

1. Introduction

The AOB monitors Austria's entire public administration since 1977 by order of the Federal Constitution. It checks the legality of decisions by authorities and examines possible cases of maladministration in the public administration thus exercising public control to serve the rule of law and democracy.

As an administrative review body, the AOB constantly has to deal with specific issues and considerations of fundamental rights. Since 2001, the Austrian Ombudsman Board has been adding a specific chapter on human rights to its annual reports. This report section deals with legal problems relating to human rights that the AOB had to solve when assessing complaints about administrative misconduct and infringements of legal provisions by public authorities.

Cases touching upon the fundamental constitutional requirements of the Federal Constitution are also considered as are complaints on the principle of equality, data protection and the right to respect for private and family life. Different aspects of discrimination, such as discrimination based on religion, nationality or ethnicity, are covered as well.

These general observations by the AOB are on the agenda of the respective Parliamentary committee, and form an important basis for further action. By compiling these human rights sections over the past couple of years, the AOB screened the fundamental rights situation in Austria and successfully illustrated that there was no legally regulated area of life that from the outset can be examined separately from fundamental rights as administrative practice unfortunately sometimes suggests.

Attached is a selection of cases from these human rights sections of the Annual Reports 2006 to 2009.

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2. AOB Annual Report 2009

2.1. Right to liberty and security of person and the right to property

2.1.1. Cross-border property offences

Four four-axle 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 South-eastern Europe. The Italian company approached the Austrian Ombudsman Board because the Austrian police were not investigating properly. The optically very eye-catching /conspicuous 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., and 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. Timely intervention by the police, however, failed due to the lack of cooperation with ASFINAG, among other reasons. This company is 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. 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.

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.

Article 6 of the Charter of Fundamental Rights of the European Union states: “Every person has the right to liberty and security of person.” In its interpretation of basic/simple Austrian laws, the Supreme Court has 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 Austrian Ombudsman Board, is clearly unacceptable in this form.

2.2. Right to a fair and public trial

2.2.1. Criminal records about foreign convictions

In January 2008 Mr. N.N. filed a petition to delete/ expunge 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 entail unlawful handicap/detriment that could 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 relevant to a criminal offence.

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. In and of itself this already results in serious doubts about whether such a conviction can then be entered in the Austrian criminal record. In actuality/actually it should not be difficult to send a certain file, if applicable in the form of a copy, and if necessary to provide additional information, especially since this does not entail any particular administrative effort. Even authorities in foreign countries should be

aware of what the consequences of an entry into the criminal record can have for the person affected.

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. That the Federal Ministry of the Interior refused to undertake this procedure must be objected to, especially as, in the end, it was the Ministry itself that authorised the authority to rectify this *ex officio*, respectively, to expunge it.

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 Austrian Ombudsman Board will keep the legislative process under observation.

2.3. Principle of equality

2.3.1. Practice of medicine by physicians in Austria

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/training. In order to work as a GP, they must acquire a specific diploma as a general practitioner or a specialist.

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 physicians available for the best possible care.

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.

The non-academic further qualification of doctors completing their residencies is in the interest of the best possible care of the population and therefore a motive on the part of the lawmakers that must be recognised. But even with this reasoning, it is questionable if, un-

der the aspect of the principle of quality, 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.

2.3.2. Differentiating tariffs for men and women

The Austrian Ombudsman Board 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.

For entities doing business 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/prices 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.

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 Ombudsman Board, excessive charges during that last three years could be reclaimed.

Numerous times there were permutations of indirect preferential treatment relative to tariffs/prices that complicated the Ombudsman Board'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 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/prices resulted as a secondary effect or if the ostensible effect and primary objective of these constructs was hidden preferential treatment of the residents of the municipality.

Another problem crops up if private companies are the direct provider. In the complaints received by the Austrian Ombudsman Board, 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 Ombudsman Board 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 Austrian Ombudsman Board, due to the large number of complaints in this area, there is an urgent need to expand the investigative purview of the Ombudsman Board in this direction.

Different rates for semester tickets sold by Vienna's Public Transport Authority

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

During its investigative proceeding, the Austrian Ombudsman Board 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. Other States also support this public interest and take similar steps.

After a thorough investigation, the Austrian Ombudsman Board 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 pursuing the educational mandate by subsidising the students, 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.

2.4. Right to private and family life

2.4.1. Amendment of regulations for residence permits based on humanitarian reasons

In the Annual Reports 2007 and 2008 to the National Council and the Federal Council, the Austrian Ombudsman Board 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.

For example, in 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.

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 Austrian Ombudsman Board participated actively in this reform process and gave a positive statement regarding the legislative recommendation. The respective amendment took effect on 1 April 2009.

Based on concrete investigated cases, the positive expectations of the Austrian Ombudsman Board 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 permits 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 lawmakers 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 problem 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/sojourn or the right of residence. However, the authorities must wait with a repatriation if a proceeding to issue an order for a deportation 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 sojourning in the Republic of Austria. Once the person in question has been repatriated, a residence permits based on humanitarian reasons can no longer be granted, even if sufficient criteria exist relative to the protection of private and family life.

2.4.2. Traffic mirror enables view into living room

Ms. N.N. complained to the Austrian Ombudsman Board 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.

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 streets/roads, which must be guaranteed by the municipality. They are 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.

Both case law and teachings make 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.

When installing traffic mirrors, as the entity responsible for road maintenance, 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 Austrian Ombudsman Board 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 Ombudsman Board’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.

2.5. Right to religious freedom

2.5.1. Must children participate 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 determined that the child was actually participating in Catholic religious instruction. Thus 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 Austrian Ombudsman Board, the child was suddenly cared for otherwise after all. As a result, the Ombudsman Board conducted an ex-officio investigative proceeding.

Apparently the originally selected course of action by the school in question was based on an older 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.

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.

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 not remain in the class group during these classes.

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 Austrian Ombudsman Board, there is potential here to give greater consideration to this fundamental dimension.

2.6. Prohibition of torture

2.6.1. Prison conditions in the Correctional Institution Garsten

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

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 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. The long-term goal was to equip all multiple inmate cells with a properly separated toilet area. The Ombudsman Board was promised that renovation would begin in 2010.

2.7. Protection of minorities

2.7.1. 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 and therefore, the names of towns on place-name signs must also be in Slovenian. Nevertheless there is still no equivalent signage in German and Slovenian at the town limits when entering or leaving a town.

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.

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. Based on a motion filed by the Austrian Ombudsman Board, 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 Ombudsman Board initiated an official investigative proceeding, in order to bring its misgivings to the attention of the Constitutional Court.

In the opinion of the Ombudsman Board, 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 Austrian Ombudsman Board filed a petition with the Constitutional Court to overturn the directives of the Administrative District Authority Völkermarkt regarding the municipalities of Ebersdorf/Drveša vas, Bleiburg/Pliberk and Schwabegg/Žvabek due to unlawful signage.

2.8. Anti-discrimination

2.8.1. Discrimination due to gender

2.8.1.1. Senior pass for railway and bus for men only from the age of 65 – still no change

The Austrian Ombudsman Board has been handling an increasing number of complaints because men can purchase senior 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 these 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 thus far.

Because the Austrian Ombudsman Board 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, however, it obtained

informal statements. The ÖBB informed the Ombudsman Board 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 incomes of women.

The Wiener Stadtwerke (Vienna Public Utilities)/Wiener Linien are the operators of public transportation services in Vienna. They declared that with regard to this question their regulations are aligned with the statutory retirement age, which is protected under the Constitution and is stipulated under the law. This age is 60 for women and 65 for men. The Ombudsman Board was assured only that the question of an adjustment of the senior tariffs would be included in the current discussion of tariffs/rates.

The Minister of Traffic represented the opinion vis-à-vis the Ombudsman Board that differentiated senior benefits could be seen as a positive measure to promote equal treatment/status of women. Regarding a solution, she referred to the currently pending court and commission proceeding. As the Minister of Social Affairs had said, she also stated that it was not possible for government offices to interfere in the pricing set by the autonomous associations of transport services.

