



VOLKSANWALTSCHAFT

Annual Report

to the National Council
and the Federal Council

2009

Austrian Ombudsman Board

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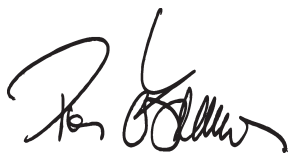
Preface

Based on the Austrian Federal Constitution, the Austrian Ombudsman Board (*Volksanwaltschaft*) has independently and impartially controlled national, state and municipal public administration since 1977. Once a year, its members submit a report to the National Council and the Federal Council outlining the institution's work, priorities and main findings throughout the past year.

The present volume is a short version of the annual report 2009 compiled in German and consists of a general section, which outlines the activities of the three members of the Austrian Ombudsman Board. All key data, such as statistics on investigative proceedings and the number of cases, can be found in this section. Section two gives an overview of the international activities of the institution, which covers a broad range from the International Ombudsman Institute (I.O.I.) to EU twinning projects and bilateral contacts.

Since 2001, the Austrian Ombudsman Board has been putting a particular emphasis on human rights in its annual report. Therefore section three of the report deals with legal problems relating to human rights, which the Austrian Ombudsman Board had to resolve in 2009 when assessing complaints about administrative malfunction and administrative offenses of legal provisions by public authorities.

Both the original report written in German and the English translation are available free of charge from the office of the Austrian Ombudsman Board (*Volksanwaltschaft*) and can be downloaded from the institution's website www.volksanw.gv.at.



Peter Kostelka



Gertrude Brinek



Terezija Stoisis

Vienna, August 2010

Key Figures 2009

Performance record

In 2009, 14,853 people turned to the Austrian Ombudsman Board (AOB) with their concerns; in comparison to the already high figures of the previous year, this is an additional slight increase. The number of cases, in which persons concretely complained of having been treated poorly or having been inadequately informed by a government agency, also rose from 9,641 to 10,320. At the same time, the number of investigative proceedings has fallen slightly to 6,235 cases (2008: 6,563). In 60.4% of all complaints about government agencies, the AOB initiated a detailed investigation. 4,084 cases dealt with complaints that fell within the sphere of responsibility of the AOB, but where, from the very outset, no maladministration could be determined. In these cases, the AOB provided additional data and gave legal information.

[More enquiries](#)

Performance Record	2009	2008
Complaints regarding administration	10,320	9,641
Initiative investigative proceedings	6,235	6,563
No investigative proceedings	4,084	3,078
Initiated appeal of a directive	1	0
Complaints outside scope of investigative duties	4,533	5,004
TOTAL of citizen enquiries processed	14,853	14,645

The AOB is an important point of contact for people who are worried that they will not obtain justice. Just over 4,500 cases in the reporting period involved questions that were outside of the scope of the AOB's investigative duties. The AOB tried to be of assistance by providing information and advice in these cases as well. It established contact with the appropriate authorities and outlined possible approaches to potential solutions for the parties affected.

[Information outside its mandate](#)

Investigative Proceedings within the Federal Administration AOB Priorities 2009	
Federal Ministry of Labour, Social Affairs and Consumer Protection	1,160
Federal Ministry of Justice	756
Federal Ministry of the Interior	474
Federal Ministry for Traffic, Innovation and Technology	398
Federal Ministry of Finance	291
Federal Ministry of Economy, Family and Youth	254
Federal Ministry of Agriculture, Forestry, Environment and Water Management	151
Federal Ministry for Education, Arts and Culture	68
Federal Ministry of Science and Research	66
Federal Ministry of Health (excl. health and accidental insurance)	51
Federal Ministry of European and International Affairs	44
Federal Ministry of Defence and Sports	36
Federal Chancellor's Office	26
TOTAL	3,775

Investigations in the federal administration

The AOB monitors all public administration authorities, that is, all authorities, public agencies and administrative offices that are charged with the implementation of federal laws. Its investigative mandate goes far beyond the federal ministries listed above and encompasses organisations from the social security institutions to the Federal Asylum Office. In 2009 the AOB conducted 3,775 investigations in the federal administration.

Social sector leads in complaints

Most of the complaints and investigations were in the area of social welfare, for which Ombudsperson Peter Kostelka is responsible. An increasing number of shortcomings concerning nursing care allowances, problems regarding calculation of employment periods for pensions or complaints about unemployment benefits have affected many people. A total of more than 30% of all investigative proceedings were in the area of social welfare. This includes the Ministry of Labour and Social Affairs, as well as the social security and insurance institutions, and the Public Employment Service Austria (AMS).

In 2009, 756 complaints about the justice system were made to the responsible Ombudsperson Gertrude Brinek. 20% of all investigations were in this area. The decline in comparison to the previous years (2008: 927) is due on one hand to certain legislative reforms. On the other hand, the ombudsman institutions that were created in the justice sector in 2007 have been undertaking part of the internal monitoring of the administration of the judiciary. The AOB is responsible for monitoring the administration of the judiciary, the offices of the Public Prosecutors, the penal system and the investigation of procedural delays. A large part of the complaints in 2009, however, also involved cases relative to independent adjudication by the courts which does not fall into the mandate of the AOB.

The justice system,
an investigative
focal point

Ombudsperson Terezija Stoisits recorded 474 complaints in the reporting period from the internal security sector; this means that 12 percent of all investigations were in this sector. In comparison to the previous year, the number of complaints decreased by 9% (2008: 503). However, the rise in the number of complaints relative to alien and asylum law continued in 2009. The complaints did not apply exclusively to the Federal Ministry of the Interior and its subordinate authorities. A third of the complaints concerned the Asylum Court, respectively, the Independent Federal Asylum Board. The parties affected objected primarily to the long duration of their appeals proceedings.

Internal affairs, a
perennial issue

Completed Investigative Proceedings within the Federal Administration	2009	2008
No case of maladministration on the part of the authorities	3,664	3,798
Maladministration on the part of the authorities	641	689
Investigative proceeding inadmissible (administrative proceeding still ongoing)	1,076	1,206
Complaints outside the mandate of the AOB	890	1,093
Complaints retracted	490	663
TOTAL	6,761	7,449

Maladministration in 14.9% of the investigative proceedings

In 2009, 6,235 investigative proceedings were initiated and 551 proceedings that were still pending from previous years completed. Therefore a total of 6,761 investigated cases were resolved. In 641 investigative proceedings, maladministration on the part of the authorities was determined. In 3,664 investigative proceedings this was not the case and the AOB informed the parties involved regarding the legal situation and, if applicable, suggested approaches to potential solutions. Thus in 2009, the percentage of cases completed with a formal declaration of maladministration was at 14.9% and thus comparable with the results of the previous year (2008: 15.3%) despite the slight decline in the total number of investigative proceedings. On the average, the affected parties found out after 47 days, whether there was maladministration involved in their case or not.

Advice and information 2009

In 1,076 cases, while the complaints were within the purview of the AOB, there was no reason to initiate an investigative proceeding. In these cases, it was primarily a matter of providing additional data and legal information. 890 cases concerned questions that were outside of the scope of the AOB's mandate. The AOB tried to be of assistance by providing information and advice in these cases as well. It established contact with the appropriate authorities and outlined possible approaches to potential solutions for the parties affected. In 490 cases, the complaint was retracted.

72 ex-officio review proceedings

The Austrian Federal Constitution provides the AOB with the possibility of ex-officio review proceedings if it has a concrete suspicion regarding possible maladministration within the administration. As was the case in the previous years, the members of the Board made use of this right, initiating 72 ex-officio review proceeding: (2008: 71).

In addition to the federal government administration, the AOB also monitors and controls all the regional and local government authorities in seven of the nine Federal States. Only the States of the Tyrol and Vorarlberg have their own regional ombudsman. Overall the AOB conducted 2,458 investigations of the regional and local government authorities in 2009. In comparison to the previous year, the number of investigated cases in these sectors has remained constant (2008: 2,410).

Investigative proceedings of regional and local government authorities

Investigative Proceedings of the Regional and Local Government Authorities	2009	2008
Vienna	816	796
Lower Austria	537	528
Upper Austria	313	318
Styria	302	336
Salzburg	185	135
Carinthia	157	168
Burgenland	148	129
TOTAL	2,458	2,410

It is not surprising that the most populous States, Vienna, Lower Austria and Upper Austria, occupy the top three places with regard to the number of investigative proceedings. At the same time, there is no uniform trend regarding the number of complaints. While the number of cases in Vienna, Lower Austria, Salzburg and Burgenland rose, the numbers declined in the other States in comparison to the previous year.

