behaviour was merely recommended or would actually incur a fine. Public discussions on the matter were not “legal sophistry” but were held in view of a focal element of the rule of law: *nulla poena sine lege* (no penalty without a law). Nobody can be penalised for an action that was not a crime at the time of the deed. Equating political recommendations with applicable law is sometimes exaggeratedly called “fake laws”. A total of 24,095 charges were filed for illegally entering public places, and 17,623 of these resulted in administrative fines. The Regional Administrative Courts of Lower Austria and Vienna interpreted the bans decreed on the basis of the COVID-19 Measures Act less strictly than the Federal Government. Those who accepted their fine and did not initiate legal remedies were left with the legally binding fine that had to be paid.

At the same time of ruling the Regulation, Federal Law Gazette No. 98/2020, to be unlawful, the Constitutional Court decreed that said regulation shall no longer be applied, which affected pending penal proceedings, all of which had to be nullified.

Those affected do not agree with the penalty

In reaction to the ruling of the Constitutional Court, many affected persons contacted the AOB and hoped to have their penalty notification nullified and their paid fines refunded. Those affected did not agree with fines that were imposed on the basis of an unlawful regulation. They also considered the amount of the fines, which was often several hundred euro, to be disproportionate.

The AOB requested the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and all of the regional governments for a statement of opinion on these complaints and on the question of whether the enacting of an amnesty law was being considered.

No amnesty law planned

The responses argued that the current legal situation provides no basis for nullifying penalty orders or refunding already paid fines. Several *Laender* and also the Federal Ministry of Social Affairs, Health, Care and Consumer

Protection pointed out that the drafting of a dedicated amnesty law with which a clear legal basis for refunding paid fines could be introduced was not planned. Only in rare cases have penalty orders been nullified due to massive formal deficits, and paid fines refunded.

The AOB endeavoured to present the legal grounds in an understandable way in their final letter to those affected.

The AOB also received several complaints in which it appeared doubtful that an administrative offence had actually been committed. In one case for example, two sisters had gone outside the front door to “get a breath of fresh air”. The sisters had gone back into the house immediately when a group of adolescents went by. Nevertheless, they were reported for not complying with the required distance rules by police officers who had observed the scene. In another case, a young couple (boyfriend and girlfriend) had been penalised for allegedly failing to observe a distance of one metre from each other while out walking.

As such issues cannot be subsequently verified beyond all doubt, the AOB refrained from determining cases of maladministration. The AOB recommended, however, that the competent authorities proceed with more sensitivity when implementing similar rules in the future.

Sensitivity in implementation demanded

5.2. Travel, border traffic and repatriation

5.2.1. Travel restrictions through entry regulations

To prevent the accelerated spread of infection, the Federal Minister of Social Affairs, Health, Care and Consumer Protection decreed COVID-19 entry regulations that imposed restrictions on entering Austria from neighbouring countries and other states.

Entry considerably restricted

Many persons complained about the regulations and the implementation thereof. These include couples with separate places of residence, families with relatives in other European countries, owners of second homes abroad, business travellers, students, daily commuters, persons with permanent or temporary employment in Austria as well as persons who have a farm in a neighbouring country with animals to be looked after.

Broad spectrum of complaints

Many persons were angered and exasperated by the uncertainty caused by the large number of amendments. The freedom to travel within Europe is one of the greatest achievements of European integration. During the COVID-19 pandemic, many countries felt compelled to not only control their borders after the outbreak of the pandemic but to close them to foreigners and impose entry restrictions for their own citizens.

The legal basis for this in Austria is Section 25 of the Epidemics Act (*Epidemiegesetz*) – a regulation dating back to the time of the monarchy, which has been applicable in its unchanged original form for over 100 years. This norm empowers the legislators to decree measures “to prevent disease from abroad being carried into the country, which affect the entry and transport of persons (into Austrian territory)” without specifying these and defining precise conditions. As this constitutes an infringement of the fundamental right to personal freedom, an interpretation that is conformant with the constitution is indicative, as is in light of the principle of legal certainty of Section 18 (1) of Federal Constitutional Law, that Section 25 of the Epidemics Act could not form an adequate legal basis for such measures.

5.2.1.1. Imprecise formulations

Unclear definition
of family

With the Regulation, Federal Law Gazette II No. 149/2020, the reason for making an exception for “especially extenuating circumstances in the family” was added to the COVID-19 Entry Regulation (*COVID-19-Einreiseverordnung* – originally Federal Law Gazette II No. 87/2020). This exception allowed entry into the country without a medical certificate and without the obligation to go into self-monitored home quarantine. It remained however open, what is deemed to be an especially extenuating circumstance and which definition of family was used as the basis for this regulation.

The following information was available in the FAQ section of the website of the Ministry of Social Affairs, Health, Care and Consumer Protection on 20 April 2020: “The special family-related reasons include for example visits from family members in the event of illness or one’s own children within the framework of custody obligations, or a visit by the significant other.”

According to this information, visits to children by parents who do not have custody and visits by grandparents or grandchildren were not covered in the definition of the exception. There was also no clear answer as to whether ill family members had to stay in Austria or whether relatives abroad could be visited.

The uncertainty did not improve over time but worsened.

Interpretation of the
FAQs changed several
times

The information on the website of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection was changed on 7 May 2020. Visits from grandparents, parents or their children, between persons who are in a long-term relationship/partnership or for special occasions such as a christening, funeral or wedding were considered allowed from this point in time. On 6 June 2020 and 16 June 2020, the website of the Ministry of Social Affairs, Health, Care and Consumer Protection still indicated that visits from close relatives are extenuating circumstances.

However, despite the published FAQs, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection interpreted the regulation differently to the AOB. The mere visit to relatives, that is, a visit from parents, siblings, aunts and uncles, one's own adult children etc., was not an exception (status: 31 May 2020). That the liberal interpretation of the provision had only applied to the Mother's Day weekend was explained in a statement of opinion sent to the AOB.

No harmonised interpretation inside the Ministry

The AOB notes the following points of criticism: first of all, the formulation of the exception rule was imprecise and broadly defined. This made it impossible for those affected by the COVID-19 Entry Regulation to comprehend the precise content of the regulation. Second, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection repeatedly changed the interpretation of the regulation. Third, the information on the website differed from the interpretation that was communicated to the AOB and apparently to the border officials. The Ministry failed to find a consistent way of interpreting the regulation.

The constitutional principle of the legal certainty and the factual efficiency of legal protection are important pillars of the state under the rule of law. A regulation shall be formulated such that it can be assessed what is legal in a specific case. When the wording of a regulation is so unclear that it is not possible for those applying the law to discern the basic content, arbitrariness follows.

Constitutionally critical practice

5.2.1.2. Protection under the law against order to start home quarantine

The COVID-19 Entry Regulation stipulates quarantine as the legal consequence of entering the country from abroad. Several persons complained that they felt like they were at the mercy of the border officials. They did not know how to subject the approach to an examination and whether quickly presented forms really had to be signed in order to enter Austria.

By accepting the obligation to go into home quarantine, those affected are forbidden to leave their own homes or otherwise face criminal charges. This constitutes an infringement of the fundamental right to personal freedom pursuant to Article 5 of the ECHR and Section 1 of the Federal Constitutional Law on the Protection of Personal Freedom – Personal Liberty Act (*Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit*), as it goes beyond a restriction of movement pursuant to Section 4 of the Basic Law on the General Rights of Nationals (*Staatsgrundgesetz*). Despite the fact that 14 or 10 days of home quarantine constitute a serious infringement of fundamental rights, the affected persons received no information about alternatives for protection under the law or even written confirmation of the forms they signed when crossing the border. Even on the FAQ page of the website of the Federal Ministry of Social Affairs, Health, Care and Consumer

No information about protection under the law

Protection there was merely the information that persons concerned could photograph the form, which had to be signed, with their mobile phone and then show this photograph to the border officials.

The Federal Ministry of Social Affairs, Health, Care and Consumer Protection could not understand why there were complaints about this procedure. It was, however, overlooked in this context that border crossings can have consequence in other fields of law. For example, consenting to enter home quarantine after returning to Austria from a business trip abroad meant being unable to come to work. The consequences for the employee's claim to remuneration were however not clear. In particular, cases in which the quarantine-related absence from work was not foreseeable at the time when the business trip was planned or commenced led to arguments with employers to whom not even a certificate from the border control office could be presented. Only since 14 January 2021 the so-called pre-travel clearance forms have been available as a consequence of the new regulation of Section 25a of the Epidemics Act, which provide more transparency for all involved. Those entering the country have to provide requested information electronically in advance in order to have the necessary information available – in particular for contact tracing – when travelling from areas with a high risk of infection. This document shall be presented to the authorities. The authenticity of this confirmation can be verified by QR code. The recorded data is transferred to the district administrative authority that is responsible for the place of residence.

What is voluntary monitored self-isolation?

From the complaints submitted, it is known that several Austrian citizens as well as persons with their main place of residence or permanent abode in Austria were refused entry into the country by quoting Section 25 of the Epidemics Act. This was the case when they did not present a health certificate that confirmed a negative COVID-19 test result or were not willing to go into 14 days of monitored self-isolation. Since the neighbouring countries also refused PCR tests for apparently healthy persons at the beginning of the pandemic, the question arose as to the legal nature of this “voluntary self-obligation to go into home quarantine”. In any case, it is not based on a sufficiently individualised, founded assumption that the affected person represents a source of risk for the spread of infectious diseases as required for self-isolation in Section 7 (1a) of the Epidemics Act. Merely spending time in a neighbouring country is not grounds for such an assumption if there are not additional aspects such as stays in proven risk areas or symptoms of illness. There can be no question of voluntariness if self-monitored home quarantine is a condition for entering the country. The legal view in the pertinent literature is that in the absence of cover in Section 2 (1) (5) of the Personal Liberty Act such home quarantine shall be deemed an unfair infringement in the constitutionally guaranteed right to persons freedom (see Klaushofer et al., *Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus*, ZÖR 2020, issue 4, December 2020).

In fact, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection was initially unsure of which legal remedy could be applied. In a statement of opinion, the Federal Ministry informed the AOB that the legal remedy of bringing an individual appeal before the Constitutional Court of Austria pursuant to Section 139 (1) (3) of Federal Constitutional Law was possible.

The AOB pointed out in this context that preventing entry, in the opinion of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, by border officials should in any event be by means of coercion, which therefore constitutes an act of direct administrative power and coercive measures. The legal remedy against such acts is the measures complaint to the competent Federal Administrative Court pursuant to Section 130 (1) (2) of Federal Constitutional Law. The Federal Ministry of Social Affairs, Health, Care and Consumer Protection subsequently shared this legal opinion.

5.2.1.3. Implementation of the provisions at border checks

Many persons had the impression at border checks that they were being subjected to arbitrary behaviour. The border officials did not always appear to be informed of what they could demand from whom and which certificates and documents would suffice to enable unrestricted entry into the country.

Complaints about arbitrary procedures

Quite a few travellers entering the country reported that they had been waved through several times whilst suddenly out of the blue hotel bills or confirmation from relatives with whom they had stayed or proof of their travel routes or the like had been demanded.

It was also criticised that the affected persons were allegedly not told the reason why the obligation to go into home quarantine had been ordered. Many said that they were merely asked to complete forms as quickly as possible.

Procedures that are conformant with the rule of law are absolutely essential even in crises. Any mistakes made shall be corrected as quickly as possible. This happened very late or not at all in several cases.

The AOB informed the Federal Ministry of Social Affairs, Health, Care and Consumer Protection of its reservations in connection with the enactment of a new COVID-19 Entry Regulation in October 2020. Most of the points of criticism were not taken into consideration.

5.2.2. Travel warnings and cancellations

Since the beginning of the outbreak of COVID-19 in Austria, many letters have been sent to the AOB by persons who wanted to or had to cancel planned trips due to the situation. There was great uncertainty in particular in cases in which tour operators waited too long with the cancellation of a package

Tour operators and airlines unreachable for days

holiday thus leaving the decision on the time of the cancellation up to the traveller who then had to accept paying cancellation fees. In particular, persons who due to health considerations such as an underlying condition or the coronavirus-related postponement of a medically necessary operation were unable to embark on their planned trip were angered by the lack of good will on the part of tour operators and were not pleased with the cancellation fees that were due. Employees who feared losing their jobs in the event of quarantine after returning from a trip were also anxious.

In addition, there were complaints about airlines or tour operators who were unable to provide the agreed services due to the coronavirus but still delayed or refused the reimbursement of already paid costs. In some cases, the possibility to change bookings was offered, which, however, had to be decided at very short notice and was not accepted by those affected due to the uncertain situation. What was particularly critical was that in almost all cases the tour operators or airlines were often unreachable to customers for days and these were confronted with telephonic queues – without the prospect of receiving an answer.

Some of the queries directed to the AOB also had to do with planned cruises. In particular, elderly travellers expressed health reservations and worried that they would be held on the ship longer in the event of an outbreak of the virus.

Considerable need for information about EU Package Travel Directive

The AOB concluded that there is a considerable need for information regarding the EU Package Travel Directive but also on the meaning of travel warnings. Several times the AOB had to point out that in the event of a travel warning for the affected target destination at the time when the traveller embarked on the trip a free cancellation is set forth in the law. On the other hand, an earlier cancellation can incur cancellation fees for which there is no legal claim to reimbursement even if the tour operator cancels the trip at a later date.

5.2.3. Repatriation from abroad by the Federal Ministry for European and International Affairs

Due to the imposing of entry bans and landing bans, the airlines operating from Austria temporarily suspended their regular flight operations on 18 March 2020.

Contribution for repatriation

As a consequence, the Federal Ministry for European and International Affairs launched the greatest repatriation campaign in its history on behalf of the Federal Government of Austria. According to the Ministry, 39 repatriation flights were operated from 29 different countries with more than 7,500 passengers. The Ministry cooperated with three airlines during the repatriation campaign: Austrian Airlines, Laudamotion and Level. The cost of operating the flights was initially charged to the Ministry and paid by the same. During the repatriation flights, the passengers were handed a form with which they

had to consent to paying the intended contribution. The Ministry subsequently collected the announced cost contribution from the passengers.

The AOB received many complaints about this repatriation campaign. On the one hand, there were complaints about the amount of the cost contributions, and on the other, the passengers on the repatriation flights complained about the chaotic management of the repatriation and the lack of or late provision of information to the passengers.

The AOB contacted the Federal Ministry for European and International Affairs several times because of the contributions charged by the same.

A globetrotter complained that the Ministry charged her EUR 1,200 for the repatriation flight from New Zealand. Of course, she had “ticked everything and signed in order to return safely to Austria”. In hindsight, however, she felt that the invoiced amount was too high.