This is not satisfactory for the Austrian Ombudsman Board. Due to the many complaints it receives, the Ombudsman Board 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, we do 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 of why price benefits for men and women are exclusively attached to the statutory retirement age. The 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 Austrian Ombudsman Board and generally complained about the “social imbalance” of these policies regarding aid granted by the public sector.

The Ombudsman Board 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.

2.8.1.2. Problems for fathers in receiving child care benefits

More than 7,300 fathers in Austria receive child care benefits; in the opinion of the Austrian Ombudsman Board, there are problematic situations in some cases. Family N.N. has two children, who are both cared for by the father. While the father was receiving child care benefits for the older child, the second child was born. When he wanted to visit a doctor shortly after his daughter's birth, Mr. N.N. was told that his E-card had been blocked and that he currently had no health insurance. The Vienna Regional Health Insurance Office informed him that he would not have health insurance based on receipt of child care benefits until his partner's maternity benefit had ended.

The Austrian Ombudsman Board 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 In-

urance 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.

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 Ombudsman Board, 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 lawmakers. The child care benefit was introduced to compensate the temporary loss of an (usually second) income. The lawmakers thus stipulated it as an important contribution to financial security while starting a family.

The statutory 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 Ombudsman Board, this provision can be interpreted in conformance with the Constitution that this does not apply to the father's child care benefits while the mother is receiving a maternity benefit.

The State Secretary for Families does not share the Ombudsman Board'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.

Therefore, Austrian Ombudsman Board continues to uphold its misgivings. By creating the child care benefit, it was the declared goal of the lawmakers 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. It is the Ombudsman Board's opinion that, against the backdrop of these figures, 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.

2.8.2. Discrimination based on nationality or ethnic origin

2.8.2.1. Discrimination with regard to regional family benefits

The Austrian Ombudsman Board reported last year about discrimination in Carinthia with regard to payment of the one-time birth allowance, which violates EU law. This is a one-time allowance for parents of newborn children. This allowance was, however, restricted to families having Austrian citizenship who had lived in Carinthia for at least two years prior to the birth of the child. After the Ombudsman Board had been involved in the matter, the citizenship clause was rescinded and the Carinthian one-time birth allowance expanded to include families who are citizens of EU member states. The families must still 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, including 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 a 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 sovereign territory. This ruling is also applicable to regional family benefits such as the Carinthian birth allowance. Therefore the Ombudsman Board 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 Ombudsman Board recommended that the guideline be promptly amended to comply with Community 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 Austrian Ombudsman Board recommended to completely waive the requirement of a minimum period of residence. However, this has been rejected thus far by the Carinthian State Government, which refers to similar provisions in other Federal States.

As a result, the Ombudsman Board conducted an *ex-officio* investigation of comparable family benefits in other 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 Austrian Ombudsman Board 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 and to rescind the requirement regarding a minimum period of residence. This has already been implemented in part by the States affected, respectively, it will be implemented.

2.8.2.2. Systematic TB testing of persons from new EU states

Ms. N.N. is a Hungarian citizen. She wanted to relocate her primary residence to Upper Austria and to live there with her partner. The Authorities then demanded that she undergo a lung X-ray. Ms. N.N. considered this discrimination of herself as an EU citizen and turned to the Austrian Ombudsman Board for help. The Ombudsman Board was able to achieve a change in the legal situation in the States of Upper Austria and Salzburg.

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.

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 in the event that serious indications are present, in order to establish that persons who are entitled to reside in an Austrian Federal State are not suffering from a communicable disease. In his statement to the Austrian Ombudsman Board, the Minister of Health agreed with the Ombudsman Board 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.

2.8.2.3. 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 surprising high language requirements. For example, “very good” or “perfect” command of German was required for jobs as an unskilled kitchen worker, cleaning person or unskilled worker. Ms. N.N. presumed that the intention was to prevent persons whose native language was not German from applying for these jobs and she filed a complaint with the Austrian Ombudsman Board. For the Ombudsman Board, excessive language requirements represent indirect ethnic discrimination, as they penalise persons whose native language is not German.

In its statement to the Ombudsman Board, 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.

The Ombudsman Board cannot concur with this viewpoint. 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 pe-

nalise 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.

It is undisputed that there is a direct connection between successful integration in Austria and a good knowledge of German. The better someone can communicate, the better their educational opportunities and opportunities for advancement. However, language varies considerably in its usage according to the requirements of the particular context. In the Ombudsman Board's viewpoint, cleaning persons, kitchen assistants and unskilled labourers also need language competence. This is the only way to enable functioning 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. In the Ombudsman Board's opinion, requiring very good or perfect knowledge of German for job offers as a cleaning person or unskilled kitchen assistant are neither necessary nor permitted.

2.8.2.4. Quotas for foreigners in amateur football (soccer)

Mr. N.N. is a Hungarian citizen and lives with this family in Hungary not far from the Austrian border. His twelve-year-old son goes to a middle school in Pamhagen in Burgenland and plays on the school football team. The rules and regulations of the Austrian Football Association for players in the U14 age category permit only two, respectively, three foreign players without a primary residence in Austria per game. Therefore, Mr. N.N.'s soon was only allowed to play every other game so that the other foreign children could have their turn. In the meantime the Austrian Football Association has rescinded this rule.

The European Commission ruled already 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 football. Subsequently Spain abolished the quota regulation. Our research showed that the quota regulation for the regional associations of the Austrian Football Association is an exception in the EU zone. SOLVIT Austria has long since pointed out the problematic nature of such "quotas for foreigners" in amateur football to the Austrian Football Association. It initiated a discussion, which also included representatives of various federal ministries.

The Austrian Ombudsman Board 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 Ombudsman Board welcomes the recently made change in the Austrian Football Association regulations, which places young players who are foreign nationals on an equal footing with Austrian players.

The Ombudsman Board also received a complaint regarding the same question in adult football. The Austrian Football Association announced that intensive, Europe-wide discus-

sions between UEFA, FIFA, European Commission and European Parliament are ongoing and they are waiting for the result. A solution will be found depending on the result of these talks.

2.8.3. Discrimination due to illness or disability

2.8.3.1. Insufficient ORF offerings for the visually and hearing impaired

Both the hearing and the visually impaired often contact the Austrian Ombudsman Board and complain that only a small part of the public television offerings of the ORF is accessible to them. Although both the hearing and the visually impaired must pay the full radio/TV licence fees, the ORF offerings are insufficient for them.

The Austrian Association of the Blind and Visually Impaired appealed to the Austrian Ombudsman Board, as basically only one television show per week is accessible to the 318,000 visually impaired in Austria. According to surveys, however, TV is the primary information and entertainment medium for the vast majority of the blind and visually impaired. The radio is therefore not a replacement for television. Therefore 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 Austrian Public Broadcasting ORF. Additionally all films that are financed or partially financed by state funds should be available as audio films for the visually impaired.

In his statement, the State Secretary for Media emphasised that ORF has recently substantially expanded its offerings for the hearing and visually impaired. For example, currently about 370 hours of television monthly are subtitled. The number of broadcasting minutes with signing is currently 760 and has been increased ten-fold since 2003. Starting recently, the news programme *Zeit im Bild* has been accompanied by sign language. Furthermore transmissions of debates from Parliament will be subtitled in the future.

The question of barrier freedom regarding accessibility of the ORF offerings was also the subject of a parliamentary enquiry in September 2009. During this enquiry, a number of experts evaluated the ORF programme offerings for the hearing and visually impaired as still inadequate. For example, with a 30% rate of subtitling, Austria occupies the second to last place in Europe. Only Albania has even poorer offerings 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.

The current draft of an amendment of the ORF Act provides for a gradual binding annual increase in the percentage of the ORF offerings 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. They are demanding the audio description of all broadcasts as part of the public service core mission by 2020 at the latest. In his comment to the draft of the 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 in-

creased 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.