Regional focal points

Regional and Local Government Authorities AOB Priorities	2009	2008
Regional planning, housing and development	608	631
Social welfare, youth welfare	504	418
Community affairs	393	370
Citizenship, voter register, traffic police	235	276
Regional finances, regional and local taxes	158	176
Regional and local roads	152	126
Health care system and veterinary sector	99	126
Education system, sports and cultural matters	92	73
Agriculture and forestry, hunting and fishing laws	52	53
Skilled trades and energy	49	49
Transport and traffic on regional and local roads (excl. traffic police)	33	39
Nature conservation and environmental protection, waste management	36	37
Directorate of regional affairs, civil service law and civil service compensation law for regional and municipal employees	45	35
Science, research and the arts	2	1
TOTAL	2,458	2,410

Regional and local priorities

As was the case in the past years, there are clear thematic focal points in the investigative activities of the AOB at regional and local levels. At the top of the list are problems that citizens have in the area of regional planning and building law. In 2009, a total of 608 cases were brought to the attention of the responsible Ombudsperson Gertrude Brinek. The sectors of social welfare and youth welfare are also frequently a reason why people turn to the AOB. In comparison to the previous year, there was a massive increase in complaints in this sector, resulting in a total of 504 investigated cases for Ombudsperson Peter Kostelka. In practice there are frequently problems in connection with general local and/or municipal matters. In 2009, 393 persons contacted Ombudsperson Gertrude Brinek in this

regard. In the area of granting Austrian citizenship, hardship cases keep occurring systematically due to a lack of discretionary latitude. In her investigative activities, Ombudsperson Terezija Stoisits had to deal with a number of exemplary cases.

Communication with the public

People took widespread advantage of the opportunity to contact the AOB personally, by phone or in written form in a completely unbureaucratic way in 2009. 8,000 people contacted the information service of the AOB either in person or by phone for initial information, to lodge a concrete complaint about a government agency or state authority or to enquire about the status of their proceeding. About 13,200 letters and e-mails arrived in the offices in the Singerstrasse. These communications noted concrete problems with government agencies or had the purpose of obtaining various facts and legal information. The correspondence between the employees of the AOB and people who suspected maladministration on the part of a government authority at federal, regional and local levels actually rose compared to the previous year by 20% and comprised more than 23,100 pieces of correspondence. About 8,800 letters and e-mails were exchanged with authorities.

Communication
with citizens

Communication with the Public

- 8,000 people contacted the information service personally or by phone
- 13,200 people wrote to the AOB
- 23,100 documents made up all of the correspondence
- 8,800 letters and e-mails were sent to authorities
- 1.34 million hits at the website www.volksanw.gv.at
- about 307,000 people watch the weekly TV show "Bürgeranwalt" ("Advocate for the People")

Consultation days across Austria	The consultation days held across Austria continue to be very popular; on 189 occasions, persons in all the States had the opportunity to discuss their issue with an ombudsperson. Over the course of the year, almost 1,200 of these personal discussions took place. Vienna, with the largest metropolitan area in Austria, had the largest number of consultation days at 54. However, consultation days were held in all other States on a regular basis over the course of the year. In the Tyrol and Vorarlberg, where the AOB does not investigate any complaints regarding the regional and local authorities, 15 and nine consultation days, were held. Consultation days were held not only at the offices of the Administrative District Authorities or in administrative offices of the state government, but people were able to directly address an ombudsperson with their problems in penal institutions, police detention centres and federal army buildings.
Increased communications and public relations work	In order to inform the public even more comprehensively about its controlling activities, the AOB reorganised its communications. A new International Relations and Communication unit has been set up. It deals with all public relations issues and is the initial point of contact for all representatives of the media. In addition to direct contact with interested parties and the parties affected, the AOB's website www.volksanw.gv.at is an important instrument of communication. In 2009, the website registered more than 1.34 million hits from a total of 116 countries. Particular interest was shown in information about the ombudspersons and their concrete areas of responsibility. In order to enhance the public relations work, a new information portal was presented in July 2010. It offers concise information on the activities of the independent control body and its members Peter Kostelka, Gertrude Brinek, and Terezija Stoitsits. Barrier-free services take the centre stage of the information portal. It includes all dates of consultation days held by one of the three Ombudspersons throughout the country and offers the possibility to submit complaints directly through the website. Exemplary cases are presented on a regular basis as well as summaries of the weekly TV show "Bürgeranwalt" ("Advocate for the People"). Information about the work of the AOB is available in English, Spanish, French, Turkish, Croatian, and Slovenian.
Weekly TV show	The TV show "Bürgeranwalt" ("Advocate for the People"), which is produced by the public broadcaster ORF, remained an important platform for the issues handled by the AOB in 2009 as well. It was one of the few TV shows that was able to not only maintain its market

share despite strong competition, but increase it. The average national market share in 2009 was 29 percent; in households with cable and/or satellite TV, it was 28 percent. For example, 472,000 viewers followed the progress of a case handled by Ombudsperson Brinek, in which glare-producing elements on the façade of a house resulted in problems for the neighbours across the way. A case handled by Ombudsperson Stoisits, which involved a door that had unnecessarily been forced open by the police and the associated question of compensation for damages, also had high viewing figures. When, during a broadcast, Ombudsperson Kostelka stood up for a waiter who had been refused a disability pension despite permanent injury to health, the viewers also showed a great deal of interest.

General observations

OMBUDSPERSON PETER KOSTELKA

The AOB is always being challenged anew by how people are affected and by their descriptions of what they consider to be a case of maladministration. Focal points of our investigations result from an accumulation of complaints and the underlying structural deficits. The people continue to call for government authorities to provide more “justice on a case-by-case basis” instead of “automatic enforcement”. The primary goal of our activities must therefore be to remedy people’s unease, both in individual cases and in general, where the instruments that are available provide measures for recourse.

Primary goal

It is the responsibility of the AOB to provide feedback to the legislative entities about how their laws are affecting people concretely, respectively, whether expectations associated with certain legislation were actually met. That this is not always the case can be clearly seen from this year’s report on our activities. The AOB is not only obligated to represent individual interests but the public good as well and it exercises its monitoring of government administration strictly based on the Constitution and the laws. It is therefore regrettable that the legislative recommendations made by the AOB do not receive more attention.

Legislative recommendations

Focal point social issues	It is a particular matter of interest for me, the ombudsperson responsible for social issues, to reposition the concerns within political discourse of those who depend on special help from the State, but who fail due to bureaucratic obstacles and formalisms. Numbered among these are people at risk of poverty, senior citizens, persons with immigrant background. Also the disabled and people needing constant care and their family members are concerned, for whom there are no central points of contact in the case of complex problem areas that cut across various areas of competence.
Children are entitled to protection	Children and young people should be entitled to protection and care, as well as the best possible physical, mental, emotional, social, and moral development opportunities. While Austria has ratified the 1989 UN Convention on the Rights of the Child, this was not enshrined in the Austrian Constitution, with Parliament declaring a so-called reservation of implementation ("Erfüllungsvorbehalt") until the implementation of appropriate legislation. As such legislation has not been passed, this prevents direct legal applicability before courts and government authorities.
Youth welfare	There have been failures and omissions at all levels during the past decades, with children and youths suffering as a result: Youth welfare lacks quality guidelines that correspond to professional standards that are internationally undisputed. There is both a lack of funds and trained personnel to enable more active prevention of dangerous situations instead of merely reacting to crises. In Austria there are currently not even any guidelines that address the particularities in the assessment of children and youths who will be making statements in criminal court proceedings in cases where sexual abuse is suspected.
Children and health	While children and youths represent 19% of the population, the share of health care expenditure for them is only 7%. In comparisons prepared by the OECD and UNICEF, Austria is in the very last place of all EU states with regard to health data concerning children and youths. Additionally a clear alarm signal is the extremely high suicide rate among 15- to 19-year olds. Specific therapies for children with learning disabilities, psychological abnormalities, adjustment disorders, chronic illnesses or disabilities are very expensive and must be largely paid out-of-pocket by the families or paid in advance, even if they are reimbursed later on. Families cannot always afford that. Classification of care allowances for children is still not being done

by paediatricians nor are annual valorisations performed. In Austria there are currently about 7,000 rehabilitation places for adults, but not a single family-oriented children and youths rehabilitation facility exists.

As the health of children is an issue that cuts across numerous areas, dealing with it in a way that makes political sense requires a bundling of resources, responsibility and knowledge from the areas of health, social welfare, and education, as well as the legal and human sciences. Health policies for children and youth are next-generation policies in the most positive sense of the word.

Necessary
bundling of
resources

OMBUDSPERSON GERTRUDE BRINEK

Of the 2,235 new cases in the area of responsibility of Ombudsperson Gertrude Brinek, 1,049 cases involved the federal government administration (Justice, Finances) and 1,186 cases regional and local authorities (in particular, building and regional planning law, regional and municipal roads, municipal law). The reports to the State Parliaments of Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, and Vienna provide compelling information in this regard.

2,235 new
cases

Regarding the complaints about the justice system, it must be pointed out that the responsibility of the AOB extends only to the areas of the administration of the judiciary, the offices of the Public Prosecutors, the penal system and the investigation of procedural delays. However, as was the case in the previous years, a large part of the personal appointments and letters referred to cases relative to independent judgements and decisions by the courts. Due not only to the large number of these complaints, but also due to their societal importance, the AOB considers it necessary to make the level of acceptance, the hardships and the statutory parameters that are considered insufficient clear to the National and Federal Council and to inform them of the AOB's perceptions.