EUR 1,200 for return flight

Another traveller complained that Ministry had charged her EUR 800 for a return flight from Argentina. The trip to Argentina had been a present. She was not able to afford the subsequently invoiced cost of her repatriation flight as a recipient of emergency assistance.

A passenger repatriated from Spain complained about the confusing formulation on the form handed out for collecting the cost contribution. She had ticked on the form to commit to bear “the cost of EUR 300 incurred for the repatriation from Tenerife to Austria for you and your family members”. Due to this formulation, she had assumed that the mentioned fixed amount of EUR 300 covered the flight cost for herself and her husband. Now however, EUR 300 were being demanded from her and her husband respectively.

Confusing form

The Federal Ministry for European and International Affairs provided a statement of opinion on these individual complaints and always pointed out that the repatriation campaign was organised and managed pursuant to the legal mandate of the Consular Law (*Konsulargesetz*) being to support Austrians in need through no fault of their own in returning to Austria. The collection of contributions from the passengers is based on the provisions of the Law on Consular Fees (*Konsulargebührengesetz*). The statements of opinion emphasised that the collected contributions in all cases were substantially less than actual cost and had been oriented on the cost of a one-way tickets under “normal” conditions. Depending on the country, the contribution was between EUR 200 (e.g. United Kingdom) and EUR 1,200 (e.g. New Zealand).

Law on Consular Fees as legal basis

The repatriation flights were managed independently of any performance obligations that the airlines, tour operators or travel organisers had to their customers. Notwithstanding the travellers are free to assert claims for reimbursement from airlines, tour operators or travel organisers for services that were not fully availed of or cancelled. A (partial) reimbursement of

Airlines and travel operators have obligation to perform

repatriation flights is not provided by the State. Exceptions in cases of hardship cannot be granted either.

The AOB informed the affected persons about the content of the statements of opinion and explained the legal bases for the repatriation campaign by the Federal Ministry for European and International Affairs in particular.

Cost contributions are proportionate

In view of the legal bases and the detailed statements of opinion from the Ministry, the AOB did not determine any cases of maladministration regarding the invoiced cost contributions and the amount thereof, particularly considering that according to the Ministry, the collected contributions were substantially less than the actual cost of the flight. Considering the still open claims of the travellers vis-à-vis their originally booked airlines and their tour operators, the AOB could understand the non-granting of exceptions such as in the case of the recipient of emergency assistance.

Regarding any claims for compensation, the AOB referred aggrieved parties to the Consumers Association of Austria or the European Consumer Centre.

Lack of information

In some cases, the passengers expressed dissatisfaction regarding the way in which the repatriation flights were managed and the information before the flights.

Late information about cost contribution

A pensioner complained that it was not clear to her and her partner when boarding the plane in Marsa Alam that she was flying on a repatriation flight organised by the Federal Ministry for European and International Affairs. The hotel manager had informed her that her planned return flight would not be taking off because AUA had suspended flight operations. An AUA flight to Vienna two days later had been offered as a “substitute flight”. The couple had taken this flight. Shortly before landing in Vienna, an official from the Federal Ministry for European and International Affairs had informed the passengers on the flight intercom system that the flight was a repatriation flight organised by said Ministry and the passengers would have to sign a letter committing them to pay a contribution of EUR 300.

Regarding this complaint, the Federal Ministry for European and International Affairs pointed out that many Austrian tourists in resorts in Egypt had booked their trips with tour operators. The initial communication had been through the tour operator in the case in question. Due to this, some passengers unfortunately seem to have had the impression that their flight was a “substitute flight” organised by the tour operator and not a repatriation flight organised by the Ministry. As the tour operator confirmed to said Ministry, the passengers had been informed under considerable time pressure. All of the registered passengers whose contact data was available to the embassy had however been additionally informed per email by the Austrian embassy in Cairo about the exact departure time and the flight number of the repatriation flight.

It was not possible for staff from the Austrian embassy to offer support at Marsa Alam airport. For this reason, an employee from the Federal Ministry for European and International Affairs was on the flight. He had not been allowed to disembark from the plane in Marsa Alam and was thus only able to inform the passengers individually about the repatriation and the contribution due after they had boarded the plane and during the flight.

According to the assessment by the AOB, the communication regarding the repatriation by the Federal Ministry for European and International Affairs could have been better. However, the AOB noted that the repatriation campaign had been carried out at short notice and under considerable time pressure. As it was apparently not possible for the employee of the Ministry to leave the plane on which he had flown to Marsa Alam after landing there, he was only able to inform the passengers in more detail about the repatriation and the requested contribution after they had boarded the plane. Due to the large number of passengers and the many individual conversations with them, some were only informed shortly before landing in Vienna. In view of these circumstances and the primary objective of facilitating as quick and unbureaucratic a return as possible, the AOB did not determine a case of maladministration.

5.2.4. Service operation in embassies and consulates

5.2.4.1. Restricted public opening hours

As a consequence of the pandemic, borders were closed and public opening hours suspended in the embassies around the world. The AOB was able to provide help here by referring to the competent office of the Federal Ministry for European and International Affairs or the alternative competent embassies by telephone or in writing.

Help could be provided to an Austrian man living in Brazil. He complained that he would have to travel to Brasilia to have a new passport issued. This would have entailed an arduous trip lasting several days due to the considerable distance. His Brazilian photo ID had also expired in 2006. The expatriate Austrian was now not able to show valid ID at the pharmacy when collecting the medication he urgently needed.

Issuing a passport

The AOB first pointed out to the expatriate Austrian that it was also possible to issue a new passport in the nearest honorary consulate in Curitiba. Regarding the expired Brazilian photo ID, the Federal Ministry for European and International Affairs was able to give him the valuable information that due to his age the expatriate Austrian was exempted from renewing his Brazilian photo ID. This was still valid and could be used as normal.

5.2.4.2. Suspension of visa service

The Austrian embassies and consulates suspended public opening hours for foreign legal matters worldwide in mid-March 2020. This included the issuing of visas and the acceptance of applications for visas and residence permits. The only exceptions were applications from family members of Austrians or EU citizens. Entry was thus not possible for persons who were not covered by the exception regulation.

Long waiting time for appointments and visas

An Austrian man spent the duration of the first lockdown with his Lebanese fiancée abroad. He returned to Austria, but his fiancée was not able to enter the country due to the restricted visa service. An Austrian pensioner living in Graz wanted to apply for a visa for his adopted adult Thai son at the Austrian embassy in Bangkok. As adopted adult children do not fulfil the legal definition of “family members”, his adopted son did not qualify under the above-mentioned exception regulation. Due to the epidemiological situation in Pakistan and the associated restriction of public opening hours on the grounds of health protection, there were longer waiting times at the Austrian embassy in Islamabad. The appointment for the application of a residence permit for the wife of an Austrian man was cancelled by the embassy. She was only given a new appointment months later.

Uncertainty due to travel restrictions

The travel restrictions abroad also caused uncertainty for persons who were waiting for their residence permits. In one case, a man explained that his wife had to present documents to the Austrian embassy in Beirut. She had to travel over 820 km across Syria and the Lebanon to this end and would have been exposed to a high risk of infection. In another case, a woman from Serbia had problems when returning to Austria especially since there were no buses due to the first lockdown and she did not have a car.

In a complaint about the amount of time taken to process an application for family reunification, the Federal Ministry for European and International Affairs requested the Austrian embassy in Nairobi in February 2020 to schedule an interview. The Austrian embassy in Nairobi had suspended public opening hours and only partially resumed operation on 4 August 2020. Interviews were only held again from 1 October 2020 whereby the family was given an appointment on this day.

5.3. Leisure, sport and living

5.3.1. Closure of the federal parks

Parks closed

The closure of federal parks during the first lockdown from 16 March to 14 April 2020 gave grounds for criticism to the AOB. The Schlosspark Schönbrunn, the Augarten, the Burggarten and the Volksgarten in Vienna and the Hofgarten in Innsbruck amongst others were thus inaccessible to the public. The Federal

Ministry of Agriculture, Regions and Tourism publicly justified the measure with the argument that in the first phase of the pandemic the primary objective was to prevent the rapid and uncontrolled spread of the coronavirus. To this end, social contacts had to be reduced and gatherings of people – including in parks – avoided.

The AOB stated that the risk of spreading the virus and the need to make the necessary public space available to the population had to be weighed up. There was also no evidence of those responsible exceeding the bounds of their discretion, which would have constituted a case of maladministration. However, a different access regulation would certainly have been reasonable – particularly in light of the subsequent knowledge of the spread of the virus and the transmission routes at the time.

Assessment required

5.3.2. Weddings and funerals

Directly after the outbreak of the pandemic – and then subsequently from November 2020 – the maximum permissible number of participants at events was severely limited. Several couples who had planned their wedding for 2020 contacted the AOB in the spring and early summer because they could not foresee the scope and number of guests for planning the wedding. The constant changes in the legal situation and ensuing lack of planning security forced some of them to withdraw from their desired wedding date. In these cases, which were very important to and seriously affected the fundamental rights of those affected, the AOB provided precise and reliable information about the relevant applicable legal situation and the pending developments thereof.

Queries about weddings

The dynamics in the changes to the law also frustrated the anticipation of passing with dignity. Pursuant to the last sentence of Section 2 (3) of the Regulation of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, Federal Law Gazette II No. 98/2020, funerals with close family were deemed necessary basic needs and thus – under the condition that a distance of at least one metre is observed between the persons – covered by the exceptions from a general ban against entering public places. There was thus no legal basis for limiting the number of persons at funerals or services in the beginning. It was thus not possible for the AOB to verify where the instruction to allow only five “close family members” came from. Per decree of 1 April 2020, the Governors were instructed to forbid indoor funeral services with more than ten persons pursuant to Section 15 of the Epidemics Act. There was a lack of clarity here too regarding whether the clericals were included in this number. Funerals with up to 20 mourners were allowed from May onwards. From June 2020, funeral services with up to 100 persons were possible and the rule for the funeral parlour of “ten square metres per person” was eased throughout the summer. The obligation to wear a mask, social distancing, refraining from offering sympathies and, depending on the size of the funeral

Complaints due to restrictions at funerals

parlour, no more than 50 persons at funeral services have been the prevailing code of conduct since autumn 2020. This made the blessing of coffins as well as saying farewell with choirs, brass music bands, bugle blowers etc. impossible. Public prayer before funerals (vigil) was no longer allowed from November 2020.

5.3.3. Holiday home levy

No use of the thermal baths at second place of residence

Persons who own a holiday home in a tourist location have the advantage of being able to use the entire touristic infrastructure. A citizen felt that he was at a disadvantage because he and his family had not been allowed to use the thermal baths at his second place of residence in Styria since March 2020. After the municipality had sent him the notice of charges for the holiday home levy, he asked the AOB whether an aliquot claw back was possible for the time during which the thermal baths had been closed. Because tourism levies are not linked to performance and consideration but are a flat sum contribution to the creation and maintenance of the touristic infrastructure, the AOB assessed the procedure by the municipality as lawful.

5.3.4. Rent for mobile home space despite entry ban

Regulation by the Governor of Burgenland

After the outbreak of COVID-19 in Austria, the Governor of Burgenland imposed a temporary restriction on camping sites and mobile home parks in the entire *Land*. Lessees of affected spaces criticised that they had to pay the full annual rent despite this restriction. The AOB received several complaints on this issue.

Municipality of Donnerskirchen

The lessee of a space in the mobile home park owned by the municipality criticised that the Burgenland Regulation prevented him from using his mobile home for weeks. His request for a rent reduction was, however rejected by the municipality.

In a statement of opinion sent to the AOB, the municipality justified this rejection with the argument that those affected were able to request an exception from the entry ban from the district administrative authority and thus, in the opinion of the municipality, would have had the opportunity to use the mobile home. Furthermore, the municipality pointed out that the subject of the lease was not completely unusable, as the mobile home could be left in its place for the duration of the ban.

However, the AOB did not share this line of argument, as the district administrative authorities had only promised exceptions in special cases of hardship, for example when the affected persons had no other home or were already in the mobile home park at the time when the ban came into force and there was no way of leaving available to them. Neither of these scenarios applied to the examined case.

Furthermore, it was unequivocally clear for the AOB that said regulation rendered the subject of the lease useless in the specific case, as there was absolutely no way it could be used. The AOB requested the municipality as owner of the mobile home park to instruct the company tasked with renting out the spaces to grant an aliquot remission of the rent.

In another case, a lessee sought help on behalf of several affected persons from the AOB and requested information on a possible reimbursement of rent for lessees of mobile home spaces at the lake Neufelder See.

Lake Neufelder See

As the lessor was a private operator, the AOB could only provide general information on the legal basis for the temporary restriction of use for the lessees.

5.3.5. Restricted bathing times

A man from Vienna complained to the AOB that due to the coronavirus-related restructuring, bathing for persons with disabilities no longer took place. Persons with disabilities in particular were often in COVID-19 risk groups and therefore exposed to a high risk if they used the swimming pool during normal hours. Furthermore, persons with disabilities are often subjected to curious looks from others, which is why many avail of the opportunity to bathe in a protected area. Without the opportunity to swim during the times reserved for bathing for persons with disabilities, many of them would no longer have the courage to use the swimming pools. This could have a subsequent negative impact on their state of health.

No swimming for persons with disabilities in Viennese swimming pools

In a statement of opinion, the City of Vienna explained that municipal department MA 44 (Viennese swimming pools) had presented an operating and hygiene concept to the medical crisis taskforce of the City of Vienna, which had been implemented after a positive evaluation. This stipulated that saunas would remain closed and from 21 September 2020 restricted indoor swimming pool operations with a maximum number of visitors could take place. Due to the COVID-19-related admission restrictions, swimming for schools, individual guests and clubs is offered separately in all indoor swimming pools because weekday mornings have to be reserved for the school swimming on the curriculum. There were benefits for all swimmers in the restructuring of the bathing operation – and thus for senior citizens and persons with disabilities too.

Changed operating and hygiene concept

The AOB determined that without doubt the COVID-19-related restructuring also brought about benefits for the majority of the swimmers. Municipal department MA 44 showed great efforts to keep the swimming pools open under difficult conditions. However, the AOB noted in their final letter to the City of Vienna that there are persons with disabilities who see the swimming for senior citizens and for those with disabilities as a “protected area” and who therefore do not want to swim during the normal opening hours.

The AOB thus requested the City of Vienna to reconsider its stance when reopening the swimming pools and to offer special swimming for the group of persons mentioned at least at some locations. These times could be removed from the Viennese swimming pools programme in the event that they are not used.