The Austrian Ombudsman Board welcomes the endeavours and measures undertaken thus far to improve the barrier freedom of the ORF offerings. However, it is also the Ombudsman Board's opinion that these measures must be urgently intensified. This is the only way to satisfy the legal obligations under the UN Convention on the Rights of Persons with Disabilities, which Austria has ratified. The stipulations of the Federal Equal Opportunities for People with Disabilities Act require rapid additional measures.

2.8.4. Discrimination based on age

2.8.4.1. No cost subsidies for in-vitro fertilisation for women above 40

The provisions for a state-funding cost subsidy 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 Austrian Ombudsman Board have demonstrated that the abolition of this state aid for women, some of whom are only a few months or years older than the age limit, is very disappointing. The persons affected are often dependent on public financing to achieve their desire to have children.

In his statement to the Austrian Ombudsman Board, the Federal Minister of Health stated that this statutory age limit for women is based on a recommendation of the Supreme Health Council dated 8 May 1999. This recommendation refers to internationally recognised criteria that provide evidence of a lower success rate for this method in women older than 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 lawmakers have limited public financing of IVF treatments to women younger than 40.

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 lawmakers have based their considerations on the declining probability of successful fertilisation and the increasing number of congenital deformities with the advancing age of the parents. In the Court's opinion, therefore, the legislators have not exceeded the range of discretion accorded by legal policy.

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 Ombudsman Board's opinion this constitutes a harshness of the law. Today the probability is significant that women whose age is only slightly over the age limit and "healthy" women of the same age, as well as women who are dependent on IVF can become pregnant.

Statistics show that both mothers and fathers are becoming older and older. While in the 1980s, for example, 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. For example, in 2001 there were 1,663 new mothers over 40, while by 2008, the number had 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.

The suggestion by the Ombudsman Board to raise the age limit for women was rejected by the Minister of Health. According to the minister's information, the additional costs that would result from this change cannot be financed by the IVF fund at this time. Nevertheless, the Ombudsman Board 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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3.1. Fundamental constitutional requirements

3.1.1. Revocation of a permit pursuant to the Aviation Act

Mr. N.N.'s airport identity card was revoked by the civil airport operator on the basis of a background check by the Federal Ministry of the Interior prescribed by law. He turned to the Ombudsman Board after his application for access to the files was rejected by the competent Federal Ministry as inadmissible.

According to the Aviation Act, the Federal Ministry of Transport, Innovation and Technology can inform the operators of civil airports if there are concerns regarding a person checked by the security authorities. In this case, the operator of the civil airport may not issue an airport identity card to the person concerned and must revoke an airport identity card already issued.

The Ombudsman Board has already stated in 2006 that this “information” by the Ministry must be considered an official notification. § 134 of the Aviation Act must therefore be interpreted in conformity with the Constitution so that the person affected by this measure must be granted legal standing and also has a right that this information is served.

The Republic of Austria was sentenced with legal effect in government liability proceedings instituted by the complainant. The appeal sought by the Republic of Austria, was not granted by a decision of the Supreme Court. The Supreme Court shared the legal opinion of the Ombudsman Board in the matter. The completely general assertion of a “protection of sources and findings” without a concrete legal codification does not release the Republic of Austria from its obligations of assertion and proof in government liability proceedings. The Supreme Court further notes: “It can and must not be in keeping with the law that a legal entity only pleads the necessity of secrecy in a completely abstract form. If it does so, however, it must bear the disadvantage of a rule of the burden of proof that turns out to its detriment.”

Following the Ombudsman Board's actions, the State Secretary in the Federal Ministry of Transport, Innovation, and Technology established a working group that is to seek ways to find a solution that takes all interests affected into due consideration.

3.1.2. Reimbursement of costs for a ECJ preliminary ruling procedure

If a complainant is successful in a suit before the Austrian Administrative or Constitutional Court, he can only be reimbursed to a minor extent for the costs eventually incurred through proceedings for a preliminary ruling by the European Court of Justice.

According to the established practice of the Constitutional Court, the legally stipulated flat rate is also compensation for the costs of any interim proceedings such as proceedings for a preliminary ruling procedure before the European Court of Justice. The same applies to

proceedings before the Administrative Court. The system of uniform flat rates chosen by the legislative authority that do not depend on the individual complaint entails that the complainant is not compensated for all costs actually incurred in every individual case.

Against the background of the legal practice of the courts of public law and of the European Court of Justice, there are no objections to the current legal situation under Constitutional and/or Community law. However, the costs of proceedings for a preliminary ruling procedure before the European Court of Justice are generally considerably higher than those of other interim proceedings for which the same flat rates are valid.

The Ombudsman Board therefore takes the view that a more realistic flat-rate calculation would be advisable to make access to justice easier for the population as a whole. However, the Federal Chancellery has informed the Ombudsman Board that no such change is planned at present.

3.1.3. Incorrect information about fees

As of 1 July 2008 the fee for applications in constitutional and administrative proceedings regulated in the Administrative Court Act was raised from € 180 to € 220. As the Ombudsman Board repeatedly observed in July and August 2008, numerous authorities – among them the Data Protection Commission – did not take note of this change in the law.

As a consequence incorrect information was provided in official documents on the rights of appeal, where it was still regularly stated that a fee of € 180 is payable if a complaint is filed with the Administrative Court or the Constitutional Court.

In view of this unsatisfactory situation, the Ombudsman Board suggested that this increase in the fee for applications should be pointed out to all authorities by a circular letter of the Constitutional Service of the Federal Chancellery to this effect. This suggestion was carried out very quickly.

3.1.4. Subsidies for residential building projects

A municipality in Styria had received a written commitment from the competent member of the Provincial Government for the granting of subsidies pursuant to the Styrian Housing Subsidy Act. However, the specialized department of the Provincial Government refused to pay any funds, pointing out that a part of the two building plots was situated in flooding danger zones. The Office of the Styrian Provincial Government referred to an internal provision in connection with the 339th Residential-Construction Table on 9 October 2002, that had neither been accessible to subsidy-seekers nor known to the municipality in this case.

The municipality concerned complained to the Ombudsman Board; in the investigative procedure the Styrian Provincial Government justified its refusal as follows: “During the 339th Residential-Construction Table on 9 October 2002, it was determined that properties in the yellow danger zone would no longer be subsidised on principle. The Residential-Construction Table, which is conducted by a department of the Styrian Government, is concerned with local land-use planning. In its framework there are discussions with subsidy-

seekers about building projects with a strongly informative component. That means that, for example, notification is given within the framework of the institution that residential-building properties in yellow danger zones are not subsidised on principle. This was expressly pointed out.”

In contrast, the OB stated that the provisions of the Styrian Housing Subsidy Act 1993 do not preclude the allocation of funds for building projects that lie in the danger area of floods. With the entry in the current zoning plan, approved by the Styrian Provincial Government, a decision has been made as to the status of the land as for building purposes.

It is a cause for concern for the Ombudsman Board if the execution now imputes to the Styrian HSA 1993 a purport that would allow it to genuinely assess the building-land status of the land to be covered with buildings and to exclude a project on dedicated building land from subsidies. Such a course of action is unconstitutional in several respects. It violates the border between legislation and execution, grants execution latitude within which incomprehensible decisions can be made that, moreover, must be accepted as unopposable by the subsidy-seeker.

3.2. Principle of equality

3.2.1. Vienna: Place of residence determines fees for graves

The Ombudsman Board is repeatedly concerned with differing assessments of fees for graves that are tied to the place of residence. This not only violates the principle of equality, but also EC law.

In 1990, Mr. N.N. paid the fee for the granting of a right to use a grave at the Stammersdorf cemetery in Vienna. For the first ten years he had to pay triple the fee for the right to use the family grave. The calculation base was a decision of the Vienna Municipal Council from 1985 that divides Vienna’s metropolitan area into four zones. For decedents whose last place of residence did not lie within the residential zone belonging to the cemetery, three times the grave fee was charged. This was also the case for the father of the complainant. In the year 2000, Mr. N.N. extended the right to use, this time being charged a fee twice the amount.

In the year 2001, the cemetery regulations of the City of Vienna were changed. Since 1 January 2002, fees for the extension of non-zone grave rights are only assessed at once the amount. The complainant therefore does not have to pay an increased fee for the right to use his father’s grave.