Justice system

In a majority of the cases, the sectors of adult guardianship law and custody law were involved. The most frequent reasons for complaints were poor care by guardians, appointment of guardians that was often felt to be premature and the difficulties of lodging effective complaints about inadequacies.

Focal point - Adult
Guardianship Law

Disputed custody proceedings	In (disputed) custody proceedings, the evaluations performed by expert witnesses, the duration of the proceedings and the removal of children to foreign countries was in the centre of criticism.
Building law	The investigative proceedings involving building law that is executed within the purview of the municipality have again shown that builders accept deviations from their building permit in the management of their construction. Furthermore, the building authorities often do not take steps against these deviations with the proper swiftness or the proper means. It seems that people are not sufficiently aware of the fact that improper execution of development and planning law and of building codes results in infringement of fundamental rights, of the principle of equality and of the rule-of-law principle.
Zoning proceedings	There is also a potential for conflict in zoning proceedings. It is not only difficult for the individual to comprehend that his or her private interests must give way to public interests, but there are also complaints about the lack of influence by an individual on the decision-making process and its lack of transparency.
More cases with EU relevance	During the reporting year the importance of EU law in this context has grown. In a number of cases, there was disharmony between national and supranational law. In this context, the AOB would like to point out the permit requirements and the notification obligations for stair lifts in residential buildings (which differ from State to State) and the necessity for timely barrier-free design and construction of public buildings.
Divested legal entities	The AOB also frequently deals with questions of different structuring of the tariffs of public utility facilities and in this context the unequal treatment of senior citizens that can no longer be solely evaluated in accordance with national laws. It is with great regret that the AOB has been forced to acknowledge that it has only limited powers to monitor large sectors of general-interest public services, as these entities have often been divested and have become private limited companies or joint stock companies. In these cases, the AOB can only hope that the companies are willing to provide a statement but cannot force them to cooperate.

OMBUDSPERSON TEREZIJA STOISITS

Within the area of responsibility of Ombudsperson Terezija Stoitsits there were 1,713 new cases in the reporting period. Of these cases, 1,089 concerned federal administration authorities and 624 regional and local authorities (in particular state police laws and regional and local taxes and levies).

1,713 new cases

Of the 474 cases in the area of federal government administration, most of the complaints concerned the Federal Ministry of the Interior and here, in particular, the implementation of alien and asylum law. Regarding complaints on asylum law, it must be noted that they did not all concern the Federal Ministry of the Interior. A third of the complaints concerned the Asylum Court, respectively, the Independent Federal Asylum Board. Years of policy failures have created a considerable backlog of pending appeals proceedings. In 2008, this entire backlog, together with all the associated problems, was shifted to the newly created Asylum Court. Therefore, the most frequent complaint remained the long duration of the proceedings. But there were also complaints about decisions pronounced by the Asylum Court. However, as opposed to the Independent Federal Asylum Board, the AOB has no authority here to undertake any investigations.

Ministry of the Interior leads in number of complaints

The presented cases and legislative recommendations in the area of granting citizenship have to be pointed out emphatically. It is primarily the lack of any discretionary latitude in evaluations of the requirement of a proven means of making a living that results – in structural terms – in hardship cases. They result directly from the Austrian Citizenship Act. The observations of the AOB make it clear that the substantial Austria-wide decline in naturalisations by 22.2% in 2009 compared to 2008 does not just represent a statistical figure but show that these are very concrete human destinies.

Citizenship question

The restrictive implementation practice in alien law is demonstrated very clearly in the example of the growing number of complaints because of refusals of visitors' visas. In the meantime the granting of a visitor's visa seems to be just as difficult as obtaining a residence permit. The increase in the number of complaints in this area seems even more consequential because the visa applicants are always abroad. Therefore their knowledge concerning the existing possibilities for lodging complaints or judicial remedies in Austria can be regarded as rather slight. Furthermore a negative decision regar-

Visa regulations

ding a visa cannot be fought by way of an appeal, but only by way of a cost- and time-intensive process through the highest courts. If one considers the average duration of a proceeding before the highest courts, it appears evident that in actual practice this path is closed to many people living in foreign countries.

Place permit law There are deficits with regard to judicial remedies in the area of plant permit law as well. For years, the AOB has been pointing out the problems inherent in the fact that in some parts of the Trade and Commercial Regulations residents do not have the status of a participating party. The complainants frequently do not even know to what extent a plant or business can be operated, what inspections have already been carried out by the authorities and whether subsequent requirements have been stipulated. The legislative recommendations by the AOB in this area have unfortunately not been addressed and therefore continue to be valid.

No authority to investigate divested legal entities In one investigative proceeding regarding a mobile phone tower on top of a school building, the Bundesimmobiliengesellschaft – BIG (the company responsible for the management of real estate used by government authorities and bodies) refused to give a statement, noting the lack of authority on the part of the AOB to investigate. Only after it was pointed out that the management of the BIG had explicitly agreed to cooperate with the AOB was the required information provided after all.

In this context, the AOB would like to refer to a longstanding recommendation to align its authority under the law with that of the Court of Auditors with regard to the monitoring of divested legal entities. The reason for this is that the authority of the AOB to investigate has been gradually reduced since 1990 by more than 50 entities that have been divested. This means the transfer of areas where the government exercises power over their administration ("Hoheitsverwaltung") and areas that govern private economic activities ("Privatwirtschaftsverwaltung") to legal entities that are set up having the legal form of companies under private law (e.g. BIG, ASFINAG or ÖBB). With this broadened mandate of the AOB, the existing gap relative to monitoring activities would be closed.

The question of bilingual place-name signs in the State of Carinthia has been unresolved for a long time. In recent years, the AOB approached the Constitutional Court a number of times in this matter. The Court has concurred three times with the petition set out by the AOB.

Place-name signs:
contested before
the Constitutional
Court

The AOB is of the opinion that directives by the Administrative District Authority Völkermarkt regarding the towns of Ebersdorf/Drveša vas, Bleiburg/Pliberk and Schwabegg/Žvabek continue to not be equipped with proper signage. Due to reports in the media, the AOB initiated an ex-officio investigative proceeding, in order to bring its misgivings to the attention of the Constitutional Court yet again. In the opinion of the AOB, the contested place-name signs do not comply with the principle, which can be derived from the law relative to ethnic/national groups and minorities, that German designations and designations in the language of the ethnic/national group and/or minority be coequal and not be used in a discriminatory way.

International Activities

International Ombudsman Institute (I.O.I.)

The relocation of the General Secretariat of the International Ombudsman Institute (I.O.I.) from the University of Alberta, Canada to the headquarters of the AOB has been pursued since the end of 2007 and completed in 2009. This change will enable the I.O.I. to meet the growing needs of its members for coordination, exchange of information and networking and to raise its profile even more as a partner for global cooperation among the independent ombudsman offices.

General Secretariat
now in Vienna

The I.O.I. was established in 1978 as an independent and non-partisan organisation in Edmonton. It is structured in six regional groups – Africa, Asia, Australia & Pacific Islands, Caribbean & Latin America, as well as North America and Europe – and currently has about 150 members from 75 countries. Since September 2009, this association of local, regional and national ombudsman offices and boards, which is the only organisation acting worldwide, has had the status of an international NGO recognised by the Austrian state and is managed by the new General Secretariat in Vienna. The position of Secretary General of the I.O.I., which pursuant to the by-laws is held by one of the three members of the AOB, is held by Ombudsperson Peter Kostelka. He is assisted in fulfilling his international responsibilities by three full-time staff members.

Ombudsman
Kostelka is I.O.I.
Secretary General

The decision on the relocation was made by the General Assembly of the I.O.I. during the IX. World Conference of the International Ombudsman Institute in June 2009 in Stockholm. This positive result for Austria is due to the active commitment of all three members of the AOB. Ombudsperson Gertrude Brinek, Ombudsperson Terezija Stoisits and Ombudsperson Peter Kostelka were all in Stockholm and showed themselves united in their interest in a relocation of the headquarters of the I.O.I. to Vienna. The broadly based political support from the head of state, the federal government, the National Council, the Federal Council, and the City of Vienna also played a decisive role. Additionally the application by the AOB satisfied all the criteria of the selection process with regard to personnel, space, and financial requirements for the General Secretariat.

Broadly based
support

Future perspectives
and projects

The I.O.I held its first annual Board of Directors meeting at its new location in November 2009. The members of the Board of Directors, who travelled from all six regions of the I.O.I., visited the new offices of the I.O.I. in the former ballroom of the AOB and laid the groundwork for the further development of the I.O.I. The activities in the core sectors of human rights, basic liberties and the rule of law will be expanded. The members from the new democracies and the emerging countries, in which support for the rule of law and the battle against corruption have special priority, will profit particularly from this expansion. Furthermore the I.O.I. will enhance its function as an information and service platform and will also expand the training sector. Developing and conveying best-practice models and benchmarks for fair treatment of the people by the authorities is in the forefront. The first concrete project will be a seminar offered in the fall of 2010 in Vienna for employees of ombudsman offices; it was developed by the Ombudsperson from Ontario, Canada, and is called "Sharpening your Teeth". Practice-oriented events of this kind organised by the I.O.I will be supplemented by additional research. Moreover, collaboration with other international organisations is planned, for example with the World Bank, which has shown interest in projects relative to good governance.