5.4. Public opening hours and contact with the authorities

Since March 2020, the AOB has been receiving COVID-19-related complaints connected with the right to vote, the law of associations, civil status law, the law on residence registration requirements and road traffic law. The main points of criticism were problems caused by the restricted public opening hours of the authorities.

Participation in referendum

A woman asked the AOB for information on how she could take part in the *“FÜR IMPF-FREIHEIT”* referendum (initiative for vaccination freedom) despite the lockdown. The AOB explained to her that as a citizen entered in the voter register she can submit an endorsement during the registration period at any Austrian municipality during official opening hours or online (by citizen’s card or mobile telephone signature). The curfew regulations stipulated in the 2nd COVID-19 Preventive Measures Regulation (*2. COVID-19-Schutzmaßnahmenverordnung*) during the lockdown were not an obstacle to submitting an endorsement. Section 2 (1) (7) of the 2nd COVID-19 Preventive Measures Regulation explicitly allows the participation in instruments of direct democracy prescribed by law.

Founding an association

A woman requested information on setting up an association in connection with the COVID-19 situation without however referring to a specific administrative procedure, the competent authority and her involvement (as founder of the association). The AOB was thus only able to provide general information on the COVID-19-related regulations for special procedures.

A man reported about the problems his wife had when registering their new joint place of residence. Because of the restricted public opening hours, his wife’s registration was not possible at the end of May 2020, but only a month later. He could register himself and their child digitally without any problems on 20 May 2020. It was particularly problematic that the childcare allowance was stopped for five weeks because of the different addresses.

Restricted public opening hours creates problems

Municipal department MA 62 pointed out that since 15 May 2020 an appointment has to be made for all personal visits at all Viennese registration service offices (by telephone or online) in order to contain the spread of COVID-19. Since 23 March 2020, the internet pages of the City of Vienna have displayed the information that applications can be submitted by placing the necessary documents in the official letter boxes or per email. Only persons with an appointment would be admitted to the municipal district offices.

Persons without an appointment were refused entry and given the pertinent information.

The examination by the AOB showed that the communication with the complainant, who had attempted to take up contact several times, was not smooth. Municipal department MA 62 conceded that mistakes had been made. As the woman was able to plausibly show that she had had all of the documents with her on her first visit, the registration authority entered the registration retroactively with 27 May 2020. The authority also issued confirmation of the registration.

Authority concedes errors and rectifies the problem

Two other investigations in which young families complained about the registration of a change of address (deregistration date not as requested; use of the “digital public office”) which had a negative impact on the payment of childcare allowance had not been completed at the time of editing this report.

A woman had received a birth certificate for her child in Klosterneuburg registry office in April 2020. The authority was not able to register paternity due to the restricted public opening hours. However, the authority had informed the woman that the retrospective acknowledgement of paternity and the re-issue of the birth certificate are possible free of charge. Nevertheless, Vienna-Centre registry office demanded a fee of EUR 9.30. Pursuant to Section 35 (6) of the Austrian Fees Act (*Gebührengesetz*), the issue of a birth certificate is free within two years of the birth of the child. Section 35 (8) of said Act stipulates that documents and official acts that are directly or indirectly affected by the measures necessary to counter the COVID-19 crisis shall be free of fees and charges.

Fee for birth certificate

The Municipal authority of Vienna conceded that the registry office had held the view that a fee could be charged for re-issuing the birth certificate. It had however overlooked the fact that the restricted public opening hours in April 2020 in Klosterneuburg registry office could be considered a necessary measure pursuant to Section 35 (8) of the Austrian Fees Act. The Federal Ministry of the Interior also confirmed that the measures for containing the spread of COVID-19 should not cause a disadvantage in the form of fees and charges for citizens. The fee was reimbursed.

A widow complained that she had been waiting for the issue of the urgently needed death certificates. She also criticised the unfriendly manner in which she was treated on the telephone. The Federal Ministry of the Interior confirmed that the woman had applied for three death certificates at Favoriten registry office on 7 May 2020 and that an entry had been made in the central civil status register the following day. However, delivering the certificates had apparently failed. The death certificates subsequently ordered electronically on 21 May 2020 were delivered within a few days. The Municipal authority of Vienna regretted that there had been misunderstandings and delivery

Issuing a death certificate

problems in connection with the death and that the communication with the authority was unsatisfactory.

Delivery of certificates
by post

A father criticised that the birth certificate and certificate of citizenship for his child had been sent by post without any proof of delivery. The AOB explained the legal situation: only when there are particularly important reasons or it is stipulated in the law is delivery directly to the recipient required pursuant to Section 22, second sentence, of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*). The AOB did not determine any misconduct on the part of the authority. It must be taken into consideration that the dispatch of all official documents with proof of delivery would incur considerable cost. Since March 2020, the civil status authorities have been regularly suspending public opening hours and processing requests in writing. In the opinion of the AOB, the usual contactless delivery without proof of delivery is positive for containing the pandemic.

Conditions at the public
medical officer

A concerned man from Vienna explained that the waiting area for examinations by a public medical officer in the Police Department Vienna building in 1010 Vienna, Deutschmeisterplatz 3, was unsuitable in view of the COVID-19 situation (cramped conditions, no disinfectant dispenser). After the legal situation had been explained to him, he wanted to pursue the matter himself.

Citizenship procedures
in Vienna

Every year, the AOB examines many complaints about the duration of citizenship procedures in Vienna. Responses to the queries from the AOB are slow even under “normal operating conditions”. In the year under review, it was noticeable that between February and June 2020 the AOB had to send reminders to the City of Vienna even more frequently. Four to five months elapsed between the initial letter from the AOB and the statements of opinion. The City of Vienna provided no explanation for this. The AOB attributed the delays to the pandemic (too).

Vienna traffic authority:
public opening hours
restricted

With the coming into effect of the COVID-19 Emergency Measures Regulation (*COVID-19-Notmaßnahmenverordnung*) on 17 November 2020, the public opening hours of the traffic authority were restricted, which was the subject matter of a complaint to the AOB. The public opening hours were Monday to Thursday from 8.00 a.m. to 12.30 p.m. and Friday from 8.00 a.m. to 12.00 p.m. The until then public opening hours on Thursday from 1.30 p.m. to 5.00 p.m. were no longer available. The public was only admitted by summons or appointment by electronic means or by telephone. The authority made reference to a relevant “risk assessment” in this context. The main focus of the criticism was that it was not even possible during the restricted public opening hours to hand in documents to the traffic authority without an appointment. Furthermore, the suspension of the afternoon appointments created problems for the working population.

The AOB stated that the restricted public opening hours without doubt made access to the services of the authority more complicated. However, in view of the special situation caused by the pandemic, the AOB considers it was and still is justified to take precautions for the protection of the staff as a matter of principle. However, as the risk of infection in the afternoon shall not be evaluated as being any different to that in the morning, the AOB recommended resuming public opening hours in the afternoon. Furthermore, consideration should be given to installing a delivery point inside the traffic authority (if necessary, contactless). The Federal Ministry of the Interior confirmed that an incoming post box exists in the outside area of the traffic authority and therefore documents can be placed there at any time.

AOB recommends improvements

6. Traffic and mobility

Mobility was very restricted during the first lockdown in particular. However, the health-related political measures had many apparently less important effects in this area too, which were challenging for the citizens: for example, the extension of temporary driving licences and taking the driving test. Driving schools wanted to offer their services through distance learning but the legal situation, which does not cover such types of instruction, impeded them in doing so. The renewal of inspection badges and re-registration of vehicles that are only used during the warm seasons such as campers or cabriolets created problems in the spring.

Persons who had paid a flat fee for a service wondered whether they would be reimbursed part of the amount, as they were unable to use the service or only with limited access due to the mobility restrictions. Several persons asked whether they could be reimbursed part of the motorway toll from the *ASFINAG*, which is the competent authority responsible for planning, building, financing and maintaining Austrian motorways. Some major cities suspended the short-term parking zones or dispensed with parking fees during the first lockdown. Owners of a parking permit in Vienna who had paid for a full year saw themselves thus at a disadvantage.

There were also many complaints about the *Wiener Linien* (Vienna's public transport operator) whereby their handling of the obligation to wear a mask was criticised – for different reasons. The following section (chapter 6.1) presents the problems addressed by the AOB in this context.

6.1. Wiener Linien

Controversial complaints
on the obligation wear
a mask on public
transport

The AOB was confronted several times by complaints about the obligation to wear a mask on public transport in Vienna (operated by *Wiener Linien GmbH & Co KG*, or *Wiener Linien* in short). The criticism was controversial: whilst some passengers considered themselves to be at risk because of the lack of compliance with the obligation to wear a mask, others complained about the compliance checking of said obligation by *Wiener Linien*, which was excessive in their opinion.

As *Wiener Linien* is a company under private law, the AOB's options to obtaining informal statements of opinion on these cases were restricted.

These statements of opinion showed that *Wiener Linien* initially only pointed out the necessity to wear a mask. Since 1 July 2020, however, they switched to charging EUR 50 in cases of violation. The basis for this was the *Wiener Linien* transport conditions, which are valid to date. It was also noted that the *Wiener Linien* transport conditions apply from the point where the passenger

passes the ticket validation barrier. Furthermore, the obligation to wear a mask applies regardless of whether the underground station is open or closed. It was also pointed out that this approach was used by *Wiener Linien* in order to fulfil their obligation to protect other passengers. The obligation to wear a mask when using public transport is based on a regulation by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection.

Furthermore, the AOB received complaints about the alleged discrimination of annual ticket holders by *Wiener Linien*. Those affected criticised that their freedom of movement was severely restricted during the lockdown in the spring and were thus unable to use their annual ticket or only to a limited extent.

Cost for annual ticket

Regarding these cases, the AOB remarked that public transport was also available during the coronavirus crisis and it was thus possible for the customers to use the same. Furthermore, it is possible to cancel *Wiener Linien* annual tickets. In this context, however, the customers criticised that a processing fee is charged if the annual ticket is cancelled before expiry.

6.2. Expiry of deadlines in driving licence matters

In some cases, there were reports made to the AOB about problems in extending temporary driving licences and the timely completion of driving tests. This was attributable to the pandemic-related reorganisation of processes at the driving licence authorities. Public opening hours were restricted and transferred to electronic communication. It was particularly difficult to obtain appointments for examinations by a public medical officer or traffic-related psychological examinations at short notice. Access to diagnoses and services from medical experts was also restricted for as long as the curfews applied.

The provision in Section 41b (1) of the Driving Licence Act (*Führerscheinggesetz*) which came into force on 14 March 2020 and was limited until 31 December 2020 served to counter this. According to this provision, documents, certificates, records and the like with limited validity, which would expire after 13 March 2020 and which could not be extended due to the coronavirus shall remain valid until 31 May 2020. The expiry of specific deadlines was also suppressed. The powers contained in Section 41b (2) of the Driving Licence Act to extend the deadline to 31 December 2020 at the latest by regulation were not used. However, rules for the approach used by the driving licence authorities contained “tolerance regulations” from the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology calling for a “flexible approach that is adapted to the situation”.

Validity extended by law

Furthermore, Regulation No. 2020/698 of the European Parliament and the Council, which had to be applied directly, stipulated continued validity of seven months for driving licences, which would have expired between 1 February 2020 and 31 August 2020.

EU-wide tolerance regulation

6.3. Distance learning for driving test

Distance learning as alternative	As a consequence of the coronavirus-related restrictions, in-person instruction was not possible in driving schools for quite some time. Driving schools thus offered interactive internet live courses (distance learning) in preparation for the theory part of the driving test. However, these courses were not recognised by the driving licence authorities. This meant that the “graduates” had to repeat the theory course in the driving school. The AOB initiated <i>ex-officio</i> investigative proceedings.
Positive legal opinion	The Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology pointed out that in view of the provisions of the Driving Licence Act (<i>Führerscheinggesetz</i>), the Motor Vehicle Act (<i>Kraftfahrzeuggesetz</i>) and the Motor Vehicle Act Implementing Regulation (<i>Kraftfahrzeuggesetz-Durchführungsverordnung</i>), the driving licence education system was designed as “classroom instruction in front of physically present candidates”. eLearning could only be offered as a supplementary aid. The driving schools countered this with a legal opinion as well as a media-didactical opinion. According to this, there was nothing in the legal regulations that would define distance learning as impermissible or of less value. The instruction for preparation of the theory part of the driving test could also be offered without any restrictions from the media-didactical viewpoint. It was also pointed out that distance learning had evidently produced satisfactory results in the area of schools and universities. However, thought should be given – if required – to creating a specific legal basis in order to make the advantage of digitalisation available to driving licence applicants.
Detailed examination required according to the Ministry	<p>The Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology conceded that the pertinent provisions do not expressly forbid internet courses, in particular considering that the technical requirements did not yet exist at the time when the regulations were defined. However, experts considered the existing form of classroom instruction to be the optimum type of learning and feared deficits and risks to road safety in particular in the event of any changes. The advantages and disadvantages of digitalisation measures in the area of learning to drive shall be evaluated in detail in combination with other disciplines.</p> <p>The decision-making process of the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology was not yet complete at the time of editing this report.</p>
eLearning temporarily accepted	In a decree to all Governors of 5 February 2021, the Ministry clarified on the basis of the 4th COVID-19 Emergency Measures Regulation, however, that the theoretic instruction for a driving licence could be temporarily imparted in the form of eLearning due to the lockdown-related bottleneck and without attending a driving school. This applied – under certain quality assurance

conditions – until 7 March 2021. Furthermore, courses held in eLearning form since mid-November 2020 would be recognised.

6.4. Delays in vehicle registration

The bans effected by the COVID-19 Measures Act caused restrictions in the services provided by the vehicle registration offices. In addition, amongst others operations were limited to approving system-relevant documents and those key to the economy in municipal department MA 46 – regional vehicle inspection office in Vienna. This approach was agreed with the other regional vehicle inspection offices and the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology. However, the AOB received only a few complaints about delays. Furthermore, the legislators addressed this problem with provision in Section 132a of the Motor Vehicle Act (by analogy with Section 41b Driving Licence Act) with which the validity of expired legal vehicle documents, certificates, records etc. was extended to 31 May 2020.

Priority for system-relevant vehicles

6.5. Vehicle tax despite decreed restriction of movement

The curfews imposed in spring 2020 meant the restriction of their freedom of movement for many persons. Older persons or those with underlying conditions in particular were requested to spend as little time as possible outside of the home in order not to expose themselves to the risk of infection.

In this context, the AOB received a complaint from a pensioner who criticised that he had hardly been able to use his car due to the regulations applicable at that time but was still obliged to pay vehicle tax. Temporary de-registration would have been difficult, as his registration office was closed for a month and he would have incurred additional costs for the necessary drive from and back to the area where he lives. He therefore suggested a refund of the vehicle tax and insurance premium for this period.