From the point of view of the Ombudsman Board, different fees for graves for local and non-local residents within the City of Vienna violate Art. 12 and 49 EC Treaty according to the legal practice of the European Court of Justice. The Municipal Council of the City of Vienna pointed out that new graves cannot be created, or only to a very restricted extent, in all Viennese Municipal cemeteries. The calculation of charges is intended to prevent certain cemeteries usually preferred by the population from being overfilled. Above all, the population living around the cemetery should have the opportunity to acquire the right to use graves for their relatives that are relatively close to the place where they live.

The Ombudsman Board cannot recognize a compelling reason of public interest within the meaning of the ECJ rulings on Art. 12 EC Treaty. Thus EU conformity concerning different grave fees depending on residence, all the more as merely economic objectives do not constitute such a reason. An argumentation that the burial of a citizen of the Municipality in a Municipal cemetery is ensured and that the cemetery does not reach its capacity limits for this reason because many outside decedents also find their final rest there cannot invalidate Community-law concerns from the point of view of the Ombudsman Board.

The inequality of treatment of grave fees of Austrians with a residence in Vienna compared with Austrians without one and the differentiation of the fees for citizens of the Municipality according to different tariff zones finds its boundary in the rule of equality in the Federal Constitutional Act. Each differentiation requires an objective justification and must not constitute a disproportionate disadvantage. This in particular appears problematical in the case of a tariff discrimination between citizens of the municipality who are buried in a zone cemetery of their district of residence and those citizens of the Municipality who are not.

In the fall of 2007, the head of the responsible Municipal Council Department stated that the differing grave fees for local and non-local residents were to be abolished, at least for the main cemeteries in Vienna. New tariffs for the burial facilities of the City of Vienna were subsequently prepared.

3.3. Freedom of property (Art 1, 1. AP ECHR)

3.3.1. Restitution of land for building by a municipality

During the expansion of land for building in the municipality of Sierndorf in the Province of Lower Austria, the land of the mother of N.N. was rededicated from grassland to building area-residential area. After a subdivision plan was prepared, 1 582 m² of building area were assigned to the public good of the municipality of Sierndorf. As the course of the road laid down in the subdivision plan was changed and some square meters of the land assigned free of charge were no longer required as a public good, the mother of N.N. requested the municipality to reconstitute the land free of charge. She was informed by telephone that while she would get the land back free of charge, she would have to pay for the costs of surveying and the subdivision plan.

The municipality of Sierndorf argued that N.N. was evidently interested in the return of these insignificant areas, but that he had never defined which areas he wanted to get back. Although the Lower Austrian building code in principle does provide for the return of building areas, this could not be carried out because of the small surface of the area and the increase in value caused by the rededication. According to the present legal situation, exemption from notarial charges is provided for, but the preparation of a subdivision plan by the surveyor is not free of charge.

For the Ombudsman Board, the procedure followed by the municipality is in conflict with the judicature of the Constitutional Court. Following the judicature of the highest Court, the assignment of a building area to the public good is an expropriation. Its maintenance is un-

constitutional if the public purpose for whose realization a law provides for the possibility of expropriation was not realized. The Lower Austrian building code must therefore in the OB's opinion be interpreted in line with constitutional requirements. The dedication as a public traffic area must be revoked if the area is no longer needed as a public good. According to the view of the OB the municipality of Sierndorf should therefore have transferred the property back to the mother of the complainant.

The municipality stated that while exemption from charges is provided for the notarial handling of the retransfer of ownership, this does not mean that the preparation of a subdivision plan is free of charge. The Ombudsman Board's position is clearly different: Pursuant to § 10 Para. 3 Lower Austrian building code, no plan is necessary if pieces of land from which no road area must be assigned are reunited.

The municipality's course of action with respect to the retransfer of ownership of the building areas not required was not in conformity with the law, so that the OB stated that there had been a case of maladministration. The municipality subsequently informed the Ombudsman Board that the areas not required would be retransferred back to the ownership of N.N.

3.4. Data protection

3.4.1. Sensitive health data must not be circulated

The Ombudsman Board received information according to which patients who use a specific taxi service for a medically necessary transport must hand over a medical travel and/or transport order to the driver. The taxi driver passes these on to his firm for financial settlement with the respective local health-insurance authority. In this way, the taxi driver as well as the persons in his enterprise handling the settlement with the local health insurance authority obtain knowledge of the diagnosis and/or the intended therapy as well as the medical grounds for the transport order.

Pursuant to the Austrian Data Protection Act, everyone has a claim to confidentiality of his or her personal data, provided there is a legitimate interest therein. It further states that with respect to the use of personal data, unless it occurs in the vital interest of the person concerned or with his or her consent, restrictions of the claim to confidentiality are only permissible to safeguard preponderant legitimate interests of another person. Further restrictions are provided for the use of data especially deserving of protection, among them the "safeguarding of important public interests". It is also expressly stipulated that even in the event of permissible restrictions the intrusion in each case must be in the mildest form leading to the objective.

Health data are sensitive data "deserving of special protection". These data are subject to a general prohibition of use that is only overruled by the exceptions exhaustively listed in § 9 of the Data Protection Act. § 14 of the Data Protection Act contains a detailed obligation to take measures to ensure data security.

In this investigation procedure, the OB achieved that it is being examined whether it is possible that the diagnostic data as the basis of a transport order do not reach the transport

company. Instead the data should be passed on directly to the health-insurance authority rendering the benefits. The health-insurance authority can then consolidate these data with the transport account and thereby check whether the transport was allowable. A regulation to this effect entered into force on 1 January 2009. The OB hopes that this problem will no longer occur in the future.

3.4.2. Lacking legal basis for video surveillance

A street lamp owned by the municipality of Ternitz in Lower Austria was regularly damaged. N.N., who received a diversion offer from the public prosecution office because he was a suspect, complained to the Ombudsman Board. The municipality of Ternitz had demanded in a letter to the complainant that besides the costs for the maintenance of the “damage” he had caused he should also assume the costs for the renting of a video surveillance tool by the Ternitz police.

In the investigative proceeding the Ombudsman Board set out the legal bases for data applications in the “public domain” and requested the municipality of Ternitz for comments in connection with the necessary reporting to the data-protection commission. It also inquired why local authorities had asked local police to act as the invoice recipient (the video surveillance was installed by a private enterprise) and consequently charge the amount of the invoice to the municipality of Ternitz, who then asked the complainant to pay this amount.

In its comments, the urban municipality of Ternitz admitted that the report to the data-protection commission had been forgotten and that there is no legal basis for the request to the police. The municipality affirmed that it would act in conformity with the law in the future. The investigation procedure was concluded with the formal objection to the conduct of the urban municipality of Ternitz.

3.5. Prohibition of torture (Art. 3 ECHR)

3.5.1. Living conditions in the Stein prison

During the past year several complaints were directed to the Ombudsman Board concerning conditions in the Stein prison situated in Lower Austria in the city of Krems. Among other things, the Ombudsman Board ascertained that inmates of the Stein prison partially share a cell designed as a single cell with a second inmate. In some of these cells, the toilets are only separated from the rest of the room by a dividing wall and a curtain.

In November 2008, 72 inmates had to live with at least one further person in a cell which was originally designed for one single person and in which the toilet area is only separated from the rest of the cell by a wall and a curtain. 248 inmates were held in cells in which the toilet area is separated from the rest of the cell by a wall and a curtain. 95 inmates were held in cells in which the toilet area is separated from the rest of the cell by a wall and a door. 340 inmates were held in cells equipped with an own cabin.

The Federal Ministry of Justice stated that double occupancy of cells designed as single cells only occurred in one wing of the Stein prison. As the Stein prison is overcrowded and necessary renovation work is taking place at the same time, avoidance of double occupancy in cells designed as single cells is only possible once the refurbishment work is completed.