Bilateral contacts and projects

Human Rights
Advisory Council
Marocco

Sharing experiences and collaboration with ombudsman offices and comparable institutions abroad was again given great importance in the past year. In April 2009 the President of the Moroccan Human Rights Advisory Council, which was founded in 1990, presented the work that this institution has been doing during his visit in the AOB offices. The Council is working closely with the Diwan al-Madhalim, the Moroccan version of an ombudsman.

Hungarian
Human Rights
Commissioner

The Hungarian Human Rights Commissioner Maté Szábó, who was in Vienna in June 2009 to participate in talks with the AOB, provided an overview of the history of his institution as a product of the democratisation process after the fall of the Berlin Wall. He also spoke about current focal points of his work, which include the rights of children, child poverty, the crisis situation of the aged, as well as problems that have arisen in connection with the financial crisis.

An eleven-person delegation from the Petitions Committee of the Parliament of Mecklenburg-Vorpommern, Germany, visited in September 2009 to gather information about the institutional structure, the responsibilities and the activities of the AOB and to inform in turn of their own activities. The Public Protector from South Africa, Thulisile Madonsela, provided insights into her work environment during her visit in November 2009.

More visits

EU twinning project

In collaboration with the Ludwig Boltzmann Institute for Human Rights, the AOB is participating in a twinning project with the newly established ombudsman office of the Republic of Serbia. The project is being implemented and financed by the ombudsman offices in Greece and the Netherlands as well as by the European Commission. The goal of the multiphase project, which is scheduled to run from 2009 to 2011, is to effect an improvement in public administration by strengthening the Serbian ombudsman institution. It will contribute to the recognition of the principle of the rule of law, the enforcement of human rights and the democratisation of society. An event launching the project, called the "Mission & Vision Conference", took place on 12 and 13 October 2009 in Belgrade. Ombudsperson Terezija Stoisits was present. Up to 2011, numerous other activities and trainings will take place with the participation of experts from the AOB.

Support for the Serbian ombudsman institution

International conferences

A highlight for the international ombudsman community was the IX. World Conference of the International Ombudsman Institute, which took place in Stockholm in June 2009 and celebrated the bicentennial of the Swedish Ombudsman Office. As previously mentioned, all three members of the AOB were present at this event, where more than 300 participants discussed a very broad range of topics, from the history of the ombudsman concept to the effects of privatisation on the monitoring of government administration to the problems relative to asylum issues.

I.O.I. World Conference in Stockholm

- Seminar in Paphos, Cyprus The Seventh Seminar of the National Ombudsmen of EU Member States was held from 5 – 7 April 2009 in Paphos, Cyprus and was dedicated to the topic of migration and its effect on the work of national ombudspersons. Ombudsperson Gertrude Brinek, who represented Austria, took this opportunity to continue collaboration with the European Ombudsman and numerous colleagues from other European countries.
- Other events Moreover Ombudsperson Peter Kostelka attended the General Assembly of the European Ombudsman Institute (EOI) in Florence, as well as conferences in Sao Paulo, Brazil and Brno, Czech Republic.

Fundamental Rights

Right to property, liberty and personal security

CROSS-BORDER PROBerty OFFENCES

Four concrete-mixing lorries valued at about EUR 800,000 were stolen from a company in South Tyrol (Italy), channelled through Austria, and probably sold to Southeastern Europe. The Italian company approached the AOB because the Austrian police were not investigating properly as the lorries were able to drive unchecked through Austria.

The stolen concrete-mixing lorries began their trip on the Austrian motorway at 5:10 a.m., ending it at 7:58 a.m. At 6:15 a.m. the company had reported the theft to the Italian police in South Tyrol. The police in Austria were informed within the scope of international police cooperation. The request to search for the stolen vehicles was made at 6:52 a.m. and by 7:17 a.m. all the information about the appearance of the lorries, the brand and model, as well as the licence plates had been forwarded to the Austrian authorities.

Information available to the police

Timely intervention by the police, however, failed due to the lack of cooperation with ASFINAG, the company responsible for collecting motorway tolls in Austria. The ASFINAG's "GO-Box" (electronic toll system) records precisely down to the minute where lorries are at any given moment. However, the Austrian security authorities did not attempt to retrieve the location data of the stolen lorries by way of a "GO-Box query" to ASFINAG. The law enforcement agencies believed that ASFINAG would not be willing to provide these data without an order from the Public Prosecutor. Furthermore the responsible agencies (with the approval of the Federal Ministry of the Interior) were of the opinion that obtaining the data against the will of ASFINAG would not be legally possible. The search, which took place exclusively within the scope of the general patrol duty of the motorway police, was unsuccessful.

Lack of cooperation

Police can secure items in event of danger	The Federal Ministry for Traffic, Innovation and Technology denied that ASFINAG would refuse to cooperate in the securing of property by the police without an order from the Public Prosecutor's Office. Pursuant to the Security Police Act, the police can, among other things, secure items (therefore, also data and/or data carriers) in order to avert offences against property. Furthermore, in accordance with the Code of Criminal Procedure, securing of data for reasons of providing proof in the event of imminent danger by the police itself is possible without an order from the Public Prosecutor's Office – even in the event of cross-border circumstances. Thus ASFINAG would not even have had to consent.
Not enough police officers in the field	During the time of the investigation, only four police officers were in the field on about 80 kilometres of motorway where the lorries could potentially have been secured. The statement provided by the Federal Ministry of the Interior does not state in which direction the patrols were going (if they were moving at all). Thus it would be possible that at the time in question, not one single police patrol was present on a route that would have enabled access – despite the existing bulletin. This small number of law enforcement officers for such a large area to be monitored is not acceptable, even considering the European Football Championship that was going on in Austria at the time.
European case law	Article 6 of the Charter of Fundamental Rights of the European Union states: "Every person has the right to liberty and security of person." The Supreme Court to a certain extent assumed a "right to security of person" in its decisions relative to state liability. Case law of the European Court of Justice for Human Rights with regard to Article 2, European Convention on Human Rights (right to life) also assumes certain duties to avert danger, to provide information and to investigate thoroughly on the part of the State in detecting and solving crimes. Similar assumptions apply to recent case law of the European Court of Justice regarding Article 1 of the first additional protocol to the European Convention on Human Rights (right to property), according to which, for example, inadequate enquiries in the course of the investigation of property offences or an unreasonably long duration of proceedings in lawsuits concerning property claims are deemed a breach of the duty of care that is derived from the right to property. Even if one nevertheless did not wish to assume legally enforceable duties of care and/or duties to inform from the standards referred to above in the event of attacks by private parties, the

clear value judgement of the Treaty of Lisbon in favour of an “area of freedom, security and justice” and an effective protection of fundamental rights remains undisputed. That this becomes utopian in the event of the kind of staffing as was the case here cannot be disputed and, from the perspective of the AOB, is clearly unacceptable in this form.

Right to a fair and public trial

CRIMINAL RECORDS ABOUT FOREIGN CONVICTIONS

In January 2008 Mr. N.N. filed a petition to delete the entry of a foreign conviction in the Austrian criminal record. After an almost two-year proceeding, it was found that this entry was unlawful. During these almost two years it was disregarded that this entry could possibly result in damage to Mr. N.N.’s credit standing or have career drawbacks for him.

The entry or expungement of foreign convictions raises difficult practical and legal problems that are also based on statutory provisions that are not quite clear. On one hand, one must adhere to the presumption of innocence that is derived from Article 6 of the European Convention on Human Rights. On the other hand, one must take into consideration the needs of the Austrian authorities, respectively, the Austrian population. For example, a potential employer of Mr. N.N. has a legitimate interest in the past life of a foreign national living in Austria, if this is related to a criminal offence.

Statutory provisions
not clear

A foreign country is not always willing or able to provide the Austrian authorities within a reasonable period of time with the documents and information required for an evaluation of whether a conviction complies with human rights laws. This should already result in serious doubts about whether such a conviction can be entered in the Austrian criminal record. For foreign government agencies it should not be difficult to cooperate with Austrian authorities and to send a copy of a file and to provide additional information. Authorities in foreign countries should be aware of what the consequences of an entry into the criminal record can have for the person affected.

Cooperation with
foreign govern-
ment agencies

Entry should have been expunged	The country in question in this case showed itself incapable of performing this collaborative work efficiently and in a timely manner. Therefore, the Federal Ministry of the Interior should have assessed this inadequacy as "doubt" relative to the conviction's compliance with human rights and should have expunged the complainant's entry no later than after a year or even earlier, after the end of the decision period of six months.
Law amendment in preparation	It is, however, a positive aspect that in view of this case the Federal Ministry of the Interior has contacted the Federal Ministry of Justice in order to amend the law. The Federal Ministry of Justice agreed to prepare an appropriate amendment of the law in order to remove any remaining ambiguities and to enable a timely expungement of doubtful criminal record entries from foreign countries. The AOB will keep the legislative process under observation.