The AOB pointed out that in their view measures taken to contain the spread of the COVID-19 pandemic are permissible as long as they are proportionate and of a temporary nature even if they can cause challenging situations from the individual point of view. As the AOB does not have a mandate to examine the legislators, they recommended the affected person to address this criticism to representatives of the parliamentary groups.

Furthermore, the AOB recommended contacting the Austrian Insurance Association, which had referred to possible *ex-gratia* solutions for vehicle insurance during the COVID-19-related special situation in an announcement.

6.6. ASFINAG – toll refund

The AOB also received complaints – as a result of entry bans – that sections of tolled roads in Austria could not be used for months but the *ASFINAG* did not refund toll fees in full or proportionally.

No basis for refund A representative of an aid organisation registered in Switzerland thus requested the *ASFINAG* in mid-April 2020 to refund the cost of a digital motorway toll and route toll for the S16 road and the A9 motorway. Nine to ten transports of donations through Austria had been planned; however, use of the tolled roads in Austria was then not possible for persons from Switzerland. The *ASFINAG* informed the affected person that “due to the applicable general conditions”, the return, extension or (partial) refund of a purchased toll (digital or badge) was not possible.

As there is no legal obligation on the *ASFINAG* to pay refunds, even if the use of tolled roads is not possible, and the business activities of *ASFINAG* are not covered by the AOB mandate, the AOB was not able to undertake any further measures in this matter.

6.7. Short-term parking zones and parking fines

During the first lockdown, many towns temporarily suspended short-term parking zones and the surveillance thereof. Both alternatives enabled motorists to use the zones without a time limit and without paying parking fees. The objective of these measures was to counter large groups of persons on public transport and thus reduce the risk of infection.

Short-term parking zones in Vienna suspended In Vienna, short-term parking zones were suspended from 17 March 2020 to 24 April 2020. Several persons who had a parking permit or a flat rate agreement, that is, they had paid for the use of a specific or all short-term parking zones for a fixed period of time (a year in most cases) for a year in advance, requested the AOB to provide support because the City of Vienna had refused to pay the aliquot refund for the period in which the short-term parking zone was suspended. Those affected felt that they were unfairly treated with this unaccommodating stance.

The City of Vienna justified this with the argument that Section 6 of the Flat Rate Regulation (*Pauschalierungsverordnung*) only allows for refund claims of paid flat rates if the debtor is permanently impeded from making use of the same. Furthermore, a refund is not allowed for started calendar months.

The AOB considered this provision inapplicable because Section 6 of the Flat Rate Regulation assumes the existence of circumstances within the power of the debtor, such as in the event of changing to another vehicle or dispensing with the vehicle.

According to Section 4 of the Federal Fiscal Code (*Bundesabgabenordnung*), the claim to payment materialises as soon as the action with which the obligation to pay is realised. Pursuant to the regulation of the Vienna Municipal Council on the flat rate charge for parking meters, the claim to payment exists from the point in time when an exception permit exists for an extensive short-term parking zone. There can thus, in the view of the AOB, be no valid obligation to pay for a short-term parking zone that has been suspended. The City of Vienna was regrettably not willing to move from its stance.

No refund for parking permit

Another motorist contacted the AOB in a similar case in Wiener Neustadt. The woman had paid the flat rate fee for a year in advance and felt at a disadvantage vis-à-vis persons who were able to park for free.

The town of Wiener Neustadt stated that the short-term parking zone had not been suspended per regulation, but the surveillance thereof had been suspended from 19 March 2020 to 1 May 2020. The obligation to pay a fee had thus remained effective as a matter of principle. From the revenues it was evident that a considerable amount of those parking vehicles had also paid the fee per mobile telephone. The coin slots in the parking ticket machines had been sealed for hygiene reasons.

Wiener Neustadt – surveillance suspended

With regard to a potential aliquot refund, the town of Wiener Neustadt argued that when completing the application for an exception permit one is also giving consent to not receiving a refund for an already paid flat rate. Nevertheless, the town was willing to provide a generous solution. It extended the exception permit of the motorist by two months.

Generous extension of exception permit

A motorist informed the AOB that he had not been able to move his vehicle from a short-term parking zone because he had been instructed to go into quarantine. A parking fine had thus been imposed on him. The AOB was not able to investigate on the man's behalf because he had initiated legal remedies. A motorist criticised that the City of Vienna had not suspended the short-term parking zones during the second lockdown and persons who wanted to avoid public transport were at risk of overlooking the time when parking and having a parking fine imposed.

Parking fine during quarantine

Some motorists claimed that they had parked in “keep clear” and “no parking” zones while doing personal errands out of fear of contracting a COVID-19 infection. Because legal remedies had been initiated, the AOB was not able to initiate investigative proceedings. A man from Styria parked his car in a recreation area. As this opportunity for recreation was used by too many people and the authority considered road safety to be at risk because of the cars parked at the roadside, a stopping and parking ban had been imposed. The AOB considered the road safety argument reasonable.

Violation of stopping and parking bans

6.8. Access to waste collection sites

Increased volume of waste The AOB received several queries regarding the use of the Vienna waste collection sites. The reason for this was most likely that many persons diligently cleaned out and cleaned up their homes during the lockdown. The media also reported about the associated problems for the municipalities throughout Austria. Their capacities were completely exhausted in some cases.

Use of Vienna waste collection sites A man from Vienna complained that he had wanted to dispose of an old suite of furniture at one of the Vienna waste collection sites after the first lockdown. His company car had Lower Austria plates. He was refused access because his car did not have Vienna plates. The AOB found that the waste collection sites are based on the conditions of use of the Vienna Waste Management Act (*Abfallwirtschaftsgesetz*). With proof of his place of residence in Vienna and the permission to use his company car for private purposes, he could have applied for an exception permit. The AOB recommended that the employees on the telephone lines of the waste collection sites provide such information. There should be a reference to the exception permit on the website of the Vienna waste collection sites as well.

7. Facilities of the penitentiary system and facilities for the detention of mentally ill offenders

The complaints focussed on three areas in the remit of the Federal Ministry of Justice:

It was and still is sometimes criticised that there are restrictions on participating in oral hearings but not enough attention is paid to social distancing in the courtrooms. The AOB did not find any cases of maladministration in the administration of the judiciary.

Court operations

The AOB received many complaints about the way in which already paid for tickets for events that had to be postponed due to the coronavirus were dealt with. As in the area of tourist events, the main issue was the difficulties visitors to events had in receiving a refund for already paid for tickets. The amendment to the law regarding this matter was also the subject of much criticism in April 2020, which released event organisers from their obligation to make a refund and instead made it possible for them to offer a voucher for COVID-19-related cancellations.

Criticism of voucher solution

Facilities of the penitentiary system and facilities for the detention of mentally ill offenders are particularly affected by the measures to contain the pandemic. The AOB pays special attention to this area. It was noted that not least due to the enormous commitment of the officers in facilities of the penitentiary system as much as possible was done to avoid the spread of the virus to a large extent.

Focus on penitentiary system and facilities for detention of mentally ill offenders – overall summary

This chapter covers not only the activity of the AOB as an ex-post control institution but also the observations from preventive monitoring on the topic of COVID-19. Repetitions and overlaps with the Annual Report on the activities of the Austrian National Preventive Mechanism (NPM) are therefore unavoidable.

7.1. International standards as monitoring benchmark

Directly after the outbreak of the COVID-19 pandemic, international human rights organisations spoke out. They pointed out that measures that are taken in the interest of public health can result in prisoners being exposed to a higher risk of abuse and violation of their human rights. Many guidelines and recommendations were drawn up.

Vulnerable group of persons

Prisoners should receive the same health care as the rest of the population (UN Nelson Mandela Rules, Rule 24). Since close personal contact fosters the spread of the virus, there is a greater risk of infection in the prisons and facilities where liberty is deprived. This is exacerbated by sometimes unhygienic

High risk potential

detention conditions and overcrowded cells – where social distancing pursuant to the standard guidelines for the general public is not possible. The WHO, SPT and CPT therefore demand that, where possible, the number of detainees should be reduced and alternatives be used to the deprivation of liberty. The WHO guidelines for countering the pandemic as well as the national health guidelines that meet international standards shall be fully implemented and observed in all detention facilities. Risk analysis shall be used to quickly identify the persons most at risk and to accommodate them in a way that reflects the increased risk.

Minimisation of intervention It is legitimate and sensible to suspend activities in order to protect the detainees, their families and the officers. However, every restrictive measure shall have a clear legal basis, be necessary, proportionate and temporary as well as communicated to those affected reliably, comprehensibly and gently. The right to going outdoors every day (for at least one hour) shall, as a fundamental right of the detained persons, be guaranteed in full even during the pandemic. If visiting has to be restricted, the detainees should be offered alternative ways of maintaining contact with their families, for example by telephone, video communication, email and other suitable electronic media. Such forms of contact should be both facilitated and promoted, be frequent and free of charge.

Particularly sensitive area Self-isolation for medical reasons should not be in the form of a single cell as is used for disciplinary measures. The self-isolation shall be on the basis of an independent medical assessment, proportionate and procedurally covered. Compensatory measures shall be taken to alleviate the associated mental strain, for example providing more reading material, televisions or free telephone calls. Furthermore, persons in quarantine should be offered real interpersonal contact as well as psychological support. It shall also be ensured that basic complaint mechanisms and preventive measures against abuse (including the right to legal aid, to access to an independent doctor and to notifying third parties) remain fully available and functional.

Independent control at all times The CPT and the SPT emphasise that the monitoring of places of deprivation of liberty by independent bodies including the AOB is a fundamental mechanism in the prevention of abuse. During a global health crisis such as the COVID-19 pandemic, independent monitoring gains in importance due to the potential risk of abuse and violations of human rights in closed institutions. The WHO points out that the COVID-19 pandemic shall not be used as justification for curtailing the access and monitoring rights of independent institutions whose task it is to prevent abuse and inhumane treatment. The SPT also emphasises that during the pandemic the AOB shall be granted access to all detention institutions as a matter of principle, including the places where persons have been placed under quarantine. It goes without saying that the AOB takes the required precautions to observe the basic “do no harm” principle and thereby protect the public, the detainees, the care staff and themselves

(see in particular: CPT/Inf [2020], 13; SPT, CAT/OP/10 25 March 2020; WHO Interim Guidance, 15 March 2020; Statement by the council for penological co-operation working group [PC-CP WG], 14 October 2020).

The NPM used the initial announcement as an opportunity to request the opinion of the Human Rights Advisory Council. Of interest was whether the prescribed preventive measures comply with the principle of proportionality, which the Human Rights Advisory Council affirmed. In addition, all announcements and internal instructions were subjected to an ongoing monitoring process.

Human Rights Advisory Council analysis

In concrete terms, the content of the decrees was compared to international standards and a questionnaire was formulated which was initially used virtually and then in person with the decision-makers on the on-site visits after the restrictions were eased. In so doing, the feasibility and practicability of the Federal Ministry of Justice directives were evaluated.

Empirical surveys

In addition to the management and representatives of the special services, the AOB addressed employees from different professions as well as employee representatives of the law enforcement and other services to document the sensitivities but also the concerns of the staff. To the extent that monitoring visits could be conducted on-site, the NPM commissions got an impression of the living conditions in the departments and interviewed detainees. AOB consultation days were used for this purpose.

7.2. Organisational measures

On 28 February 2020, the general directorate informed the AOB that in view of the first confirmed cases of infection with COVID-19 a team of experts had been set up in the Federal Ministry of Justice involving all departments and the office of the medical superintendent.

Centralised management by the Federal Ministry

In addition to hygiene measures, a decree stipulates the restriction of detainees going outside alone and a ban on groups going outside. Visits may only be in the form of so-called glass visits. Contact to the outside is reduced considerably. Protective masks and disinfectant are provided to the institutions.

The general directorate concluded that the prison administration actively participates in state crisis and catastrophe management and that there is therefore agreement across all departments on how to proceed.

The number of directives issued by the general directorate to the correctional institutions is symptomatic of the virulence with which the numbers of infections rose in the spring. Between mid-March 2020 and mid-April 2020, seven internal instructions comprising up to 40 pages including annexes were enacted.

Extensive directives issued

- Transition in ongoing operation In mid-March 2020, the prison management was requested to take precautionary measures to switch regular operations to a group system. The aim was to divide the officers into separate groups while maintaining the prison service in the best possible way. The existing hierarchies were doubled as part of the group operation. The individual groups had to work in shifts. Personal contact at shift change should be avoided as far as possible.
- Depending on the size of the institution, crisis taskforces were set up, which met twice daily. Individual topics such as instruction on how wear a mask properly, gatherings of detainees in workshops and companies providing occupational opportunities, sports and – as long as was permitted – religious services, were discussed in subgroups.
- Considerable strain The general directorate sometimes issued directives and internal instructions to the individual facilities electronically twice to three times a week, often in the early hours of the morning with the rule that the updates had to be implemented on the same day. This time pressure confronted the prison administration with enormous challenges. In some facilities, the crisis taskforces met literally around the clock.
- The officers were informed about updates and instructed about hygiene and preventive measures by means of notices, electronically despatched letters or during meetings. They also received feedback from the general directorate thanking them for their extra work and their stamina.
- Tension in all occupational groups Some admitted that they had been stretched to their limits. On the one hand, the intense cooperation in the teams had reinforced the *esprit de corps*. On the other, some had missed the contact with colleagues who were on standby. The fixed shifts worked by all occupational groups over many weeks, being on permanent standby and the lack of regeneration as a consequence of bans on taking leave were a drain on the strength of the officers and required sacrifices from their families.
- The manager of a large correctional institution put it succinctly in concluding a meeting saying that he had never spent so much time in the facility and had got to know corners of the building that he had not seen before.
- Effects on prison atmosphere Feedback showed that the human aspect did not come off badly in light of all these strains.
- Best practice Inmates of Favoriten correctional institution thanked the officers of one department for successfully overcoming this “situation that is new to all of us”. The commission highlighted the distribution of sweets to the inmates in Klagenfurt correctional institution. Hygiene recommendations and information how to wear a mask properly were depicted as pictograms on the packaging. In Graz-Karlau correctional institution, the prison warden regularly sent circular letters to the detainees to inform them about the current status, ask for their understanding for the restrictions and, at the same time,

highlight compensatory measures such as shorter lockup times, enhanced sports programmes or extended time outdoors. Other prison wardens availed of this opportunity by using the loudspeaker system or in individual conversations on patrols through the building.