Pursuant to § 40 of the Austrian penal law, criminal prisoners are to be accommodated in rooms that are simply and functionally furnished. The Ombudsman Board does not know of a decision as to how toilets in the cells of Austrian prisons must be separated. In the Federal Republic of Germany, the 5th criminal division of the Berlin Superior Court of Justice, after stating that the guarantee of human dignity within the meaning of Art 1 Para. 1 of the Bonn Constitution is not intended to cater to exaggerated sensitivities but to offer protection against extreme impositions that attack the core of personhood, decided that the German Federal Constitutional Court and the Frankfurt Higher Regional Court have both affirmed such a serious invasion of human rights if prisoners are assigned a doubly occupied single cell with an “open toilet” (without adequate visual and olfactory screening). The conditions of confinement objected to by the complainant, namely the accommodation of several prisoners in a communal cell without a separated toilet area must be considered unconstitutional even if the necessary reservations are taken into account, as the existing curtain offered neither visual nor acoustic protection, so that when a prisoner uses the toilet, all prisoners are unacceptably deprived of any possibilities of retreat, suffer an invasion of their privacy, and are injured in their human dignity.

It is in this spirit that the Ombudsman Board believes that § 40 of the penal law must be read, so that the present accommodation constitutes a case of maladministration. Even if the OB by no means wishes to imply that prisoners were subjected to demeaning treatment, the judicature of the European Court of Human Rights must be pointed out, which starts out from minimum standards for prison conditions.

3.6. Right to respect for private and family life

3.6.1. Right to the correct spelling of the last name

During an investigation procedure the Ombudsman Board had to ascertain that last names are often incorrectly written by authorities, as the diacritics over the respective letter of the last name are lacking.

Art. 8 ECHR contains a constitutionally guaranteed right to respect for private and family life. In view of the relevant legal practice of the Constitutional Court as well as of the European Court of Human Rights, there can be no doubt that the right to respect for private life also includes a constitutionally guaranteed right to respect for one's own name. From the aspect of constitutional law one must therefore ask whether the range of protection of the right to respect for one's own name also includes the law that first and last names must be reproduced in correct characters by authorities.

The Ombudsman Board already indicated the important arguments in favor of this view in its 2006 annual report. Unfortunately, the competent authorities did not take suitable measures, such as the introduction of software and hardware for the Federal service that can

correctly store and reproduce diacritics. For this reason, the Ombudsman Board ascertained a case of maladministration in December 2007. The Federal Government was advised to change the software and hardware used in the Federal service and to ensure the correct writing of the names of persons step by step.

In its reaction, the Federal Chancellery admitted such faults, but also announced a modification. The problem was repeatedly discussed in meetings of experts, some Federal Ministries already presented concrete implementation plans. It is not foreseeable at present when the Ombudsman Board's recommendation will be fully implemented.

3.6.2. Extradition of the wife of an Austrian citizen

The Indian citizen N.N. complained to the Ombudsman Board about the duration of her proceedings for the granting of a residence title for relatives. The complainant had first entered Austria with a visa that was valid for six months. She hoped that the proceedings for the granting of a residence title would be concluded during this time. The enquiries of the Vienna Federal Police Headquarters concerning a possible residence marriage dragged on for months. In the meantime, her first child with her Austrian husband was already born in Austria. The Vienna Federal Police Headquarters nevertheless initiated extradition proceedings.

The criteria that the Constitutional Court lays down for a further legal stay in Austria are, inter al.: duration of stay, actual existence of family life and its intensity, degree of integration (relationships with relatives and friends, education, participation in social life, employment), no criminal record.

Taking these criteria into consideration, the initiation of extradition proceedings appears arbitrary. Close family ties exist, as the husband of N.N. is an Austrian citizen and their child is thus also an Austrian citizen. She herself entered Austria legally and was entitled to hope that the residence-title proceedings would be concluded within the half-year validity of her visa. The criteria of no criminal record, adequately assured means of subsistence as well as a secured accommodation situation are also fulfilled according to the information at hand. The marriage took place at a time when the complainant resided in Austria legally. Only the circumstance that she remained – for understandable reasons – in Austria after the expiration of the visa can be an accusation against her from a legal point of view.

The Federal Ministry of the Interior notified the Ombudsman Board twice between September 2007 und April 2008 that there are no objections to the granting of a residence title from the point of view of the Police. In July 2008, the Vienna Federal Police Headquarters suddenly initiated extradition proceedings against the complainant. This decision violates the protection of private and family life guaranteed by the Austrian constitution. It seems extremely improbable that a Supreme Court would confirm the authority's extradition decision. As already mentioned, practically all the criteria speak for the complainant. Moreover, the Ombudsman Board considers it unacceptable that the complainant must now struggle through proceedings in all instances in order to avert extradition at the supreme courts in the end. No comprehensible reasons for the turnaround in the authority's' decision were given to the Ombudsman Board.

3.7. Antidiscrimination

3.7.1. Discrimination based on nationality or ethnicity

3.7.1.1. Families of foreign citizenship have problems receiving family allowances

Families of foreign citizenship living in Austria are particularly often affected by problems in receiving the family allowance. As an example, the family allowance is often limited to an unjustifiably short timeperiod. In other cases, foreign families sometimes have to wait for years before their claim to family allowance is established. Further problems concern the retroactive granting of a family allowance for so-called “late-born” children.

Already in October 2006, the Ombudsman Board noted that a shorter time limitation of the family allowance for families of non-Austrian origin constitutes a case of maladministration. Nevertheless problems continue to arise in practice. As an example, a family where the mother comes from Colombia was only granted the family allowance for the younger son for four years. For the elder son, it was granted – as usual – until the 18th year of life. In another case in which the father is not an Austrian citizen, the family allowance was only granted for 6 months and the mother left in doubt as to the reason why a further granting was refused. This posed a huge financial burden on the family as with the discontinuation of the family allowance the childcare benefits and the insurance protection would have been discontinued as well. In both cases the Ombudsman Board was successful and the family allowance was granted without a special time limitation. No explanation for the short time limitations was given to the Ombudsman Board.

The official procedure on the claim to family allowance poses another problem for many foreign families as the duration is sometimes extremely long. Foreign families sometimes wait two years and more for their claim to a family allowance to be granted which they were in some cases first refused. In the proceedings, the families are sometimes also asked to produce documents in a quantity and quality that is as such not necessary for the procedure.

These cases could quickly be settled after the intervention of the Ombudsman Board. As the Federal Ministry of Health, Family, and Youth admitted, an investigation of possible fake self-employment had been done, although it would not have been necessary, namely whenever the permanent residence and the center of vital interests as well as sufficient means of subsistence are established. The problems thus evidently resulted from ambiguities regarding the legal prerequisites of the course of family allowances, in particular in the case of families who have moved to Austria from the new EU member states.

A further problem concerns the family allowance for so-called “late-born children” of third-country women with a valid residence title. These families can only apply for a family allowance when the residence title for their child is issued. In some cases, this takes a considerable amount of time, which in itself constitutes a great financial burden for the family involved. An amendment has made sure that the family allowance and the childcare benefits must be granted retroactively from birth if there is a residence title. In one case, however, the authority unjustifiably demanded confirmations of the domestic embassy for the retroac-

tive granting and/or did not meet its duty to explain how the application form must be completed correctly.

3.7.1.2. Discrimination and violation of EC law: Carinthian baby allowance

EC law prohibits the discrimination of EU citizens. According to the legal practice of the ECJ, a member state discriminates against the citizens of the other member states if it makes the payment of a birth and maternity allowance dependant on the fact that the recipient has already lived in its territory before. The Ombudsman Board has ascertained that the restriction of the Carinthian baby allowance to Austrian families with at least two years of residence in Carinthia constitutes a case of maladministration.

Ms. C. is an EU citizen of non-Austrian nationality and has been living in Carinthia for some time. She became a mother a short time ago. She was refused the Carinthian baby allowance, which constitutes a one-time financial benefit from the Province for the parents of newborn children. According to the directive then in force it was only provided for Austrians who had resided in Carinthia for at least two years. After calling on the Ombudsman Board, payment of the Carinthian baby allowance to Ms. C. was still refused. She did, however, receive the corresponding amount by a check with the title “support for the family”. Officials stated that Ms. C. was not allowed to receive a baby allowance because of the directive of the Carinthian Provincial Government in force, but that she should be indemnified all the same.