Principle of equality

LICENCE TO PRACTICE AS A GENERAL PRACTITIONER

While Austrian graduates with a medical degree automatically receive a licence to practice medicine in all EU countries, however, in Austria itself they may not practice as a general practitioner without additional education and training. In order to work as a GP, they must acquire a specific diploma as a general practitioner or a specialist.

Consequences of legal situation	This legal situation favours primarily foreign students, who will in any case return to their home countries in the EU. But considering the waiting times for openings for study places where basic medical studies can be completed, Austrian and foreign students can, for example, see this as an additional incentive to immediately gain a professional foothold in the EU area. This, however, does not automatically correspond to the interests of the Austrian population with regard to having adequate numbers of GPs available for the best possible care.
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The Austrian Constitutional Court is of the opinion that a less favourable treatment of Austrian citizens in comparison to foreign nationals must be gauged in accordance with the principle of equality. Therefore, an objective justification is not necessary. The Constitutional Court has also applied this consideration to so-called reverse discrimination (of Austrian citizens). This is not discrimination according to the criteria of citizenship, but the discrimination of purely domestic issues vis-à-vis issues that relate to the European Community.

Reverse
discrimination

The non-academic further qualification of doctors is in the interest of the best possible care of the population and therefore a motive on the part of the legislator that must be recognised. But even with this reasoning, it is questionable if, under the aspect of the principle of equality, sufficient reasons can be put forward that medical training that enables the independent practice of medicine in all EU countries outside of Austria does not provide a sufficient qualification for the independent practice of medicine in Austria.

EU qualifications
not sufficient
for Austria

DIFFERENTIATING TARIFFS FOR MEN AND WOMEN

The AOB has received numerous complaints, in which people complained that when using public facilities, such as swimming pools, ski lifts, parks, fitness studios, etc., they had to pay higher fees in comparison to the local population. The complaints were associated with facilities that were either directly operated by the municipality or operated in a certain relationship of dependency with or an exertion of influence by the municipality.

The prohibition of discrimination within the Community, pursuant to Art. 12 and Art. 49 of the EC Treaty, interdicts discrimination for reasons of citizenship, and/or restrictions of the freedom to provide services for nationals of member states who are residing in a Community member state other than the country of the service recipient. In a number of rulings, the European Court of Justice has represented the opinion that a member state that grants unjustified tariff or price advantages to local residents as compared to non-residents is violating its duties.

EC prohibition of
discrimination

Objective justification required	For entities which run public facilities under private law, the principle of equal treatment requires an objective justification for exceptions. A differentiation that has been objectively justified would, for example, be if parity of tariffs among both local residents and non-residents would result in a displacement of or insufficient access for local residents. To what extent this applies in a specific case can be assessed only in accordance with the concrete circumstances on a case-by-case basis.
Restitutory claims	Contracts between municipalities and citizens that violate these EU regulations or the principle of equality under the Constitution must be deemed partially null and void. Such a partial nullity can, if applicable, result in restitutory claims for the additional amounts charged in comparison to residents of the municipality. In the opinion of the AOB, excessive charges during that last three years could be reclaimed.
Season tickets for residents only	Numerous times there were permutations of indirect preferential treatment relative to tariffs that complicated the AOB's investigations. In the town of Wiener Neudorf in Lower Austria the prerequisite for the purchase of a season ticket for the swimming pond was that one had a so-called Wiener Neudorf Card. However, in order to purchase a Wiener Neudorf Card, it was mandatory to be a resident of the municipality of Wiener Neudorf. To what extent such indirect measures violate the prohibitions listed above must be evaluated according to whether this had primarily legitimate objectives, from the pursuit of which such preferential treatment relative to tariffs resulted as a secondary effect or if the ostensible effect and primary objective of these constructs was a hidden preferential treatment of the residents of the municipality.
Many complaints regarding the private sector	Another problem crops up if private companies are the direct provider. In the complaints received by the AOB, it has emerged that the municipality is often not the direct operator of public facilities or the provider of public services, but that these are provided by private companies.
	Based on the results of its ex-officio investigative proceedings, the AOB assumes that pursuant to rulings by the European Court of Justice, the EC prohibition of discrimination also applies directly between private parties and therefore represents a prohibition under the law. As companies operating under private law, even if they are

involved in the area of divested public responsibilities, are not subject to the investigative purview of the AOB, due to the large number of complaints in this area, there is an urgent need to expand the investigative purview of the AOB in this direction.

Numerous complaints were made regarding different rates for semester tickets for students sold by Wiener Linien (Vienna's Public Transport Authority). The company charged students with a primary residence in Vienna EUR 50.50. The same ticket for students with primary residence in other States costs EUR 100.

Different rates for public transport in Vienna

During its investigative proceeding, the AOB determined that semester tickets are subsidised by the Federal Ministry for Traffic, Innovation and Technology and the City of Vienna. This benefit, however, does not depend on the residence. It is associated with age and receipt of a family allowance. Therefore, this subsidy does not constitute unequal treatment of students who do not have their primary residence in Vienna. However, students from Vienna profit doubly. The City of Vienna subsidises the tickets for Viennese residents with an additional EUR 49.50 per person, which is why there is a different price for semester tickets. The City of Vienna argued that this is not a subsidy that is associated with discriminating conditions. On the contrary, this is intended to support Viennese students and their education. Other States also support this public interest and take similar steps.

Viennese students profit twice

After a thorough investigation, the AOB determined that the tariffs charged by Wiener Linien for semester tickets comply with the EC prohibition of discrimination and the Austrian principle of equal treatment. The different prices therefore are within the law. In awarding this grant, the City of Vienna states that it has chosen a similar course of action as other States to subsidise students. This grant is not a subsidy of a company that is associated with discriminating conditions, but rather it serves the purpose of supporting students during their education, which is in the public interest. Accordingly both the course of action undertaken by Wiener Linien and that undertaken by the City of Vienna appear to be proper and within the law as defined by the EC prohibition of discrimination and the national principle of equal treatment.

Viennese tariffs within the law

Right to private and family life

RESIDENCE PERMITS BASED ON HUMANITARIAN REASONS

In the Annual Reports 2007 and 2008 to the National Council and the Federal Council, the AOB used individual cases to illustrate that the earlier regulations regarding residence permits based on humanitarian reasons were insufficient. The requirements of Art. 8 ECHR, right to a private and family life, were not taken sufficiently into consideration within the scope of implementation.

- Previous practice** This concerned cases, in which the priority of the protection of private and family life was in itself evident, but nevertheless the filing of an application in Austria for a residence permit was not permitted by the Federal Ministry of the Interior. Respectively, a residence permit based on humanitarian reasons was not granted. Generally, it was argued that public safety and order have priority.
- Reform process** The Constitutional Court stipulated criteria in September 2007 that must unconditionally be taken into account in considerations pursuant to Art. 8 ECHR. For these considerations primarily case law of the European Court of Justice for Human Rights was consulted. The rulings of the Constitutional Court subsequently had the result that the Settlement and Residence Act was comprehensively reformed. The AOB participated actively in this reform process and gave a positive statement on the new draft law. The respective amendment took effect on 1 April 2009.
- Positive expectations confirmed** Based on concrete cases, the positive expectations of the AOB have been confirmed. Several investigative proceedings, some of which had been ongoing for many years, were finally completed in the reporting year. Sporadically occurring complaints, however, involved legally problematic areas. For example, applications for residence permits based on humanitarian reasons have no suspensive effect regarding the applicant's ability to stay in Austria. If the persons affected are repatriated during the course of such proceedings, there is no legal way to obtain a residence permit based on humanitarian reasons for Austria. In order to obtain a positive ruling, the person affected must reside in Austria.

However, the Higher Administrative Court stated that it cannot be the intention of the legislator not to enable de facto protection against repatriation at least for such cases. While the Federal Ministry of the Interior argued that the statutory provision does not provide for "de facto protection against repatriation", this problematic area was taken into consideration in the Aliens Law Amendment Act 2009, which came into effect in January 2010. Applications for residence permits based on humanitarian reasons continue to not constitute a basis for the right of residence. However, the authorities must wait with a repatriation if a proceeding to issue an order for a repatriation was not initiated until after the application was made and the granting of a limited residence permit is probable. However, the non-existence of protection against repatriation continues to be problematic for residence permits based on humanitarian reasons with regard to Art. 8 ECHR, because – as previously mentioned – these permits can only be granted to foreign nationals who are currently residing in Austria. Once the person in question has been repatriated, a residence permit based on humanitarian reasons can no longer be granted, even if sufficient criteria exist relative to the protection of private and family life.

Some problems remain

TRAFFIC MIRROR IMPAIRS PRIVACY

Ms. N.N. complained to the AOB that the municipality installed a traffic mirror on the sidewalk across from her house in such a way that passers-by had a direct view to and through the main window of her house. Therefore anyone on the street was able to determine who was in the living room of her house and was, for example, sitting on the couch and chairs. Ms. N.N. felt that this was impairing her privacy.

The Highway Code itself does not stipulate where traffic mirrors are to be installed. The Administrative District Authority can, however, prescribe that the entity responsible for road maintenance has to install traffic mirrors if safety, ease or fluidity of traffic requires this. The Administrative District Authority can also require the removal of such equipment if the installation was illegal or objectively incorrect.