In addition to the internal communication, which was assumed by the department officers as the first points of contact, it was helpful that the detainees were well informed through the media. Once practically every cell had been equipped with a television, the prisoners were able to follow the general health development and associated measures that restrict freedom outside of the correctional institution. There was thus the impression that one was not subjected to arbitrary behaviour inside the institution but was actually “protected”.

Open communication

There were initial reservations towards prison guards who attempted to talk to inmates to identify mental sensitivities and any fears. The detainees were more inclined to see a latent risk in persons with outside contact, as these had more contact with infected persons than they did themselves. They withdrew when the cells were opened and remained at a distance. However, this mild unease dissipated over the weeks with increasing knowledge about the pandemic.

Confidence-building steps

It is remarkable that during the first lockdown there were barely any offences and, in particular, trade in forbidden substances dropped sharply. What is no less notable is that officer sick leave was not excessive but on the contrary, even decreased. Both situations can be seen as a sign of a good working atmosphere.

Atmosphere

The Austrian penitentiary system was spared revolts such as those that happened in other (European) countries. This was attributable to the enormous commitment of the officers. Many, as the management of the prisons recognised, did far more than would have been expected of them.

Furthermore, sentences up to a specific duration were deferred per regulation, which had a quantifiable, noticeably easing effect in the individual institutions. The space was urgently needed in order to create departments in which new detainees and persons returning from outside and transfers could be accommodated.

Reduced numbers of inmates

7.3. Specific preventive measures

7.3.1. Isolation and quarantine

The AOB paid particular attention to the arrival cells that are also called admission or observation cells or isolation rooms in which inmates had to spend up to three weeks in quarantine after admission. It was particularly important to ensure that the persons accommodated there not only received

Measures that restrict freedom

adequate medical care but also sufficient psychological support and that accompanying measures were taken to prevent social isolation.

Several points of criticism

Stricter hygiene standards apply to these cells. They are deep cleaned, and furniture and the floor completely disinfected before each new occupant is admitted. In some cases, these rooms are located in the area of the infirmary. In other cases, departments had to be converted, which the AOB views quite critically. For example, the department for open detention in Ried correctional institution, the day release prisoner department in the Floridsdorf satellite facility of Mittersteig correctional institution and the adolescent department in Klagenfurt correctional institution were dissolved. The cells there were and are until further notice reserved for persons whose coronavirus infection status has to be clarified.

An increase in occupancy or numbers of suspected cases can mean that two inmates have to share such a cell. If they are not allocated to the cell at the same time, the quarantine is inevitably extended for one of them until the critical period has elapsed for both. On one of the monitoring visits to Vienna-Josefstadt correctional institution, the commission highlighted the problem that restrictions had to be endured for longer than planned.

In Leoben correctional institution, the AOB managed to enable the inmates in the arrival cells to not only exercise their right to go outside every day without putting other persons at risk but also to have the opportunity to get physical exercise. The express request by the AOB that an inmate in an arrival cell can use an ergometer in the entrance area was fulfilled.

Preventive measures

In addition to the living conditions of the persons in isolation, the AOB also examined whether sufficient prevention measures were taken to protect employees from infection. The directives from the general directorate contained a rule that persons with contact to those allocated to the arrival cells had to wear PPE including an FFP2 mask. In some correctional institutions the PPE was limited to wearing gloves which were otherwise used in the shift operation.

Communication was often through the food hatch in order to avoid bodily contact. Visual contact was thus limited. Just how innovative the officers proved to be even in this context was evident in St. Pölten correctional institution where the employees of the social services spoke to the inmates through the open (barred) windows from the inner courtyard.

7.3.2. Dress regulations and precautionary measures

Obligation to wear a mask

Inmates are only allowed to join the day-to-day routine in correctional institutions after admission or transfer after clarification that they are not infected with the COVID-19 virus. This decision is always taken by the doctor. As not only the inmates but also a large number of persons employed in the correctional institution have contact to the outside world, the goal is to

ensure that there are no infections in the departments and the workshops and companies providing occupational opportunities. Wearing a tight mask is thus obligatory.

In the early phase, existing stocks were used that had been put by for the bird flu epidemic (SARS-CoV-1). The individual institutions were able to help themselves quickly by manufacturing masks in the companies that provide occupational opportunities, whereby any surplus production was given to other correctional institutions. Both cloth masks and disposable masks were worn. Every detainee had a specific allowance. Cloth masks are washed at 60°C before they are handed out again.

A prison officer drew the attention of the AOB to the fact that the masks distributed in the correctional institutions in January 2021 to detainees, the executive and non-executive staff and external persons did not offer the protection of an FFP2 mask but merely bore a KN95 stamp. The distributed masks did not provide adequate protection.

KN95 masks

The AOB immediately initiated *ex-officio* investigative proceedings and requested a speedy statement of opinion from the Federal Ministry of Justice.

Ex-officio investigative proceedings

The Federal Ministry of Justice emphasised to the AOB that the masks ordered by the *Bundesbeschaffung GmbH* company indeed had confirmation of the European FFP2 standard. A few days later, the Federal Ministry of Justice had to concede to the AOB that “it was to be assumed” that these were CE-certified FFP2 masks.

In fact, it transpired that the masks did not have the CE-certification. The AOB had requested the correctional institutions to conduct a random inspection of the delivery. The poor product quality had thus been confirmed. The supplied masks had been certified and approved for medical staff only in a shortened procedure, “coronavirus pandemic respiratory masks”.

Delivered masks approved for medical staff

The supplier agreed to take the already delivered masks back and exchange them for FFP2 masks. The delivery of the FFP2 masks was due in the first two weeks of February or the first week of March.

The AOB determined a case of maladministration, as the Federal Ministry of Justice had evidently not verified whether the delivered masks complied with those ordered.

Failure to inspect the delivery

The AOB welcomed an announcement by the Federal Ministry of Justice on 3 September 2020 in connection with the obligation to wear a mask, in which the officers are informed that regarding their appearance the claim of an “appropriate dignified and, in the sense of Section 43 of the Austrian Civil Servants Act (*Beamten-Dienstrechtsgesetz*) impartial appearance”, shall be upheld. Black face masks that conceal facial features and have a martial effect are disapproved by the AOB. They generate distance and are not compatible

Appearance

with care in detention. When tube scarves are worn, the general directorate correctly pointed out that such garments represent an increased safety risk for the wearer when fulfilling their duties.

Disinfectant Providing sufficient disinfectant proved to be less of a problem in the beginning than the procurement of disinfectant dispensers which had been almost completely sold out in the spring in particular. Meeting rooms in all institutions have since been equipped with Plexiglass partitions, which, in addition to wearing a mask, help in preventing the spread of droplet infections. The housekeeping staff in the departments disinfect the surfaces. They are also responsible for regularly cleaning door handles, window handles and wall telephones.

Multifunctional visitor areas During the time when only “glass visits” were permitted, the institutions on their own initiative created temporary structural partitions in the form of berths and partitioned open visitor rooms. The directive to clean the place after every visit and to provide the visitors and those being visited with hand disinfectant was not always complied with, which had to be noted critically after looking into the highly frequented visitor room of Favoriten correctional institution. In some correctional institutions, the visitor areas were also used by the psychological and social service for individual conversations with the detainees. Group therapies had to be suspended for many months however.

7.3.3. Testing

Testing The decree of 5 November 2020 clarified that an inmate can be moved after ten days in the admission or departure department if they are tested negative. However, during the spring and summer months it was not always clear when and under what conditions tests are conducted. In some cases, the correctional institutions helped themselves by procuring such tests, which were analysed in external laboratories.

Clusters In the event of a COVID-19 infection, the patient shall be transferred to a public hospital immediately. However, there was and still is uncertainty about what has to be done in the event of a cluster. There was a lack of information on how to proceed when there are several infections in an institution, which was reported back to the general directorate. On the one hand, the management bodies all understood that infected persons should not be transferred to other correctional institutions where the virus could spread. On the other, reference was made to the capacity of a system if entire departments would have to be closed.

Compulsory work for contact persons The executive and non-executive staff have overcome the additional strain they have had to bear for months in a professional manner. In this context, there was a recent complaint from a prison guard who was tested negative as a category 1 contact person. She did not receive a quarantine notice from the authority and did not agree that she should have to work as long as she

displayed no symptoms.

An employee who is not a law enforcement officer contacted the AOB. He has to wear a mask even though he works alone in his office. Needless to say, he is prepared to wear the mask when he has contact with other employees or inmates but fails to fully understand the sense of the directive when he is sitting alone in his office.

Mask at workplace

The Federal Ministry of Justice defended the internal instruction according to which there is an obligation to wear masks at work at all times. The measure is designed to protect all inmates, for whose health the State is responsible, and all employees who have to be protected from infection with COVID-19 under the duty of care. The directive to wear a protective mask is not considered to be disproportionate but is required to counter the spread of the virus.

The AOB does not question the necessity of measures that prevent carrying the COVID-19 virus into correctional institutions. Wearing a mask is considered sensible as a matter of principle. However, the obligation can be dropped if contagion can be ruled out. This is the case if an employee performs their work alone in a room.

Undifferentiated
directive

Excessive directives cause a violation of fundamental rights pursuant to Article 8 of the ECHR. That the directive to wear a mask indirectly, directly and disadvantageously violates the legal sphere has been clarified by the Constitutional Court of Austria in G 271/2020, V 463-467/2020 = NLMR 20202/5, 409 f.

7.4. Changes in everyday prison life

7.4.1. Cell occupancy and the consequences thereof

Every correctional institution had to quickly implement the rule to set up admission cells and a quarantine department. This meant that space had to be made, which was taken away from other detainees. The result was a deterioration of the living conditions not only for individuals but for entire groups.

Considerable effects

An inmate of St. Pölten correctional institution complained that contrary to the usual practice in the institution he was not allowed to share a cell with inmates from his home region. Instead, he was placed with four inmates with whom he was barely able to communicate. The Federal Ministry of Justice countered that the necessary creation of a quarantine department further reduced the already cramped space. Furthermore, it is important to separate accomplices in regional court prisons. The situation was unfortunate for the inmate but could not be changed.

Special victims A complete department in Ried correctional institution was harder hit than this one individual. Open detention cells were cleared for the new admissions. The inmates detained in this department to date have been in regular detention since. If they have no work for which they are taken out of the cells, they are locked up for 23 hours a day.

Prison inmates in Suben correctional institution experienced a similar fate. They were already on the pre-release programme and working outside of the correctional institution. As a consequence of the contact ban, they were moved to the main building, housed in the prisoners' wing and in the absence of work locked up for 23 hours a day. The restrictions, which affected completely innocent persons felt like the consequences of a massive disciplinary wrongdoing. It is understandable that they complain about the considerable deterioration of their living conditions and perceive them as punishment.

Minimum standards at risk The setting up and operation of a quarantine department cannot be implemented without curtailments to everyday prison life. Withdrawing the easing of measures for an entire group of inmates is however unacceptable. If, as in Klagenfurt correctional institution, a juvenile department is left open to create quarantine rooms – albeit only temporarily – this shall not be at the expense of the “minimum standards for juvenile detention and for juvenile departments in Austrian correctional institutions”. They shall be guaranteed at all times, as an adolescent can be admitted at any time.

7.4.2. Work and further education

Important daily structure The law stipulates that every prison inmate is obliged to work. Conversely, the institutions shall ensure that every prisoner can perform “useful work”.

The work is performed in the inhouse “companies”. These include joineries, metalworking shops and in some cases automobile workshops. There are also production sites that were set up by businesses, so called companies providing occupational opportunities in which sorting jobs or simple manual tasks such as packing supplied goods are frequently performed.

Reciprocal protection obligation During a pandemic, the requirement to provide sufficient work is confronted with protection against infection because during the day detainees often have to share cramped rooms with others who are otherwise housed in different sections of the building. There is also constant contact with the staff which are at risk themselves on the one hand but can transmit the virus on the other.

The AOB was surprised at how different the situation was during the lockdown. Whilst all of the companies in the correctional institutions in Stein, St. Pölten and Suben – with the exception of the system-relevant ones – closed, the correctional institutions in Linz and Graz-Karlau ramped up work and kept their companies open even at the weekend. In some institutions, the companies providing occupational opportunities had to limit their work because the

number of orders decreased substantially. If they were closed in isolated cases, these were compensated for with more time outside in the Floridsdorf satellite facility of Mittersteig correctional institution.

The inhouse work included the installation of visitor booths and manufacture of masks from leftover material whereby the sewing work was often performed by the women's department. Surplus production was given to other correctional institutions. The masks were worn by the detainees and the staff.

Disadvantages
cushioned

If there was no work, some institutions provided access for their inmates to the ELIS programmes, an eLearning module. Downtime could thus be used for training and further education. Despite the tight staff situation, compulsory school operation in Vienna-Josefstadt correctional institution was continued during the hard lockdown.

Those who were unable or not allowed to work through no fault of their own received compensation. This should also continue in the event of another lockdown, which the commission recommended on their most recent monitoring visit to Korneuburg correctional institution. It is not understandable that the other detainees are treated differently to the prison inmates in Göllersdorf correctional institution and receive no money.

7.4.3. Going outdoors

Prisoners who do not work outdoors are entitled to go out into the fresh air for an hour every day. Mentally ill offenders in detention also have this right. The time shall be extended if this is possible without impeding the routine and order in the institution.

Yard exercise

To reduce the risk of infection, Korneuburg correctional institution temporarily partitioned the walking areas with plastic sheets and used their sport areas as well. In this way, all detainees spent time outdoors at the usual time. Furthermore, social distancing was practiced sufficiently. Other institutions such as Stein correctional institution strictly ensured that detainees from different departments did not come into contact with each other.

Some correctional institutions managed to extend the amount of time spent outdoors. For example, Klagenfurt correctional institution extended the yard exercise period to one and a half hours. Linz and Mittersteig correctional institutions allowed the detainees two hours outdoors. St. Pölten correctional institution was able to schedule a second yard exercise period in the afternoon. If the staffing situation and shift plan allow, this programme should be maintained after the end of the pandemic.

Logistically speaking, it is difficult to organise yard exercise for inmates from the quarantine department. Nevertheless, detainees were still able to spend at least one hour outside in the fresh air during this phase of detention.

Distance and separation
requirement

Only Vienna-Josefstadt correctional institution failed to comply with the legal obligation. The argument was that the detainees from each cell would have to be taken to the yard separately from the detainees from other cells, as otherwise the isolation would be interrupted and the existing quarantine to no avail. This is not affordable due to the size of the institution and the notorious lack of staff. The AOB criticised this restriction. Every effort should be made to ensure that the right to spend time outdoors is upheld particularly when the admission department is under permanent lock-up.