The Ombudsman Board on 18 April 2009 unanimously held that the directive of the Carinthian Provincial Government and the procedure of the authority constitutes a violation of EC law and therefore a case of maladministration. The Ombudsman Board stated that the EU member states do not have complete liberty in designing their systems of social security, but are bound by the principle of equal treatment of Community law. This also applies to the granting of private-sector promotions and subsidies.

Art. 12 EC Treaty prohibits any discrimination of EU citizens for reasons of citizenship. Pursuant to Art. 3 Reg. (EEC) No. 1408/71, EU citizens who live and work in Austria and the members of their family must be treated the same as Austrian citizens with regard to social-security benefits. Art. 7 Para. 2 Reg. (EEC) 1612/68 further provides that employees who are citizens of a member state enjoy the same social and tax benefits in the territory of a member state as domestic employees do. The requirement of equal treatment also applies to families from the EEA as well as Switzerland.

According to the rulings of the ECJ, a member state discriminates against the citizens of the other member states if it makes the payment of birth and maternity benefits contingent upon the requirement that the recipient has lived in its territory before. Such a regulation constitutes a violation of Art. 7 Para. 2 of Reg. (EEC) No. 1612/68, of Art. 52 of the EC Treaty as well as of Reg. (EEC) No. 1408/71 (ECJ, Rs C-111/91, Commission vs. Luxemburg).

The Ombudsman Board therefore recommended to the Carinthian Provincial Government that it should quickly bring its subsidy directive into conformity with EC law. As a reaction to the investigation of the Ombudsman Board, the Carinthian baby allowance was extended to families from the EU and EEC area as well as from Switzerland. The Ombudsman Board's

recommendation to delete the residence clause that demands at least two years of residence in Carinthia without replacement, as it constitutes an indirect discrimination, has not yet been followed by the Carinthian Provincial Government.

At present, besides this case, an ex officio examination in other Bundesländer (Burgenland, Upper Austria, Salzburg, and Vienna) that also make the payment of comparable family benefits from the Provincial budget contingent upon a minimum period of residence is also pending before the Ombudsman Board. As a result of the examination, one Province, the Burgenland, has already changed its law and repealed the condition for subsidy of a minimum one-year residence of the Province criticized by the Ombudsman Board.

3.7.1.3. Discriminatory treatment by police officers

A complainant felt that she had been discriminated by the conduct of police officers and their way of expressing themselves during an official action. The Cypriote citizen N.N. was on a one-week stay in Austria together with her two children and her husband, who is an Indian citizen.

Owing to her lacking knowledge of German, the complainant was not able to give a “verbatim account” of the insulting statements the police officers made. But as N.N. is professionally concerned with discrimination and racism as a university professor, the Ombudsman Board had no reason to doubt the credibility of her statement. She had felt discriminated “by the hostility” of the police officers during the official act that, for example, showed itself in “threats” by the officers to take the complainant and her family to the police station that lasted almost 10 minutes. The complainant gained the impression that the officers had above all treated her and her family in such an unfriendly manner because of her “southern appearance”.

The regulation based on the Law on the Security Police stipulates that police officers in fulfilling their duties must refrain from everything that could cause the impression of discrimination because of skin color and/or national or ethnic origin. This could not be convincingly demonstrated by the comments of the Federal Ministry of the Interior. The Ombudsman Board therefore requested the Federal Ministry of the Interior to emphasize this topic in further training for the police forces.

According to a report of the EU Commission, Austria is the country with the worst assessment in the category “Directive not transposed at all” regarding the application of the relevant directive 2004/38/EC concerning the right of the citizens of the Union and their family members to move freely and reside in the territory of the member states. The Ombudsman Board will therefore continue to observe the development of laws in Austria regarding the implementation of the directive.

3.7.2. Discrimination based on religion or belief

3.7.2.1. Freedom of religion and autopsies

The basic right to freedom of religion also includes the freedom to exercise one's religion by observing religious customs. If the relatives of a decedent argue against an autopsy for religious reasons, it may only be performed if this is necessary in particular for reasons of health protection. In any case, the persons concerned must be comprehensively informed about a necessary autopsy.

The son of the complainant had a brain damage since birth and died at the age of nine months in the Vienna General Hospital. The parents are adherents of the Islamic faith and turned to the Ombudsman Board, as they felt their religious feelings had been injured by the procedure of the hospital regarding the autopsy of their son. Immediately after the death of their son, they had emphatically pointed out to the hospital personnel that they did not want an autopsy for religious reasons. A doctor informed them the next day, that a postmortem examination had to be performed on the corpse in order to be able to ascertain the exact cause of death and expressly assured them that no full autopsy, but only a small incision in the abdominal wall would be performed. The corpse was released one day later than agreed upon, and without further explanations of the type and extent of the postmortem examination. During the ritual washing of the dead, the parents saw that the corpse of their son, despite an assurance to the contrary, had been subjected to a complete autopsy. It was only one week after burial that the parents learned that the entire brain had been removed during the autopsy, so that it was not the complete corpse of the child that had been buried. In addition to the tragic loss of her son, the complainant now had to deal with the circumstance that she had not buried her son according to her religious customs, which is why she felt that the hospital had deceived her with respect to the type and extent of the postmortem examination.

This tragic case affects the fundamental basic right to the freedom of religion. This basic right, anchored in Art. 14 of the 1867 constitution and Art. 9 of the European Convention on Human Rights, in particular includes the freedom to practice one's religion by observing religious customs. Restrictions are only permissible if provided for by law and necessary and reasonable in a democratic society to pursue a legitimate goal, e.g. the protection of the health of the population or the subject of the basic rights.

The legal regulations furthermore provide that the corpses of patients who died in public hospitals must be autopsied if the autopsy was directed by the medical police or a court, or is necessary to safeguard other public or scientific interests. This can be the case particularly because of diagnostic unclarity. If none of these cases apply and the decedent has not agreed to an autopsy while alive, an autopsy may only be performed with the consent of the closest relatives.

Any autopsy against the wishes of the relatives who see themselves unable to grant their consent for religious reasons is an intrusion in the freedom of religion. An autopsy against the wishes of the family is only permissible if the objective pursued by the autopsy, health protection in this case, is of greater importance than the intrusion in the freedom of religion. This is the case, for example, if the cause of death is not adequately explicable or if there are diagnostic unclaritys. In this case, the autopsy contributes to the determination of the

exact cause of death and to the gaining of important knowledge for similar diseases in the future. The comments of the Vienna General Hospital indicated that the sudden cause of the baby's death could not be sufficiently explained by the findings available, which is why an autopsy was necessary.

This was also unobjectionable in the light of the freedom of religion. But the investigation procedure of the Ombudsman Board showed severe shortcomings concerning the information and communication about the autopsy. The complainants were incorrectly informed about the type and scope of the postmortem examination by the hospital. If the necessity of a more comprehensive autopsy only appeared later, the hospital would have had to so inform the parents voluntarily and immediately. This did not occur and therefore constitutes a violation of a fundamental patient's right and the duty of physicians to divulge information. In its comments, the General Hospital acknowledged that mistakes were made, admitted these in a meeting with the parents, and apologized. General improvements in this area were announced by the hospital management as a consequence of this tragic case.

3.7.3. Discrimination based on lacking communication infrastructure

3.7.3.1. Application procedure for a position as an intern

The possibility of communication via the Internet must not be made a condition of application in an application procedure. People without Internet access must also, as an example, have the possibility to apply for a position as an intern.

An applicant for an internship informed the Ombudsman Board that in the procedure carried out by the Lower Austrian Provincial Government, applications are only possible by Internet. The Ombudsman Board initiated an investigation procedure in this matter and considered it discriminating that the possibility of communication via the Internet and thus personal Internet access becomes a condition of application.

As a result of the investigation procedure the Lower Austrian Provincial Government will in the future point out in information material that application forms can also be requested in writing or by telephone and sent in by mail. It must be assured that persons with no personal Internet access also have the possibility of applying for an internship at all.