District authorities responsible

In this matter, the interests of the general public are opposed to those of the individual. On one hand, it comes down to the safe use of roads, which must be guaranteed by the municipality. They are

Personal privacy merits protection

opposed by the interests of the individual with regard to privacy. This right is, as the Supreme Court has ruled repeatedly for 30 years, a personal and inherent right that every person is entitled to. The fact that personal privacy merits protection has been recognised by a number of provisions under the Constitution as well as by numerous provisions in a general legal context.

Priority of
interests must
be weighed

There are differentiations with regard to this fundamental right. The highly personal and private core area that can be described as "the private sphere of the individual" is fully protected. Invading this area is not permitted without authorisation under the law, respectively, under the Constitution. Protection of privacy, however, is not absolute. Often private interests in the preservation of integrity of belongings and possessions ("Integritätsinteressen") are opposed to the interests of others or of the general public. In these cases, it must be individually weighed, which interests have priority. Furthermore, the inconvenience or disturbance must reach a certain level of intensity.

Municipality
follows
recommendation

When installing traffic mirrors the municipality must examine if the interests of traffic safety and thus of the general public can be safeguarded even without this intrusion into rights that are protected under the Constitution. If it does not do this and if the mirror enables a view of the private living area from the street, the municipality is violating the right of the individual to have their privacy respected. The AOB recommended to the municipality of Berndorf to install the mirror at the same location, but at a lower height. It could be assumed that this would no longer enable an unobstructed view of the main window of the house of Ms. N.N. The municipality followed the AOB's recommendation and the assumption proved to be correct. With the new position of the traffic mirror, the needs of the residents/ neighbours were accommodated without the traffic mirror losing its function.

Right to religious freedom

CHILDREN PARTICIPATING IN RELIGIOUS INSTRUCTION

In Austria, parents may withdraw their children from religious instruction classes, for example, if the children's religion is not Roman Catholic or if the parents do not have a religious affiliation. The father of a Russian Orthodox child withdrew his child from religious instruction classes, without, however, officially leaving the Church. After some time, he found out that the child was actually participating in Catholic religious instruction. This was justified by the school with technical considerations relative to child care. When the father put forth his intention of lodging a complaint with the AOB, the child was suddenly cared for otherwise after all. As a result, the AOB conducted an ex-officio investigative proceeding.

Apparently the originally selected course of action by the school in question was based on an old directive. According to this directive, there are no reservations against the mere physical presence of a student in a religious instruction class that is due to supervisory duties if the school's supervisory duties cannot be met in any other way. As the initial reaction of the school in question shows, this provision seems to be somewhat broadly interpreted in some schools.

School has supervisory duties

Therefore, it is probably not a rare occurrence for children belonging to religions other than Roman Catholicism or children without a religious affiliation to de facto actually be obliged to participate in religious instruction classes. This contradicts the intention of some parents who find it important for their child not to come into contact with certain religious content. These problems are not limited to participation in Catholic religious instruction, but also to classes that are dedicated to other religions. However, due to the presumed frequency, the ex-officio investigative proceeding concentrated on Catholic religious instruction.

AOB initiates ex-officio investigative proceeding

A newer version of the directive dated 2007 stipulates that it should basically be an organisational objective that students who do not participate in religious instruction should not remain in the class group during these classes.

Right to religious freedom

The right to religious freedom pursuant to Article 9 of the European Convention on Human Rights contains the positive component of enabling a person to freely choose a religion. However, it also has the negative component of specifically deciding to have no religious affiliation. The European Court of Justice for Human Rights has recently emphasised this in its “crucifix ruling” that received a great deal of attention. Furthermore, one must respect the parents’ right to be guaranteed that their children will be raised according to their values. The right to not have their children participate in religious instruction is associated with this. From the perspective of the AOB, there is potential here to give greater consideration to this fundamental dimension.

Prohibition of torture

PRISON CONDITIONS

Inmates of the Correctional Institution Garsten complained to the AOB that they had to share cells with other inmates, in which the toilet area was separated from the main area only by curtains. The AOB already criticised similar conditions in the Correctional Institution Stein (Lower Austria) in 2008 and was able to achieve concrete improvements for the prisoners.

Toilet area not properly separated

According to information provided by the Ministry of Justice, as of July 2009 the Correctional Institution Garsten had 362 inmates. 25 persons were being housed two inmates per cell, 19 were housed three inmates per multiple inmate cell and 12 were housed four inmates per multiple inmate cell, in which the toilet area was not properly separated.

The Federal Ministry of Justice stated that in Garsten a structural remodelling of the multiple inmate cells, in which the toilet area is separated from the main area of the cell only by way of a curtain is not possible in the short term, primarily for budgetary reasons.

Austrian regulations, namely the "Strafvollzugs-Gesetz 2009" (Penal Code) stipulate that prison inmates are to be accommodated in rooms that are simply and functionally furnished. The previously mentioned separation of toilet facilities clearly offers neither visual nor acoustic protection for inmates. In the opinion of the AOB, prisoners using these toilet facilities are unacceptably deprived of any possibility of retreat and suffer an invasion of their privacy. It is in this spirit that the AOB came to the conclusion that the accommodation previously described constituted a case of maladministration. Even if the AOB by no means wished to imply that prisoners were subjected to demeaning treatment, case law of the European Court of Human Rights should be referred to, which is based on minimum standards for prison conditions. This result of the AOB investigative proceeding is also in line with German court rulings on similar cases.

Invasion of
prisoner's privacy

The federal legislators responded to the criticism of the AOB and amended the respective federal law, which now stipulates that "Detention facilities have to have separate toilet facilities. Detention facilities, where more than one prisoner is to be accommodated, must have structurally separated toilet facilities." The AOB will continue to monitor the application of this new legal obligation. Regarding the Garsten prison, the Federal Ministry stated that it was the long-term goal to equip all multiple inmate cells with a properly separated toilet area and promised that renovation would begin in 2010.

Legislator responds
to criticism of AOB

Protection of minorities

BILINGUAL PLACE-NAME SIGNS IN CARINTHIA

The question of bilingual place-name signs in Carinthia has been unresolved for a long time. The Slovenians in Carinthia are a recognised ethnic group and minority. Therefore, the names of towns on place-name signs must also be in Slovenian if a certain percentage of the population has Slovenian as their mother tongue. Shortly before the editorial deadline of this report, there still was no equivalent signage in German and Slovenian at the town limits when entering or leaving a town.

Obligation to install
bilingual place-
name signs

One of the most pressing minority rights issues in which the AOB has been actively involved in the past couple of years concerns the question of bilingual place-name signs in Carinthia, which has been unresolved for many years. The Constitutional Court decided in December 2005 that the Carinthian Administrative District Authority Völkermarkt is obligated to install bilingual place-name signs in the towns of Ebersdorf/Drveša vas and Bleiburg/Pliberk. In the absence of place-name signs in the Slovenian language, the directive issued by the Administrative District Authority Völkermarkt was overturned as violating the law.

Place-name signs
remain mono-
lingual

Both the then Governor of the State of Carinthia Jörg Haider and the then member of the Carinthian State Government State Councillor Gerhard Dörfler announced multiple times through the media that they wished to prevent the stipulation of bilingual place names that had been deemed proper under the Constitution by the Constitutional Court. Subsequently on 8 February 2006 the "displacement and reinstallation" of monolingual place-name signs was carried out in the presence and with the help of both officeholders.

Constitutional
Court deals with
AOB motion

Based on a motion filed by the Austrian AOB, the Constitutional Court, with its ruling dated 26 June 2006, again overturned the place names "Ebersdorf" and "Bleiburg" in the directive issued by the Administrative District Authority Völkermarkt as violating the law, which had been the basis for this "place-name sign displacement". The obligation to install bilingual place-name signs, however, was still not complied with. The subsequently issued directives by the

Administrative District Authority Völkermarkt regarding definition of the “place-name sign”, respectively, “end of city limits sign” for the municipalities of Ebersdorf/Drveša vas, Bleiburg/Pliberk and Schwabegg/Žvabek stipulated providing the place names in Slovenian only on additional signs beneath the respective monolingual place-name signs. In these cases as well, the Constitutional Court ruled in December 2007 that the installation of place names in Slovenian on additional signs violates the law.

Despite these rulings, the additional signs in these municipalities, which were originally installed beneath the place-name signs, were “screwed into” the place-name signs. Due to reports in the media, the AOB initiated an official investigative proceeding in order to bring its misgivings to the attention of the Constitutional Court. In the opinion of the AOB, this form of signage does not comply with the principle, which can be derived from the law relative to ethnic/national groups and minorities, that German designations and designations in the language of the ethnic/national group and/or minority be coequal and not be used in a discriminatory way. Therefore, the AOB again filed a complaint with the Constitutional Court to overturn the respective directives of the local authorities.

AOB initiates
investigative
proceeding

Discrimination due to gender

PUBLIC TRANSPORT TICKETS FOR ELDERLY PEOPLE

The AOB has been handling an increasing number of complaints because men can purchase senior public transport passes only from the age of 65, while women can purchase them from the age of 60.