7.4.4. Questionable restrictions

Parcels returned The general directorate banned accepting laundry parcels in spring 2020 to prevent the virus being brought into the institutions. Detainees were thus not able to receive parcels with clothes from relatives or friends. In view of the early summer temperatures in April in particular, the detainees urgently awaited these parcels.

To the AOB it was inexplicable why the parcels were returned to sender and not stored in the correctional institution until they could be distributed to the detainees without reservation. This measure was not objectively justifiable. Even the sources to which the Federal Ministry of Justice refers precluded as early as the beginning of March that the virus “is transmitted to persons via commodities (parcels, clothes, objects), groceries, drinking water and tap water” (AGES risk communication “FAQ Coronavirus”, as per 5 March 2020, p. 13). The general directorate recently referred succinctly to the limited storage capacity in the correctional institutions.

Copying letters Incoming letters and photos were not distributed to the recipients. In accordance with the directive, the officers made copies of the post. The detainees criticised that they were allowed to receive subscribed newspapers fresh from the press, but the original letters and photos sent to them were first stored in the depot. They received copies of the letters and enclosed photos instead.

The general directorate responded to the reproach that this infringement of human rights could be avoided if post is put aside until potential viruses on the surface are no longer infectious as follows: creating and maintaining a list documenting which letter was handed out to which inmate would involve too much effort. It was thus decided not to apply this procedure.

Closure of the kiosks Inmates can purchase essential items in the correctional institutions either by an ordering system using lists or in an on-site a supermarket. In order to reduce contact inside the institution and avoid gatherings, almost all correctional institutions switched from in-person shopping to a list system. However, many detainees prefer personal shopping in the on-site supermarket.

It should be noted in this context that despite all contact restrictions the purchase of food and tobacco was not limited in freedom at any time.

7.4.5. Compensatory measures

The AOB observed on monitoring visits that many correctional institutions went to great trouble to try and maintain the usual daily routine. Nevertheless, restrictions, for example affecting visits, games and sports or other leisure activities, could not be avoided. Many of these bans were ordered by the general directorate per decree and internal instructions. To reduce the disadvantages for the detainees and stop them from becoming bored, activity boxes were distributed in some institutions. Jigsaws, board games or card games and puzzles were also distributed. It was possible to use the library all of the time in almost all institutions.

Activities and pastimes

TV sets were donated to Linz correctional institution by an association. The management was thus able to fit a TV set into all cells. St. Pölten correctional institution announced video films in advance through its internal intercom and then played them on a television channel at different times in different languages. The channel could be transmitted into every cell. Salzburg correctional institution procured a larger number of non-web-enabled gaming consoles and gave them to the detainees to pass the time.

Films and gaming consoles

The leisure activities were expanded in some institutions. Darts and tennis were offered. Visits to the gyms were organised in small groups. In contrast, the complete closure of the sports hall in Suben correctional institution was incomprehensible.

Sports and leisure activities

Graz-Karlau correctional institution established the “inmates’ information” in which the detainees were informed about measures, and the leisure activity programme was promoted. Other institutions extended the cell opening times to compensate for the compulsory restrictions and thus reduced the psychological pressure during the lockdown period. Ried correctional institution allowed the inmates to shower more frequently; an additional bathroom was installed in the women’s department.

Services and religious gatherings were not permitted to take place for weeks. However, the detainees were given the opportunity to speak to pastoral workers via video conference during this time. Where masses, devotions and common prayers were allowed thereafter, the institutions observed the restrictions that the religious communities had set for themselves.

Practising religion

7.5. Contact to the outside

With the beginning of the hard lockdown in mid-March 2020, personal visits by relatives were not permitted in the correctional institutions. The same applied in November after a contact ban was re-imposed in public spaces as a consequence of the disproportionately rapid increase in the reproduction number.

Massive infringements through visiting bans and restrictions

Visits were allowed again when the measures were relaxed in May and mid-December – while observing all hygiene rules. Visitors and detainees were able to see each other albeit separated by a pane of glass. Communication was through an intercom or the perforated pane of glass. Bodily contact was forbidden without exception.

The number of visitors was limited to two persons whereby children were only allowed after a second phase of easing of the measures six months later. Many institutions introduced a reservation system. Visitors were allocated a time slot. The system proved to be successful and should be maintained. It contributes to shorter waiting times and prevents arguments about who was there first.

Understandable complaints Many detainees and relatives complained about the lack of direct contact. Children in particular missed a parent. They missed bodily contact above all. The rooms for family visits including toys were closed for preventive reasons. It was difficult for them to deal with seeing their parent through a pane of glass. Despite the glass, the adults had to wear a mask.

Restriction of the centralised transfer service Detained spouses and significant others could not see each other for months at a time. The reduction of the centralised transfer service to the absolute minimum meant that they could not be taken to see each other.

Rapid implementation of video telephony The Federal Ministry of Justice has been planning the installation of video telephony in the correctional institutions for some time in order to enable the detainees – as a complement to visits – to maintain social contact to their relatives and friends in a legal way. After completion of a test phase, this form of communication was allowed in all institutions in March 2020. The prison administration thus followed a longstanding demand of the AOB.

It was stipulated per decree that internet telephony is not a visit in the sense of Section 93 of the Penitentiary System Act (*Strafvollzugsgesetz*) but rather a type of telecommunication.

Organisation and process The immediate implementation came as a surprise to the correctional institutions. First of all, they had to procure sufficient devices. In some cases, notebooks with integrated camera were and still are used. The system has since been established in all institutions and resonance from the detainees is positive. Only those in facilities for the detention of mentally ill offenders are sometimes overwhelmed and continue to use conventional telephone calls.

Video telephony is also open to detainees awaiting trial. The prosecuting authority dispensed with the surveillance of conversations during the lockdown. However, those participating in the conversation had to identify themselves by showing ID to the camera at the beginning. Each detainee was allocated about 40 minutes for the conversation respectively.

Multiple benefits On monitoring visits, the AOB observed that video telephony is not only promoted by the institutions but requested by the inmates. Persons whose

relatives live far away in particular thus have the opportunity to maintain visual contact to their family. They also often get to see their relatives in familiar surroundings, compensation for the sometimes poor audio quality. Only in the Floridsdorf satellite facility of Mittersteig correctional institution did the AOB have to criticise that the inmates were not adequately informed about the opportunity to use this modern form of communication.

The new development was welcomed in most cases. During the first lockdown in the spring, the courts had often held hearings via internet. The management of the institutions would like this practice to be continued and that both the courts and administrative authorities maintain the same after the end of the COVID-19 pandemic. Every time detainees have to be taken for questioning and hearings by the Federal Office for Immigration and Asylum binds human resources that are then lost for everyday prison life.

The times in which detainees are allowed to use the telephone was extended in most of the correctional institutions. In Klagenfurt correctional institution, the officers provided mobile telephones to the detainees in order not to be dependent on the few available wall appliances and thus on the cell opening times.

Telephone times
and credit: different
modalities

Telephones are used by the detainees with a (chargeable) card. The cost is debited from the house money account. The maximum amount for telephone credit was increased to enable the detainees to telephone for longer. Detainees with no money were allowed to telephone for free.

In Korneuburg correctional institution, the social service made their work mobile telephone available to the detainees in the admission department under supervision. They were thus able to make telephone calls inside Austria. Some officers responsible for the quarantine cells activated the loudspeaker mode and placed their mobile telephone in the open food hatch so that the inmate in the admission department did not have to touch the device and was able to have contactless telephone calls. In Linz correctional institution, even calls to other countries were possible.

Unfortunately, the approach was not uniform in all institutions. It was observed in Innsbruck correctional institution that detainees who had no money were not able to make telephone calls. Such unequal treatment is a violation of the prohibition of arbitrary action. It is also contrary to the standards of the general directorate of 17 March 2020, according to which in the event of “telephone need” – as in the wording of the decree – non-internet-capable mobile telephones shall be purchased from the institution budget, which shall be “made available free of charge” under supervision to the detainees. The general directorate evaluated compliance with this rule at the end of the same month.

Violation of the
prohibition of arbitrary
action

7.6. Health care

Dangerous bottlenecks In order to guarantee the examination of an inmate within 48 hours after admission to a correctional institution, a general practitioner must be present on at least three days a week. The doctor makes the ultimate decision whether an inmate is transferred to the cell in another department or has to stay in quarantine.

The attendance level of the resident doctors in the correctional institutions during the crisis varied. Whilst many general practitioners increased the amount of time they spent in the institutions, were often on-site every day and were also on standby, other institutions reported that they received insufficient care. This particularly affected institutions that were already suffering from bottlenecks in medical care before the outbreak of the pandemic (e.g. Graz-Jakomini correctional institution, Innsbruck correctional institution, Leoben correctional institution).

Caregivers were put to the test in the same way the doctors were. They are not only responsible for storing and managing medication but also for the correct storage and distribution of PPE such as in Leoben correctional institution for example.

Inmates were only transferred to hospitals in emergencies. If the hygiene regulations could not be consistently observed, the detainees had to be admitted to the quarantine department upon return to the correctional institution and were isolated there for days. After in-patient care, some of the patients were already tested for COVID-19 virus in the hospital and some in the correctional institution.

Insufficient care by medical specialists During the lockdown in spring 2020, the dentists were not in attendance in the institutions most of the time. Inmates with severe toothache were taken to a dental clinic. Check-ups or caries treatments were suspended. There were also no transfers to other medical specialists. The risk of contracting infection through contact with the outside world was too high.

If already scheduled appointments for operations or examinations were cancelled by the hospitals due to the general health situation, the detainees could only be informed that the administration of the judiciary acknowledged the same with regret but can do nothing to change situation.

Not all correctional institutions followed the recommendation by the medical superintendent to forego checking inside the mouth after issuing substitution medication on preventive grounds. For example, visual and palpatory examinations were still made in November 2020 to check whether the inmate had swallowed the medication.

Specialist services are vital supports In addition to the medical staff, the psychological services also had a key function. Like the social service employees, the clinical psychologists were the

first contacts for persons in quarantine. They made a great contribution to ensuring that there were no suicides during the lockdown and that the number of reported self-inflicted injuries fell considerably as well.

In the beginning, the detainees received support on the telephone and per video or in the visitor room with glass partitions. As the measures were eased, individual conversations could be held in therapy rooms and group meetings were resumed in which case the number of participants was limited. Some institutions such as Leoben correctional institution offered discussion groups where the pandemic situation could be reflected on together with the inmates. Rooms were adapted and plexiglass partitions were promptly installed.

The general directorate allowed external therapists again from the beginning of May in order to cover the care needs of the inmates. They were able to take up their therapies either virtually or on-site. The therapy sessions had to be held behind glass in the institutions. Only one-on-one meetings were allowed. Treatment in a group setting was not permitted. Group counselling, a method that contributes to an improved atmosphere through de-escalating conflict and clearing up misunderstandings, was limited to five participants.

Resumption of therapies

As the management of Mittersteig correctional institution put it, in actual fact the psychotherapies only started very sluggishly. Some therapists refused to continue therapies via the internet because they considered the data transmission via a software that can be purchased on the open market not to be secure. They terminated existing contracts. The administration of the judiciary had to look for replacements. In Graz-Karlau correctional institution, there was still not a single detainee in psychotherapeutic treatment in July 2020.

Although prescribed by the general directorate and recommended by the Austrian Federal Association for Psychotherapy (*Österreichischer Bundesverband für Psychotherapie*) and public health insurers, not all correctional institutions enabled psychotherapy per video conference. It had not been heard of in the Floridsdorf satellite facility of Mittersteig correctional institution at the end of November. The AOB is of the opinion that this opportunity should be expedited, thus making it possible to hold group therapies. In view of the fact that psychotherapists work under supervision in some correctional institutions, the video therapy offer helps to improve quality, which the commission pointed out on the monitoring visit to Graz-Karlau correctional institution.

Video therapy as opportunity

7.7. Resocialising and release

Prison inmates shall be detained in relaxed detention if the structural conditions allow and it can be expected that the eased restrictions will not be abused. The easing of restrictions includes limiting or not deploying guards

Relaxed detention

when working. The detainees are also allowed to leave the institution once or twice a month on day release.

Curfews for months At the end of March, the general directorate decreed that day release shall only be granted for “urgently required system-relevant workers to maintain the infrastructure and supply (e.g. harvest hands)”. This restriction was gradually relaxed as the other measures were eased and reinforced again recently. It was throughout forbidden to leave the institution.

This regulation gave grounds for dissatisfaction on the part of those affected as a large number of complaints during the summer in particular showed. They argued that they had contact with lots of people at work but they were not allowed to see their relatives and friends. This unfairness was not justifiable.

The Federal Ministry of Justice defended the restrictions with the argument that it is far more difficult to check if the measures are being complied within the family and circle of friends than at work. The risk of carrying the virus into the correctional institutions was considered to be high.

Requirement shall be evidence-based The AOB sees these infringements of privacy and family life critically. In addition to the intensity of the infringement, the time factor in particular creates problems, as nobody can say for how long restrictions will have to be tolerated in view of the (again) current strong increase in numbers of infections. Most recently, the measures for the penal system were extended until 31 March 2021 (Section 7 Regulation Federal Law Gazette II No. 120/2020 as amended in the Federal Law Gazette II No. 419/2020).

An additional toughening of measures (also for life outside closed institutions) was also anticipated due to the increasing lack of beds in hospitals. It is clear that all restrictions shall only be upheld for as long as they are necessary. The legislators and regulators shall – as the Constitutional Court of Austria emphasised in V 411/2020 – substantiate this with relevant numerical data.

Pre-release programme In the same way as with day release prisoners, detainees who are already on the pre-release programme were affected by the curfew. This begins three to twelve months prior to the planned release depending on the extent of the custodial sentence to be served. During this time, prison inmates “shall be given one or more opportunities for day release of a maximum of three days respectively in Austria plus any required travel” in preparation for life in freedom and to bring their personal affairs into order.

It is true that the correctional institutions made an effort not to release detainees abruptly, as the AOB was assured in Innsbruck. Despite the contact restrictions, the preparatory meetings with the social service were “held normally”. However, the fact of the matter is that the release preparation was reduced to a minimum. It was as difficult to look for work and accommodation, take care of administrative affairs and go to the support facilities as it was to look up private contacts again.

The preparatory steps for conditional release from detention of mentally ill offenders were and are not affected by these restrictions. Nevertheless, the AOB became aware of circumstances that result in an extension of detention in a closed institution.

Detention of mentally ill offenders

For example, the manageress of a follow-up care facility in southern Austria complained that her facility was not running at full occupancy. Whilst there had been a run on places in the previous year, supply had been exceeding demand for some time. The AOB explains that this is attributable to a directive by the Federal Ministry of Justice according to which persons whose placement is interrupted go into quarantine in a single cell if they return to the correctional institution. However, the cramped conditions in most of the institutions make it impossible to place several patients in quarantine at the same time. As a result, the easing of restrictions was reduced or they were not relaxed in the first place. The situation in which patients cannot be taken back into the correctional institution if they display problematic behaviour was to be avoided.