4. AOB Annual Report 2007

4.1. Fundamental constitutional requirements

4.1.1. Rescission of an approval pursuant to § 134a of the Aviation Act

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

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

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

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

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

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

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

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

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

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

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

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

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

The Ombudsman Board concedes that § 134a(4) of the Aviation Act explicitly only looks at the case of the "notification" to the civil airport keeper regarding existing security misgivings and does not expressly mention whether the respective notification must also be sent to the (potential) employee. However, on the basis of the constitutional situation described above, the conformity with the constitution of the legal provisions under discussion can only be affirmed, if it is regarded as admissible when interpreted in conformance with the constitution—and thus, consequentially, as necessary—to also serve the "notification" from the federal minister on the "potential" employee negatively affected in the sphere of his fundamental rights. That view is supported by the fact that the Constitutional Court also permits analogous application of the law when interpreted in conformance with the Constitution (e.g. VfSlg. 15.197/1998 and 16.350/2001) and neither the wording of the legislative provision nor the intention of lawmakers expressly excludes service of the "notification" here in question to the (potential) employee.

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

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

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

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

4.2. Right to a fair trial

4.2.1. Decision-making period in accordance with 2000 Act for the Review of Environmental Compatibility

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

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

The review proceedings conducted by the Ombudsman Board revealed:

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

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

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

Section 3(7) of the Environmental Compatibility Assessment Act in fact contains such a variant provision, stipulating that the authorities must determine at the request of the project applicant, a cooperating agency or the Environmental Ombudsman whether an environmental compatibility assessment needs to be conducted in accordance with the Federal Act and what state of affairs in Annex 1 or § 3a, Paragraphs 1 to 3 are realized by the project.

This determination may also be made ex officio. The decision must be made in the first and second instances within 6 weeks by official notice.

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

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

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

The Environmental Compatibility Assessment Act took force pursuant to § 46(1) there (BGBl 1993/697) on 1 July 1994. The Burgenland State Government has therefore been competent for implementing the Environmental Compatibility Assessment Act in Burgenland for over 10 years. Irrespective of the fact that proceedings have been conducted in the State of Burgenland in which civil-servant agricultural experts have conducted investigations and given opinions and civil-servant veterinarians have rendered opinions on safety buffers (cf. only the administrative court findings in 99/05/0162 and 98/05/0024), it is astonishing that the Burgenland State Government does not possess the necessary specialized personnel to ascertain the facts relevant to a decision in implementation of the Environmental Compatibility Assessment Act. This deficit can only be seen as a failure to fulfill organizational responsibility.

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

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

No outsider can claim to have such specific knowledge in this case. Nor is any such knowledge required. As communicated to the authorities in the ongoing investigative proceedings by letter of 3 September 2004, in fact-finding proceedings pursuant to § 3, Paragraphs 1 and 2 of the 2000 Environmental Compatibility Assessment Act it is merely to be reviewed whether the thresholds determined in Annex 1 of the 2000 Environmental Compatibility Assessment Act have been exceeded or whether the specific project is spatially near to other projects and crosses the relevant threshold together with them and could thus have a significant harmful, damaging or disruptive effect on the environment due to an accumulation of factors. In such proceedings, nothing can and may anticipate the results of an environmental compatibility assessment.

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

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

4.2.2. 27 months for an alternate notice

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

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

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

The affected property owner, X.X., then filed a complaint against this official notice with the Constitutional Court. By order of 17 May 2004, the Higher Administrative Court then rescinded the official notice of the Salzburg State Government due to the illegality of its content. In connection with the legal opinion of the Higher Administrative Court, the Salzburg State Government had to rescind by official notice dated 12 July 2004 the appeal decision of the municipal representatives of the Market Town of Neukirchen am Großvenediger of 14 September 2000 and remanded the matter back to the Municipality for new decision.

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

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

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

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

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

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

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

From the perspective of the Ombudsman Board, this failure, which has additionally delayed the proceedings, must be protested to nearly the same degree as the procedural delay that gave rise to the original deficiency declaration and recommendation by the Ombudsman Board. In conclusion, a period of 27 months was necessary for a new consultation on an

appeal. We can no longer speak of proceedings "within a reasonable time" in the terms of Article 6 of the European Convention on Human Rights in light of the serious delay, which the Market Town of Neukirchen am Großvenediger has not even attempted to explain.

4.3. Principle of equality

4.3.1. Rejection of petitions for exemption from TV and radio receiver fees on unsubstantiated grounds

*In the Fundamental Rights Section of the 30th Report to the National Council and Federal Council (p. 376 f), the Ombudsman Board criticized that petitions for exemption for TV and Radio receiver fees are regularly rejected in official notices by the Gebühren Info Service (Radio and TV Fee Information Service; GIS) on the unsubstantiated ground that the household's income exceeds the relevant assessment limit for fee exemption. To rectify this deficiency, the Ombudsman Board **recommended** on July 9, 2004 that the GIS alter its method of communicating the grounds for its official notices so as to take into account both the legal requirements in §§ 58(2) and 60 of the 1991 General Administrative Procedure Act and the constitutional right granted to all citizens to stand equally before the law in accordance with the requirements to be derived from the legal rulings of the Constitutional Court.*

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

4.4. Data protection

4.4.1. Inadmissible dissemination of sensitive health data

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

According to the constitutional provision in § 1(1) of the 2000 Austrian Federal Data Protection Act (Datenschutzgesetz; DSG), everyone has a claim to confidentiality of data concerning his person, to the extent that an interest meriting protection exists. Paragraph 2 of this constitutional provision explicitly provides with respect to the use of personal data (to the extent that such use is not vitally important to the health of the affected person or is under-

taken with his approval) that restrictions on the claim to confidentiality are only permissible to protect the overriding legitimate interests of another person. For the use of data deemed especially worthy of protection, further restrictions are foreseen in the cited constitutional provision, among others that use be restricted to cases requiring the "protection of important public interests." It is further explicitly ordered that the intervention may only be made, even in the case of admissible restrictions, in the mildest possible manner required to attain the desired goal.

According to the legal definition of § 4(2) of the 2000 Data Protection Act all health data is to be regarded as "sensitive" as well as "especially worthy of protection." These data are subject to a general prohibition on use, which can be lifted only for the exceptions exhaustively listed in § 9 of the 2000 Data Protection Act. In order to have an impact on the legal situation thus created, § 14 of the 2000 Data Protection Act contains a detailed obligation to implement measures that warrant data security, including, in particular, the duty of ensuring the proper use of data.

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

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

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

4.4.2. Form to procure a free annual motorway permit sticker

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

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

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

4.5. Right to respect of private and family life

4.5.1. Accurate reproduction of the diacritical marks in a family name

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

Article 8 of the European Convention on Human Rights contains a constitutionally guaranteed right to respect of private and family life. In light of the applicable legal rulings both of the Austrian Constitutional Court and the European Court of Human Rights (cf. VfSlg. 13.661/1994 and 15.031/1997 and the decision of the ECHR in the case *Burghartz* of 22 February 1994, reprinted in *ÖJZ* 1994, 559; also the rulings in the cases *Stjerna* and *Guillot* of 25 November 1994 and 24 October 1996), no doubt can exist that the right to respect of private life also encompasses a constitutionally guaranteed right to respect of one's own name.

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

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

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

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

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

When ascertaining the normative content of constitutional standards, not only the standard to be interpreted but also its normative environment and ultimately even the entire constitutional system has to be taken into account. Such a systematic constitutional interpretation is also required in the context at hand, because the European Convention on Human Rights is applicable as constitutional law in Austria and the normative content relevant for Austria first becomes evident with due regard to other normative provisions in Austrian constitutional law.