Since August 2008, Austria has a statutory prohibition against discrimination with regard to goods and services. In 2009, the Equal Treatment Commission determined that differentiated discounts for men and women represent a direct discrimination based on gender. Social benefits are excluded from this ruling. Different age limits do not represent positive measures to promote equal treatment/status of women. Nevertheless the appropriate tariff regulations have not been changed so far.

Tariff regulations
represent discrimi-
nation

<p>Informal statement by the Austrian Railways</p>	<p>Because the AOB does not have the authority under the Constitution to monitor the ÖBB (Austrian Railways) and Wiener Linien (Vienna's Public Transport Authority), it was not able to initiate an official investigative proceeding, but obtained informal statements. The ÖBB informed the AOB that according to an expert opinion of the Equal Treatment Commission, it does not see a need for action to initiate a change. Rather this is a social benefit to equalise the generally lower income of women.</p>
<p>Regulations aligned with retirement age</p>	<p>Wiener Linien declared that their regulations are aligned with the statutory retirement age, which is protected under the Constitution and stipulated under the law. This age is 60 for women and 65 for men. The AOB was assured that the question of an adjustment of the senior tariffs would be included in the current discussion of tariffs.</p>
<p>Explanations not satisfactory</p>	<p>The Minister for Transport stated that differentiated senior benefits could be seen as a positive measure to promote equal treatment and referred to currently pending court proceedings. Just like the Minister of Social Affairs she said that it was not possible for government offices to interfere in the pricing set by the autonomous associations of transport services.</p> <p>This is not satisfactory for the AOB. Due to the many complaints, the AOB is quite aware of the widespread cases of unequal treatment of women both in the workplace and outside of this sector. In this case, however, the AOB does not see a social benefit or a positive measure to promote equal treatment/status of women. If the price discounts are actually pursuing solely social aspects, then the general question arises why price benefits for men and women are exclusively attached to the statutory retirement age. People who are affected have left the labour force for health reasons years prior to reaching retirement age and they then generally receive lower pensions. In recent years, retirees who have retired due to invalidity or disability have contacted the AOB and generally complained about the "social imbalance" of these policies regarding aid granted by the public sector.</p>
<p>Directive to be revised</p>	<p>The AOB assumes that public funds must be distributed without discrimination. If the state has private entities provide a public service, such as social tariffs, it must ensure that they are provided without any discrimination. The Minister of Traffic announced that the Directive dealing with this matter will be revised in 2010.</p>

PROBLEMS FOR FATHERS RECEIVING CHILD CARE BENEFITS

More than 7,300 fathers in Austria receive child care benefits; in some cases problematic situations may arise. Family N.N. has two children; both cared for by the father. While the father was receiving child care benefits for the older child, the second child was born. Shortly after his daughter's birth, Mr. N.N. visited a doctor and learned that his health insurance card (e-card) had been blocked and that he currently had no health insurance. The Vienna Regional Health Insurance Office informed him that based on receipt of child care benefits, he would not have health insurance until his partner's maternity benefit had ended.

The AOB was able to clarify quickly that this information was incorrect. The blocking of the e-card was based on a technical error by the Regional Health Insurance Office. The current legal situation ensures that the father continues to have health insurance based on receipt of child care benefits even while the mother is receiving the maternity benefit.

E-card blocked due to technical error

Another problem, however, could not be resolved. If during receipt of the child care benefit another child is born, the father's child care benefit is reduced by the mother's maternity benefit. In the opinion of the AOB, this represents a disadvantage for families, in which the father cares for the children. A family with two parents, in which the children are cared for by the mother, have both the mother's maternity benefit and the income of the employed father during the eight weeks after the birth of the second child. A family, in which the father is responsible for child care, must make do solely with the mother's maternity benefit. This is probably not the intention of the legislator. The child care benefit was introduced to compensate the temporary loss of an (usually second) income. The legislator thus stipulated it as an important contribution to financial security while starting a family.

Maternity benefits affect child care benefits for fathers

The regulation states that the claim to child care benefits while receiving a maternity benefit after the birth of another child are suspended, respectively, reduced by the amount of the maternity benefit. In the opinion of the AOB, this provision can be interpreted in conformance with the Constitution in the sense that this does not apply to the father's child care benefits while the mother is receiving a maternity benefit.

Opinion of the AOB

Amendment to
Child Care
Benefit Act

The State Secretary for Families does not share the AOB's misgivings and refers to Supreme Court case law. According to it, the claim to child care for the older child ends in any case – including if it is being collected by the father – no later than with the birth of another child. With the most recent amendment to the Child Care Benefit Act, it was clarified that for the time period prior to the birth of another child the father's child care benefits are not suspended while the mother is receiving the maternity benefit (if it is the mother who is receiving the child care benefit, it is suspended while the mother is receiving the maternity benefit). For the period after the birth, child care benefits equal to the amount of the maternity benefit are suspended.

Fathers participa-
tion in child care
to be increased

Therefore, the AOB continues to uphold its misgivings. By creating the child care benefit, the legislator intended to generate a positive impulse toward a partnership-like participation by the father in the care of the infant. The office of the State Secretary for Families confirmed, however, that the percentage of male recipients of child care benefits still remains very small. For example, in December 2009, 95.3 percent of the 155.605 recipients of child care benefits were women. Only 7,323 fathers, a 4.7 percent share, stayed home with their children. Based on these statistics it is the AOB's opinion that every effort should be undertaken to increase the percentage of fathers participating in child care. The remedy of the problem described here – in addition to the introduction of income-based child care benefits – would represent an additional step in this direction.

Discrimination due to nationality or ethnic origin

DISCRIMINATION WITH REGARD TO STATE FAMILY BENEFITS

The AOB reported last year about discrimination in Carinthia with regard to payment of the one-time birth allowance, which violates EU law. This one-time allowance for parents of newborn children was restricted to families with Austrian citizenship that had lived in Carinthia for at least two years prior to the birth of the child. After the AOB had been involved in the matter, the citizenship clause was removed and the Carinthian one-time birth allowance expanded to families of EU citizens as well. Families still must have lived in Carinthia for at least two years prior to the birth of the child in order to claim this allowance.

In 2001, around nine percent of persons living in Austria were citizens of a country other than Austria. Of the 4 million employed persons in Austria in 2001, around 411,000 were citizens of a country other than Austria. The equal treatment of these persons, with regard to family benefits, that is required under EU law is a key element of the freedom of movement within the European Union. The European Court of Justice has ruled that an EU member state is discriminating against citizens of other member states if it makes payment of a birth or maternity allowance dependent on whether the recipient previously lived in its territory. This ruling is also applicable to state family benefits such as the Carinthian birth allowance. Therefore the AOB determined in April 2008 that the minimum residence clause represents indirect discrimination of foreign families from the EU/EEA region. It is much more difficult for foreign families to fulfil the period of residence than for Austrian families. The AOB recommended that the guideline be promptly amended to comply with Community law.

Carinthian birth allowance violates EU law

Because EU law takes precedence, the Authorities are already obligated to take periods of residence in other EU/EEA member states into consideration equally, regardless of the wording of the guideline. At the same time, it is necessary to prevent so-called reverse discrimination. This would be discrimination of families who are Austrian citizens, which is prohibited under the Constitution. Therefore, the AOB recommended to completely waiving the requirement of a

Residence in EU member state must be considered

minimum period of residence. However, this has been rejected thus far by the Carinthian State Government, which refers to similar provisions in other Austrian States.

Similar provisions
in other Austrian
States

As a result, the AOB conducted an ex-officio investigation of comparable family benefits in other Austrian States. In addition to Carinthia, the States of Burgenland, Upper Austria, Salzburg and Vienna have such minimum residence clauses, as well as sporadically occurring citizenship clauses with regard to family benefits. Therefore, the AOB has contacted the State Governors in question and requested that they amend the relevant guidelines to make them compliant with EU law and the Constitution. This has already been implemented in part by the States affected, respectively, it will be implemented.

SYSTEMATIC TB TESTING OF PERSONS FROM NEW EU STATES

Ms. N.N., a Hungarian citizen, wanted to relocate her primary residence to Upper Austria, to live there with her partner. The Authorities demanded that she undergo a lung X-ray. She considered this discrimination of herself as an EU citizen and turned to the AOB for help. The AOB was able to achieve that the States of Upper Austria and Salzburg changed their legal provision.

Pursuant to a directive of the State of Upper Austria, persons residing in Bulgaria, Estonia, Latvia, Lithuania, Poland, Romania and Hungary (among others) who wish to establish a residence in Upper Austria must be tested for tuberculosis. Systematic testing of persons of several EU member states is also required in Salzburg.

Systematic TB
testing violates
EU law

This systematic testing of persons from other EU member states who are taking advantage of their right to freedom of movement violates anti-discrimination provisions under EU law. Free examinations by a physician can only be ordered if serious indications are present, in order to establish that persons who are entitled to reside in an Austrian State are not suffering from a communicable disease. The Minister of Health agreed with the AOB and requested the Governor of Upper Austria to amend this provision. This was done shortly before the editorial deadline of this report. Salzburg has also submitted a draft to amend its relevant provision.