8. Police, asylum and immigration

- Police detention** The NPM commissions were unable to perform their monitoring visits in police institutions during the first lockdown. In the absence of sufficient PPE, the risk of infection associated with the monitoring visits was not justifiable. The commissions were able to resume the monitoring visits both in police stations and police detention centres after the first lockdown. They could also observe rallies again. The AOB was in permanent contact with the Federal Ministry of the Interior during this time whereby it was particularly interested to know if there were infections in detention areas and how the police were dealing with the situation. The AOB constantly received the decrees of the Federal Ministry of the Interior and made them available to the NPM commissions. After the resumption of the monitoring visits, the commissions were able to integrate this information in their work.
- Federal support** Federal support facilities in which asylum seekers are housed are not places of deprivation of liberty as a matter of principle. However, they sometimes became such when the health authorities decreed entry bans by regulation due to infections. This was the case several times in Lower Austria and Salzburg. There was a regular dialogue between the AOB and the Federal Ministry of the Interior for the purpose of following the infection status and the measures taken. Complaints about health care and the feared re-opening of federal support facilities were also submitted to the AOB.
- Immigration law procedures** The AOB received many complaints about the duration of procedures for granting a residence title – particularly in the *Land* Vienna – regardless of the pandemic situation. However, the AOB was not able to examine some of these during the first lockdown, as an extension of the decision deadlines by almost three months in administrative procedures was also adopted with the COVID-19 measures. Persons who had already been waiting for a long time had to wait even longer.

8.1. Police detention centres

- 16 visits to police detention centres** In 2020 the NPM commissions carried out a total of 16 visits to (police) detention centres. The commissions mainly examined compliance with the stipulations that the Federal Ministry of the Interior has announced in several decrees for the prevention of COVID-19 infection in detention since March 2020.

Because of the first nationwide lockdown and the risk of infection, the commissions were not able to carry out visits in police detention centres from 9 March 2020 until the beginning of June 2020. The AOB therefore obtained ex-officio information weekly by telephone from March to the end of April 2020

from the Federal Ministry of the Interior on potential but not yet materialised cases of infection in the detention centres.

8.1.1. Preventive measures against COVID-19

The Federal Ministry of the Interior announced a decree in mid-March 2020 with rules for avoiding the transmission and spread of coronavirus infection in detention. This decree stipulated severe restrictions of the provisions set forth in the decree of the Ministry of May 2019 (see NPM Report 2019, pp. 156 et seq.). This included reducing visits to the detainees to “glass visits” in the legally regulated cases such as for legal counsel or return advice or from close relatives of detainees awaiting forced return whose forced return was imminent. The Ministry also stopped detention pending forced return completely in open sections of detention centres.

Decree with massive restrictions in detention

Moreover, there was a ban on transferring detainees to other police detention centres. This affected detainees awaiting forced return in particular who had to be detained for more than seven days and were not located in Vordernberg detention centre or in the police detention centres of Salzburg, Hernalser Gürtel or Roßauer Lände. Only these four facilities are set up for longer time detention pending forced return.

However, the decree stipulated that the detainees shall still – only by cell and with social distancing – be able to exercise outdoors, shower and receive medical care. Furthermore, the Federal Ministry of the Interior committed all detention centres to have sufficient games, books and magazines in different languages to avoid swapping between cells and thus the spread of infection.

The AOB started evaluating the restrictions in April 2020 in order to document the effects on the detained persons. The Federal Ministry of the Interior forwarded an amended version of the decree of March 2020 in this respect. Therein, the Ministry declared all “glass visits” to detainees as permissible. However, the Ministry required all visitors to wear a mask while being in the detention centres.

Ex-officio evaluation of the decree

The Federal Ministry of the Interior introduced arrivals quarantine in the second decree: according to this, all of the newly admitted persons within one to three days had to be housed in very small groups (two persons in the best case) during the first fourteen days of detention. This did not apply to persons transferred directly from correctional institutions who had been in detention for more than fourteen days. The persons in arrivals quarantine had to be allowed by cell to go out into the yard every day, shower and have access to medical care during the time they were separated from the other detainees. However, the Ministry made the transfer of detainees awaiting forced return to the open section conditional on passing the arrivals quarantine and on displaying no symptoms of infection.

Quarantine for all new arrivals

At the end of June 2020, the Federal Ministry of the Interior communicated to all Police Departments that the separation of new arrivals in police detention centres – with the exception of concrete suspected cases of infection – does not justify preventive isolation of those affected. The Ministry explained this specification to the AOB with the occasional lack of free places in two police detention centres in which only one person respectively is admitted on many days.

Revocation of eased restrictions

Due to the rise in COVID-19 infections in Austria in autumn 2020, the Ministry announced new restrictions in detention per decree at the end of November 2020. The detainees were only allowed “glass visits” again in the legally regulated cases and detainees awaiting forced return were only allowed visits from their closest relatives and important reference persons. The detainees had to be allowed to shower and go outdoors only by cell or in small groups.

Open detention pending forced return maintained

However, the Federal Ministry of the Interior did not generally stop open detention pending forced return. Instead, the Ministry made the transfer of detainees awaiting forced return to the open section conditional on completing the now ten days of arrivals quarantine. The new decree also stipulated opening the cells in detention pending forced return at different times in order to avoid larger gatherings of detainees.

Concepts to compensate for restrictions

Furthermore, the Ministry instructed all Police Departments to present concepts for the daily structure and occupational activities in the detention centres in a timely manner. In accordance with the decree, the concepts should in any case include the provision of sports equipment and, insofar as the architecture permits simple implementation, fitting the communal cells with TV sets.

Regulations for the COVID-19 testing of persons in arrivals quarantine were not included in the decree. The AOB recommended the use of tests in order to shorten the duration of arrivals quarantine in the event of a negative test result. This recommendation was made because of a previously forwarded report from the Federal Ministry of the Interior on the COVID-19 infection of two detainees awaiting forced return directly before their forced return by air.

COVID-19 testing of detainees only in suspected cases of infection

In January 2021, the Federal Ministry of the Interior stated that there were no plans to use COVID-19 tests on detainees without a justified case of suspected infection, as these could result in false negative test results, for example because there is too little virus material at the time of the test. According to the Ministry, there is no legal basis for the obligatory COVID-19 testing of detainees.

The Federal Ministry of the interior announced, however, that all employees of the Ministry have had the opportunity to take part in voluntary antigen tests since December 2020. Furthermore, the Ministry reported about the intention to create a department-wide test strategy according to which the employees

working in detention enforcement in particular are entitled to two voluntary anonymous COVID-19 tests.

8.1.2. Handling COVID-19 measures

The commissions identified several deficits in relation to the COVID-19 pandemic on their visits to the detention centres.

For example, they noticed on the monitoring visits to Hernalser Gürtel police detention centre in March and July 2020, and to Innsbruck police detention centre in October 2020 that the receivers of the intercom in the visiting area were not disinfected after each use. Furthermore, there was doubt on a monitoring visit to Roßauer Lände police detention centre that the door handles and the telephone system for the detainees were cleaned regularly.

Inadequate surface disinfection

On the visit to Innsbruck police detention centre in October 2020 the NPM commissions found the disinfectant dispensers in the women's washrooms and in the hallway empty. The monitoring visit to Hernalser Gürtel police detention centre in July 2020 showed that there was no disinfectant in the cells and no disinfectant dispensers at the entrances to the police detention centres.

During the latter visit, the detainees complained about the lack of written information in foreign languages on the hygiene measures for the prevention of COVID-19 infection. Furthermore, it was observed on the monitoring visits to Vordernberg police detention centre and Roßauer Lände police detention centre that there was only information in German and English on the hygiene protection measures.

Inadequate information on protective measures

The deployment of a prisoner serving an administrative penalty as a house worker in Graz police detention centre appeared critical to the commission. Although only admitted to the police detention centre just five days before the monitoring visit, the detainee was not in quarantine but helping out with serving food to the other detainees.

The focus of the visits by the commissions was also the provision of sports and occupational activities in the locked cells.

During the monitoring visit to Wels police detention centre, there were doubts as to whether the detainees in single cells have other opportunities to occupy themselves in their cells apart from reading books. The Federal Ministry of the Interior stated that radio reception with installed receiver terminals is possible in all of the cells and that magazines are available to all detainees. The AOB criticised the lack of opportunity for the detainees to use sports equipment such as small sports mats in the cells, which was not contested by the Ministry.

Few opportunities for detainees to occupy themselves

The commission received contradictory information on the visit to Innsbruck police detention centre in June 2020 regarding the opportunities of the detainees to receive visits or get exercise outside every day during arrivals

quarantine. The Federal Ministry of the Interior contested any restrictions of these opportunities and stated that the occupational opportunities in the police detention centre in the new location of Innsbruck correctional institution (since the beginning of September 2020) had improved.

On the monitoring visit to Salzburg police detention centre in July 2020, the commission learned that the gym there had been closed since the beginning of the COVID-19 pandemic. The reason for the closure was unclarity regarding how the room should be disinfected. The Federal Ministry of the Interior did not contest the closure and stated that all of the detainees can now use the gym again.

During this visit, the commission noticed the poor acoustic situation in the visiting room that resulted from the structural conditions and the plexiglass shields used as partitions. The Federal Ministry of the Interior communicated that Salzburg Police Department is examining whether the installation of an intercom in the visiting room could be brought forward.

On the monitoring visit to Vordernberg detention centre, it became evident that Styria Police Department did not replace a sufficient number of defective TV sets and justified this with the argument that the detainees in the shared accommodations should occupy themselves together more. In the opinion of the NPM this justification requires more clarification due to the different nationalities of the inmates in the shared accommodations and potential conflict between them.

In September 2020, the commission learned on a monitoring visit to Linz police detention centre, which is operated in a container building, that there was no daily yard exercise for at least one hour due to the emergency operation. According to the staff, the detainees only had the opportunity to go outside the container building for short smoking breaks.

Not all of the detainees and law enforcement officers interviewed on the monitoring visit to Innsbruck police detention centre in October 2020 were aware of the books and sports mats stored in the detainees' common rooms. In addition, there were generally only a few books (also in foreign languages) and hardly any games and magazines.

On the monitoring visit to Bludenz police detention centre, all of the detainees praised the respectful behaviour of the staff and the range of games, magazines and books available at all times. It was also possible for the detainees to hold video phone calls on their mobile telephones in a cell under video surveillance.

8.2. Police stations

The NPM commissions visited 20 police stations between January and 10 March 2020. Monitoring visits were not possible for a long time after that due

to the first lockdown and the risk of infection. The commissions resumed their visiting activity after the curfews were eased at the beginning of May 2020. When talking to the officers, the delegations focussed on dealing with the pandemic in everyday police life.

8.2.1. Preventive measures against COVID-19

Just a few police stations complained about a lack of PPE and disinfectant as well as inadequate training at the beginning of the first lockdown. On the vast majority of their visits, the commissions praised the strict compliance with the hygiene regulations (maintaining distance, wearing a mask, installing disinfectant dispensers, temperature measurement). The plexiglass shields in Vösendorf police station ensured safe contact with the public. The commission commended that in the week of the visit to St. Johann in Tyrol police station on 11 December 2020 all of the law enforcement officers had routinely been tested with antigen tests.

Lack of PPE at the beginning of the pandemic

In order to keep the risk of infection for the officers in the stations low, the staff was divided into groups in all facilities. Sector patrols were no longer carried out by officers from other police stations. This prevented the spread of the infection beyond one group in Fürstenfeld police station. The commissions also considered it positive that no larger meetings were held.

Strict shift planning to prevent contagion

The monitoring visit to Wolkersdorf police station showed that between mid-March and mid-April 2020 a third of the staff was not available. The examination by the AOB indicated that the police security of the population in the district of this police station was at no time in danger. The police stations in the surrounding area took over some of the work.

The holiday ban imposed in direct connection with the first lockdown increased the staffing level. In combination with the unanimously reported decrease in the normal workload by all of the interviewed officers, the additional effort required to support the health authorities (monitoring quarantine rules) could be easily managed.

On their monitoring visits, the commissions observed that for the protection of the detainees against infection with COVID-19 the covers in the detention rooms were changed after every time they were used. Cells and cars were also disinfected after use. The commission praised the handling of a detainee displaying flu symptoms and a temperature on their visit to Kopernikusgasse police station. A PCR test was carried out immediately. The affected person was detained in a single cell until there was a negative test result. The law enforcement officer involved went into self-isolation.

Exemplary handling of an ill detainee

8.3. Observation of police coercive acts

As depicted in the NPM Report (chapter 2.8.), due to the coronavirus situation, there were in general fewer football games, targeted campaigns and other events that required police operations and thus observation by the commissions.

Demonstrations There were also fewer demonstrations because of the coronavirus pandemic. However, the “Notification Decree” was an issue again, that is, the decree that defines the criteria under which the AOB should be informed about police operations (see NPM Report, chapter 2.8.3). During the coronavirus pandemic, the AOB was not informed of all the politically controversial demonstrations, as in the view of the police there is no obligation to notify about peaceful and semi-peaceful events. Nevertheless, commissions observed two demonstrations against the coronavirus measures of the Federal Government. On the demonstrations in Vienna on 14 May 2020 and 31 October 2020 respectively, the AOB perceived the behaviour of the police force to be de-escalating and proportionate.

Statement of opinion by the Human Rights Advisory Council Whilst other topics were often the focus of demonstrations in which many people participated in spring 2020 (e.g. “Black Lives Matter”, climate protection), the larger and major demonstrations starting in autumn and with the second lockdown in particular concentrated on the coronavirus measures adopted by the Federal Government. Unlike in the spring, there were incidents and frequent violations of the preventive measures prescribed for such gatherings, which moved the police to announce in the media that they would crack down harder on demonstrators who did not wear a mask and observe social distancing. The AOB addressed the Human Rights Advisory Council with this topic, who wrote a statement of opinion on the options open to the police and the health authorities in such cases. This statement of opinion can be invoked on the AOB website.

Demonstrations against coronavirus measures from January 2021 Protest rallies against coronavirus measures increased throughout January 2021. These took place in the form of “walks” on the one hand, and also as “carnival parades”, which were usually peaceful and at least some of the time in compliance with the COVID-19 protective measures. On the other hand, there were major anti-coronavirus rallies directed against the Federal Government, particularly in large towns, at which the police intervened due to non-compliance with the COVID-19 protective measures.