PERFECT GERMAN NECESSARY FOR A CLEANING PERSON?

Ms. N.N. is a Dutch citizen and has been living in Austria for some time. When looking for a job, she found that numerous job offers from the Labour Market Service had surprisingly high language requirements. "Very good" or "perfect" command of German was required for jobs such as cleaning person or unskilled worker. Ms. N.N. presumed that the intention was to prevent persons whose native language was not German from applying and she filed a complaint with the AOB. Excessive language requirements represent indirect ethnic discrimination, as they penalise persons whose native language is not German.

In its statement to the AOB, the Labour Market Service conceded that at first glance the required knowledge of German seems to be high for this type of job. However, ultimately the Labour Market Service considered them necessary and justified particularly in these sectors. The requirements with regard to the knowledge of German, especially reading German, are continuously rising relative to the use of machines or cleaning agents. As the percentage of other nationalities among the jobseekers in this sector is high, these requirements do not demonstrate a tendency toward hidden discrimination.

Labour Market Service deems requirement justified

The AOB cannot agree with this argumentation. The equal treatment law prohibits discrimination due to ethnic origin. Therefore, job listings must use non-discriminatory standards. Restrictions are possible only if the characteristic in question is an essential prerequisite for the type of work. In accordance with the rulings of the European Court of Justice, only those language skills may be required that are actually necessary for the concrete job. Excessive language requirements represent indirect ethnic discrimination, as they penalise persons whose native language is not German. Around 1.4 million people with an immigrant background are living in Austria today. The foreign nationals living in Austria have a significantly different educational profile than the native population. Foreign nationals are disproportionately represented both in the highest and the lowest levels of education, while higher than average numbers of Austrian citizens have a mid-level educational background of apprenticeship and vocational school training.

Job listings must be non-discriminating

AOB position It is undisputed that there is a direct connection between successful integration in Austria and a good knowledge of German. However, language varies considerably in its usage according to the requirements of the particular context. In the AOB's viewpoint, cleaning persons, kitchen assistants and unskilled labourers also need language competence. This is the only way to enable communication with supervisors and colleagues. Furthermore this is the only way to understand the rights and obligations that result from a particular employment. However, the Labour Market Service must pay strict attention that language competence be required only to the extent that this is actually necessary to perform the vacant job. Requiring very good or perfect knowledge of German for job offers as a cleaning person or unskilled kitchen assistant are neither necessary nor permitted.

QUOTAS FOR FOREIGNERS IN AMATEUR SOCCER

Mr. N.N. is a Hungarian citizen. His twelve-year-old son goes to a school in Pamhagen in Burgenland and plays on the school soccer team. The regulations of the Austrian Soccer Association permit only two, respectively, three foreign young players without a primary residence in Austria per game. Mr. N.N.'s son could only play every other game so that the other foreign children could have their turn, too. In the meantime the Austrian Soccer Association has rescinded this rule.

Austria is exception in the EU The European Commission ruled in 2005 that quotas for foreigners in amateur sports represent a violation of the rights of the citizens of the EU and discrimination under EU law. Accordingly, the European Commission initiated a breach of contract proceeding against Spain, which had a comparable quota for amateur soccer. Subsequently Spain abolished the quota regulation. AOB research showed that the quota regulation for the regional associations of the Austrian Soccer Association is an exception in the EU. SOLVIT Austria has long since pointed out the problematic nature of such "quotas for foreigners" in amateur soccer and initiated a discussion, which also included representatives of various federal ministries.

The AOB also stated that a discrimination of foreign nationals is incomprehensible especially when sports are involved, which have a positive and integrative effect in many ways. Therefore, the AOB welcomes the recently made change in the Austrian Soccer Association regulations, which places young players who are foreign nationals on an equal footing with Austrian players.

Change in regulations

The AOB also received a complaint regarding the same question in adult soccer. Discussions between UEFA, FIFA, European Commission and European Parliament on that questions are ongoing for the moment and the AOB will monitor their outcome.

Adult soccer

Discrimination due to illness or disability

TV ACCESS FOR THE VISUALLY AND HEARING IMPAIRED

Both the hearing and the visually impaired regularly complain to the AOB that only a small part of the public television programme of the Austrian Public Broadcasting ORF is accessible to them although they must pay the full amount of radio/TV licence fees.

The Austrian Association of the Blind and Visually Impaired turned to the AOB, as basically only one television show per week is accessible to the 318,000 visually impaired in Austria. According to surveys, TV is the primary information and entertainment medium for the majority of the blind and visually impaired. The radio is no replacement for television. The Association of the Blind and Visually Impaired demands that a binding audio description be enshrined in the law within the scope of the public service mission of the Austrian Public Broadcasting ORF. Additionally all films financed or partially financed by state funds should be made available as audio films.

Limited access for the blind and visually impaired

The State Secretary for Media emphasised that ORF has recently substantially expanded its broadcasts for the hearing and visually impaired. About 370 hours of television per month are currently subtitled. The number of broadcasting minutes with signing is currently 760 and has been increased ten-fold since 2003. Starting recently,

Subtitles and sign language

the news programme "Zeit im Bild" has been accompanied by sign language. Furthermore transmissions of debates from Parliament will be subtitled in the future.

- Experts evaluate programme as inadequate
- The question of barrier-free access to ORF programmes was also the subject of a parliamentary enquiry in September 2009. During this enquiry, a number of experts evaluated the ORF broadcasts for the hearing and visually impaired as still inadequate. With a 30% rate of subtitling, Austria occupies the second to last place in Europe. Only Albania has even poorer broadcasts for the hearing and visually impaired. In comparison, Great Britain and Ireland already have 100% of their programming subtitled, while the figure is 60% in Belgium, Sweden and France.
- New draft law
- The current draft of an amendment of the ORF Act provides for a gradual binding annual increase in the percentage of the ORF broadcasts for the hearing and visually impaired. However, this is not sufficient for the persons affected. They are specifically demanding a concrete and binding step-by-step plan with audio description of all broadcasts as part of the public service core mission by 2020 at the latest. In his comment to the draft law, the Ombudsperson for the Disabled pointed to the agreement concluded at the end of 2009, according to which the percentage of subtitled broadcasts will be increased from currently 33% to 45% in 2010 and to 55% in 2011. Moreover, the audio description will be increased both for the ORF's own productions and co-productions.
- Measures must be intensified
- The AOB welcomes the endeavours and measures undertaken thus far to improve the barrier freedom of the ORF broadcasts. However, these measures must be urgently intensified. This is the only way to comply with the legal obligations under the UN Convention on the Rights of Persons with Disabilities, which Austria has ratified.

Discrimination due to age

NO IN-VITRO FERTILISATION SUBSIDIES FOR WOMEN OVER 40

Subsidies for an in-vitro fertilisation are very strictly regulated in Austria. Financial aid is possible only if the woman has not yet turned 40 at the beginning of the treatment. For men, the age limit is 50. A number of complaints to the AOB have demonstrated that this provision is problematic. The persons affected are often dependent on public financing to achieve their desire to have children.

The Federal Minister of Health stated that this age limit for women is based on a recommendation of the Supreme Health Council from 1999. This recommendation refers to internationally recognised criteria that there is a lower success rate for this method for women above 40. These figures show that the success rate for IVF treatments slowly begins to fall as early as the age of 35. For this reason, the Austrian and German legislators have limited public financing of IVF treatments to women younger than 40.

Government
recommendations
from 1999

In a March 2009 ruling, the German Federal Social Court did not see any unconstitutional age or gender discrimination in this limit. Rather this provision takes the biological differences into account, according to which the fertility of women typically ends earlier than that of men. In determining the age limit, the legislator took the declining probability of successful fertilisation into account. Therefore, the legislator did not exceed the range of discretion accorded by legal policy.

Case law

These considerations under constitutional law are largely transferable to the legal situation in Austria. Therefore, no illegal age or gender discrimination could be determined. Nevertheless in the AOB's opinion this constitutes a harshness of the law. Today it has become realistic that women slightly over the age limit and "healthy" women of the same age as well as women who are dependent on IVF can become pregnant.

Situation has
changed

Expert opinion Statistics show that both mothers and fathers are becoming older and older. While in the 1980s the average age of women giving birth was 26.4, in 2008 the average age was 29.9. Additionally the number of women giving birth who are 40 or older has increased massively in recent years. In 2001 there were 1,663 new mothers over 40, by 2008 the number increased to 2,716. Furthermore in 2004 the Austrian Medical Association recommended raising the age limit of women to at least 42, as similar pregnancy rates can be achieved for women above 40 as for younger women. At the same time, the Austrian Medical Association recommended eliminating the age limit for men.

Ministry of Health
rejects suggestions The suggestion by the AOB to raise the age limit for women was rejected by the Minister of Health. The additional costs that would result from this policy change cannot be financed. Nevertheless, the AOB is advocating increasing the age limit for women in order to adapt it to today's reality for women and families. At the same time, the funds of the IVF fund should be increased if possible.

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