The Vienna Police Department thus decided at the end of January 2021 to ban rallies. Nevertheless, according to reports from the media thousands of people assembled in Vienna to demonstrate despite the ban. According to the media reports, the police did not disperse the rally immediately and allegedly charged thousands of demonstrators for non-compliance with the protective measures.

As a consequence of these events, the AOB received complaints and protests from persons regarding the actions of the police. Persons who were penalised for non-compliance with the protective measures complained that the police had not immediately dispersed the unauthorised rally. Others for their part complained about the dispersal of the rallies and the disproportionate actions of the police. As many of the complaints were based on film material in social media and those reporting them were not personally affected, the AOB requested the Human Rights Advisory Council for a supplemental opinion of its assessment of the police approach from the perspective of the protection of fundamental rights.

Human Rights Advisory Council interviewed again

During a forced return, which was observed by the Association of Human Rights Austria as part of its monitoring function, a person awaiting forced return criticised that he had not been given a mask during the contact meeting, which was why he had had to use a friend's mask. The AOB, which receives the reports on these observations, initiated ex-officio investigative proceedings.

Forced returns

In a statement of opinion, the Federal Ministry of the Interior stated that every person is given a disposable mask before a contact meeting. There were sufficient masks available on-site. If the affected person really was wearing the mask of a fellow detainee as he claimed, it had been passed on to him unknown to the officers in the cell for multiple inmates and could not have been noticed by them. For the AOB, the statement of opinion from the Federal Ministry of the Interior was plausible, which is why they did not identify any evidence of a possible case of maladministration.

8.4. Federal support

8.4.1. Infection situation in the facilities

The AOB has received 18 complaints with COVID-19 relevance since March 2020. The focus was above all on the re-opening of a support facility and the accommodation situation for asylum seekers in connection with the pandemic. During the first lockdown up to the summer in particular, the AOB had regular contact with the Federal Ministry of the Interior and received reports on the developments in the federal support facilities.

On 20 April 2020, a total of 1,375 persons throughout Austria were under federal support. Occupancy in the facilities was 75%, and on 6 May 2020 70% of capacity. The number of applications for asylum fell significantly during this time. There were 60 asylum seekers in Schwechat support facility, 137 in Bad Kreuzen and 109 persons in St. Georgen im Attergau (only initial reception centre).

15 infected persons in all federal support facilities

On 20 April 2020, 14 asylum seekers under federal support were tested positive, of whom nine were in Traiskirchen Federal Support Facility (Lower Austria)

and five in Bergheim Federal Support Facility (Salzburg). On 6 May 2020, 13 persons had recovered, one person with a serious underlying condition had died. On 3 June 2020, an infected asylum seeker was moved to the main building at Traiskirchen Federal Support Facility. This person was not a new arrival. The man had assumedly contracted the infection outside the federal support facility. All of the asylum seekers and staff of the federal support facility were tested in cooperation with the Austrian Agency for Health and Food Safety after this infection was discovered.

Entry bans in Traiskirchen and Bergheim

The health authorities decreed regulations in the affected federal support facilities that banned entering and leaving the same. In Traiskirchen Federal Support Facility, the Baden District Authority decreed such regulations for the periods from 24 March to 13 April 2020, from 14 April to 30 April 2020 and – after the new infection was detected – from 23 May to 6 June 2020. The regulation in Bergheim Federal Support Facility was revoked on 6 May 2020.

The Federal Ministry of the Interior initially housed new asylum seekers in Schwechat Federal Support Facility where they spent 14 days in quarantine. According to the Ministry, all of the occupied federal support facilities were checked for persons who might become seriously ill if they contracted COVID-19.

Citizens' initiative fears re-opening in Leoben

The federal support facilities that were not operated anymore in Semmering, Mondsee, Leoben, Villach, Klagenfurt and Vienna were prepared for occupancy by the beginning of May. The additional relocation of healthy asylum seekers was not necessary, as there were no more cases of sickness. Several persons from Leoben – apparently members of a citizens' initiative – contacted the AOB and expressed concerns that Leoben Federal Support Facility would be reactivated and asylum seekers with COVID-19 would be moved there. The information obtained by the AOB from the Federal Ministry of the Interior and passed on to those affected helped to clarify the situation and reassure the residents.

After clarifying qualification for admission proceedings, the Federal Ministry of the Interior continued allocating asylum seekers to the *Laender* facilities that provide reception conditions under the Basic Provision Agreement during the coronavirus crisis. Contrary to speculations in the media in the spring, the times when persons became infected in Traiskirchen Federal Support Facility precluded the transmission of the virus by an asylum seeker from Traiskirchen to the Wien-Erdberg accommodation that fulfils the reception conditions under the Basic Provision Agreement, according to the Federal Ministry of the Interior.

8.4.2. Health care

The counselling centre for deserters and refugees contacted the AOB and expressed concern about inadequate living conditions due to reports in the

media about COVID-19 infections in federal support facilities and return counselling facilities. The AOB was able to inform the NGO that it had been in permanent contact with the Federal Ministry of the Interior since the beginning of the pandemic and received regular reports on the situation.

In July 2020, an asylum seeker criticised his temporary placement in Bergheim Federal Support Facility and being tested by a PCR test a total of four times. The AOB thoroughly examined the measures taken in this federal support facility to prevent infection with COVID-19 above and beyond the case in question. The Federal Ministry of the Interior explained the processes:

All asylum seekers are standard tested upon arrival as part of the initial medical examination. Male asylum seekers travelling alone are moved from quarantine to the initial reception centre at Bergheim Federal Support Facility after receiving a negative test result. This should help avoid the further spread of the virus. The second PCR test is carried out eight days after the first negative test and can – after a negative result – mean a transfer to the planned basic provision facility. All transfers are carried out in buses that are not full. Every time an asylum seeker arrives, is transferred, at meals and every time they enter or leave the facility their temperature is taken. Access control, increased hygiene intervals, but also information campaigns about rules of conduct in an understandable language and the relaxed occupancy of rooms should prevent those being accommodated from infection with COVID-19.

Standardised approach:
testing and isolation

The investigative proceedings in the case in question showed that the reason why the man was detained for longer and tested several times was the positive test result of his roommate. As a contact person, he had received a self-isolation notice from the health authority. The Federal Ministry of the Interior stated that all requirements in the notice had been complied with (isolated accommodation, repeated test at the end of the quarantine) and that the man had been transferred to Federal Support Facility East on 31 July 2020.

Four tests unavoidable
in isolated case

In November 2020, two asylum seekers contacted the AOB and also criticised that their accommodation at the Bergheim Federal Support Facility lasted several weeks despite four negative COVID-19 tests. The affected persons did not respond twice to the request to substantiate their claims, which is why the AOB was not able to pursue the complaint.

An asylum seeker contacted the AOB in October 2020. He criticised his accommodation and support situation at Traiskirchen and Schwechat Federal Support Facilities. The Federal Ministry of the Interior stated that asylum seekers in the federal support facility were informed about the rules of contact in an understandable language. Transfers were carried out in buses that are not full and in compliance with a catalogue of criteria (negative COVID-19 test result prior to travel, observing the minimum distance, issue of masks etc.). Positively tested persons were taken to dedicated areas after receipt of the test result. Disinfectant dispensers were available in all buildings and refilled.

Preventive measures in
autumn 2020

Permanent COVID-19 monitoring is part of the federal reception conditions. In the case in question, the examination by the AOB indicated that the accommodation and medical care gave no grounds for complaint.

Ex-officio investigative proceedings

In April 2020, an NPM commission expressed concern over the accommodation of a girl suffering from lung disease in Graz-Andritz Special Care Facility. The AOB initiated *ex-officio* investigative proceedings.

Risk groups with special protection in special care facility

The Federal Ministry of the Interior stated that the adapted former retirement home had closed living areas, was equipped with a daily manned medical station and was located close to Graz Regional Hospital. The special care facility is thus suitable for the accommodation of asylum seekers with regular care needs. According to the Ministry, there was no COVID-19 infection in the special care facility from March 2020 up to the response to the query in mid-June 2020. There were only two suspected cases.

Sick child well taken care of

The special care facility set the following measures for vulnerable groups of persons: access controls including temperature measurement and registration; ban on external visitors; the installation of a report chain in the event of a high body temperature; issue of masks to all accommodated persons and staff; disinfectant dispensers on every floor; a closed area for suspected and actual cases of infection. The needs of the girl suffering from cystic fibrosis and her family (e.g. special food, provision of FFP3 masks) had been taken care of.

8.5. Immigration law procedures

8.5.1. Procedure for awarding a residence title

Statutory extension of the decision deadline

In spring 2020, the National Council adopted the collective amendment of the 4th COVID-19 Act. This granted the administrative authorities longer decision deadlines amongst others. As a matter of principle, if nothing to the contrary is stipulated in the administrative regulations, authorities are obliged pursuant to Section 73 (1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsgesetz*) to issue a notice for applications from parties without unnecessary delay, however, at the latest six months after receipt of the same.

As a compromise for the fact that the coronavirus-related circumstances made a rapid and uncomplicated processing of applications difficult for the authorities, the amendment excluded the period from 22 March 2020 to 30 April 2020 from the decision deadline. Furthermore, the deadline was extended by six weeks. Many persons applied for a residence title in the period mentioned so that the settlement authorities had more time for making their decisions. As in the previous years, most of the complaints about the duration of the proceedings were in the Land Vienna.

A representative case should be mentioned here. A man applied for a registration certificate at the beginning of April 2020 and complained to the AOB in October 2020 about the length of time the procedure was taking. The AOB was not able to examine the delay in the procedure due to the statutory extension to the deadline. However, they informed the affected persons when the decision deadline would end and from when they could contact the AOB again with a complaint. Several affected persons contacted the AOB again after the extended decision deadline had expired.

A woman who had already applied for a permanent residence permit from Wolfsberg District Authority in 2016 was anxious about the overall problematic economic situation. Due to the coronavirus crisis, her company was not currently generating enough revenue to provide evidence of the subsistence necessary for the settlement procedure.

8.5.2. Long journey to hearing

The Federal Office for Immigration and Asylum consists of a head office in Vienna, field offices and a regional office in each of the Laender as well as the initial reception centres in Traiskirchen, St. Georgen im Attergau and at Wien-Schwechat international airport. The admission proceedings begin as soon as the application for political asylum is submitted. The first step, performed by the competent initial reception centre, is to check whether the application is likely to be rejected or not. If the application is not to be rejected, it is assigned to a regional office for detailed examination.

A lawyer from Vorarlberg complained that his client who was staying in Vorarlberg had been summoned to St. Georgen im Attergau for his hearing. He would have had to travel over 1,000 km to participate in his hearing even though he was in the coronavirus risk group due to his age. The authority turned down the request to hold the hearing in the Vorarlberg regional office. The AOB did not determine a case of maladministration because of the defined competencies for the procedure.

9. Federal Army and alternative civilian service

Despite the extensive deployment of the Federal Army, there were only few complaints in this area. Initially, the extension of basic military service and the different levels of compensation for the militia personnel gave rise to dissatisfaction. Due to the legal basis and permissibility, a case of maladministration was not determined. However, there was criticism of delays in the drafting procedure and the conscription of system-relevant staff. There were only a few complaints about alternative civilian service too. The extension of alternative civilian service gave grounds for complaint.

9.1. Delays in the drafting procedures

Waiting for a draft
appointment

The father of a young man who was required to enlist complained to the AOB that the long waiting time for a draft appointment was stressful for his son. He had been initially assessed as unfit and was now waiting for a new draft appointment. In order to be able to make plans for the autumn and a possible place in third level education, he had requested the rescheduling of his new draft appointment, which had been planned for July 2020 to an earlier date.

The Federal Ministry of Defence stated during the AOB investigative proceedings that the draft procedures had initially been suspended from 16 March 2020 due to the COVID-19 situation. In the period from 25 May to 29 May 2020, there had only been “brief enlistments” for a maximum of 30 trial persons per day. From 2 June 2020, “full enlistments” had been carried out again, but with a maximum of 80 trial persons as well as 30 “brief enlistments” per week. As long waiting times for those required to enlist had been caused by the suspension of draft appointments, the continuation of the draft operation during the original “enlistment-free” period in the summer shall be examined.

In its investigative proceedings the AOB mentioned that – with reference to this specific complaint – the coronavirus-related longer waiting times could be stressful for those required to enlist who had already been assessed as “temporarily unfit” a long time ago. Maintaining enlistment operation during the summer was thus considered helpful. In particular, the AOB spoke out in favour of bringing those conscripts forward who had already been assessed as unfit quite some time ago and were confronted with an extended waiting time for their new draft appointments due to the coronavirus situation. The Federal Ministry of Defence ultimately announced in retrospect that the draft operation had been continued in the original “enlistment-free” period during the summer months too. The draft operation only had to be suspended for a week in Lower Austrian and Upper Austria respectively to carry out the required basic cleaning.

9.2. Conscription of system-relevant staff

Another complaint was against the conscription of a system-relevant employee to in-person service in the infrastructure area for the duration of three months. In this case, the Federal Ministry of Defence reacted immediately and released the person from conscription. The AOB assumes that in future more consideration shall be given to persons in system-relevant positions when conscripting them for in-person service.

Who is system-relevant?

9.3. Alternative civilian service

The AOB has received seven COVID-19-related complaints about the approach of the alternative civilian service agency since March 2020. One of the focal points was the extension of alternative civilian service due to the pandemic. Section 21 (1) of the Civilian Service Act stipulates that those required to perform alternative civilian service shall be conscripted in the event of natural disasters, major accidents and exceptional emergencies for the amount of time and in the numbers necessary to perform special alternative civilian service.

In March 2020, the girlfriend of a person performing alternative civilian service contacted the AOB requesting information. Directly before the end of his alternative civilian service, the competent agency had assigned her boyfriend for another three months of special civilian service. The AOB explained the applicable legal situation. In April 2020, two affected persons also criticised the extension of their alternative civilian service.

Extension of three months

In May 2020, a person performing alternative civilian service contacted the AOB to complain about unequal treatment in the remuneration of special civilian service. In all three cases, the AOB explained the competence and the existing options for protection under the law to those affected. It was evident from the media and the complaints themselves that cases were already pending before the courts.

Unequal treatment with remuneration

Two submissions had to do with the fear of contracting COVID-19 during alternative civilian service. A man who suffered from asthma amongst others had been conscripted for alternative civilian service despite presenting diagnoses. However, the public medical officer quickly determined that he was unfit. In the second case, a risk patient feared that her son who was living in the same apartment as her would expose her and her elderly husband to an increased risk of infection by performing alternative civilian service. The AOB explained the possibility of postponing the alternative civilian service.

Fear of infection

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