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

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

In the given context, it should finally not be overlooked that spelling a family name without diacritical marks represents a particular annoyance especially for members of linguistic mi-

norities, because forms of discursive appreciation and recognition of minorities and their identities by the majority and the state occur in the written language precisely through diacritical marks. Diacritical marks have full orthographic significance. As the name itself suggests, they serve as signs that differentiate letters from otherwise identical looking letters. The constitutional recognition several years ago in Article 8(2) of the Federal Constitution of the linguistic and cultural variety that has emerged within the Republic of Austria as expressed in autochthonous groups of people contains a value judgment of the authors of the constitution that at minimum suggests that only the correct spelling of a minority family name would not constitute intervention in the constitutional sphere.

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

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

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

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

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

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

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

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

4.5.2. Residence permits—non-approval of petition filed in Austria for humanitarian reasons

An Iranian citizen applied for residence permits for herself and her three children in order to live in a family community with the father who was resident in Austria as a key maker. Because the family initially came to Austria on entry visas and only applied for residence in Austria, an inadmissible application was in principle made within Austria pursuant to § 21 of the Establishment and Residence Act (Niederlassungs- und Aufenthaltsgesetz; NAG). Pursuant to §§ 72 ff. of the Establishment and Residence Act, however, the Federal Minister of the Interior has the option to admit applications filed in Austria for humanitarian reasons. Despite all efforts, the Federal Minister of the Interior did not wish to recognize humanitarian grounds in the present case.

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

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

On a constitutional level, it is evident that the decision of the Federal Ministry of the Interior impairs the protection of private and family life pursuant to Article 8 of the European Convention on Human Rights. Though dismissing the application for the issuance of a residence permit does not mean automatic deportation, residence without a residence permit leads to deportation proceedings. Likewise in the present case, the authorities carried out deportation proceedings, which are pending before the Constitutional Court. That the right to private and family life is to be afforded great significance even in relation to public security and order was explained vividly by Prof. Funk at the 64th Meeting of the Human Rights Advisory Board on 5 December 2006:

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

That the Constitutional Court has also recently attributed respect for private and family life (particularly in deportation cases) increased significance was shown in the ruling of 12 June 2007 (B 2126/06). In its ruling of 29 September 2007 (B 328/07), the Constitutional Court summarized the criteria stipulated by the ECHR which are to be applied in deportation cases in view of Article 8 of the European Convention on Human Rights. Likewise, the numerous decisions of the ECHR issued regarding Article 8 of the European Convention on Human Rights demonstrate how decisive the details of an individual case can be when assessing proportionality. The length of residence is not the solely decisive criterion. Several

other factors, such as the requirements of public order, integrity before the law, the degree of integration, the connection to the home state, the intensity of family life and the date the family life originated are of significance when making the assessment (see also Peter Chwosta, "Die Ausweisung von Asylwerbern und Art. 8 MRK," ÖJZ 2007/74).

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

4.6. Anti-discrimination

4.6.1. Introduction

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

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

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

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

4.6.2. Planned amendment of the Equal Treatment Act

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

In its commentary on this bill (12/SN-142/ME XXIII. GP), the Ombudsman Board point out inter alia that the resources at the disposal of the Ombudsman for Equal Treatment are al-

ready scant. The massive extension of the scope of responsibilities planned in the bill must be accompanied, in the opinion of the Ombudsman Board, with an extension of recourses to the Ombudsman for Equal Treatment, if this is not merely to be a legalistic cosmetic measure without any actual effect in reality (also see the commentary of the Human Rights Commissioner of the European Council, Thomas Hammarberg, on the lack of resources among equal treatment institutions, Report of 12 December 2007, CommDH(2007)26) Marginal No. 53 f).

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

The problem of a lack of transparency in equal treatment law is also greatly compounded: The literature already criticizes the legalistic overload in the current Federal Equal Treatment Act with largely identical provisions and the resulting lack of clarity in protection against discrimination (cf., e.g., Rebhahn, Kommentar zum Gleichbehandlungsgesetz [2005], Introduction, Marginal Nos. 18 and 42).

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

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

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

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

which represents an obstacle that should be removed through legislation creating clear and comprehensible rules of jurisdiction.

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

In its statement to the Ombudsman Board dated 17 November 2007, the competent department of the Federal Ministry for Health and Women, where the Equal Treatment Commission has been established, stated the following regarding the general approach in the case of problems with jurisdiction: "If, when a petition is submitted, a problem of jurisdiction arises between the Equal Treatment Commission for the Federal Public Service and the private sector—which can occur in spin-offs due to the different personnel structures—the senate discusses and decides on the jurisdiction based on the relevant spin-off law." Unfortunately, the relevant spin-off law in this case is silent about the applicability of the Federal Equal Treatment Act (Bundes-Gleichbehandlungsgesetz).

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

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

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

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

The employment issues and the technical issues beyond the civil service issues, particularly the structure of labor deployment, the application of the sample management instruments

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

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

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

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

4.7. Discrimination based on gender

4.7.1. No gender-specific designation of civil servants in the clerk's office of the Higher Regional Court of Vienna

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

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

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

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

The Ombudsman Board recognized the complaint of N.N. as legitimate, because it was not comprehensible why a gender-specific designation of decision-making officials should not have been possible in the automated processing of minor IT applications since 1986, i.e. for nearly 20 years.

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

4.8. Discrimination based on nationality or ethnicity

4.8.1. Racial discrimination a misdemeanor?

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

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

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

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

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

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

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

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

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

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

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

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

The City of Vienna also reacted to the Ombudsman Board's recommendation: prosecutions will no longer be conducted by the 19 district magistrates, but in four prosecutorial centers of competence, in order to ensure consistent and efficient enforcement of the discrimination ban. In addition, a coordinator and contact person was appointed to coordinate the prosecutions (Opinion of the Chief Executive Office [Magistratsdirektion] of the City of Vienna of 22 October 2007, MPRGIR – V-1263/06).

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

4.8.2. Headscarves as a barrier to employment?

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

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

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

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

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

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

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

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

The federal government has emphasized the integration of immigrants and children of immigrants living in Austria. Both the Report on Immigration presented by the Austrian Minis-

ter for Women, the Media and Public Service in autumn of 2007 and the Report on Integration presented in January 2008 by the Minister for the Interior reveal that foreign-born persons, and especially foreign-born women, suffer particularly severe discrimination in the job market. The reasons for this discrimination are diverse, but it is clear that urgent action is necessary. In particular, it would be advisable to define immigrants and the children of immigrants as a separate target group within AMS and to broaden the offerings for this group (Federal Ministry for the Interior; Integration: Moving Closer Together, p. 67).

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

4.8.3. Plaintiffs' Association asks Ombudsman Board to review conduct of proceedings by the Equal Treatment Commission

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

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

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

In November 2007, the Plaintiffs' Association and the ZARA association turned to the Ombudsman Board and complained about the Equal Treatment Commission's enforcement of the Equal Treatment Act. Those organizations feel hindered in their representation of discrimination victims, as provided by law, by supposed defects in the conduct of proceedings by the Equal Treatment Commission. The complaint involves several aspects: the duration of the proceedings, principles of evidentiary assessment, the manner in which NGOs are included in proceedings before the Equal Treatment Commission, as provided by law, and the content of recommendations by the Equal Treatment Commission in cases where discrimination is found.

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

4.8.4. Continuing discrimination in the delivery of family benefits to non-Austrian families

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

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

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

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

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

The Ombudsman Board does not object to this argument, in principle. It should be noted, however, that a severe abbreviation of family benefits, as is often the case, represents a

burden for families, since it requires them to undergo multiple official proceedings and furnish documents. If there is no objective justification for the abbreviation of benefits, such an act constitutes discrimination and is inconsistent with constitutional principles and the principles of European Community law (for details, see last year's report). Above all, the uncertainty as to the receipt of benefits in the future and interruptions in the delivery of benefits to families which depend on these funds constitute an unreasonable burden.

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

A recent report in the media reveals that such problems affect not only families with non-Austrian citizenship but also those with "foreign-sounding names." As reported in the "Presse" newspaper of 12 January 2008, a mother has been asked by her local Tax Office in Vienna to present a school or kindergarten attendance certificate and to document the citizenship of her three children. For a child of just 6 years, family benefits were actually suspended as of January 2008.

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

4.8.5. Man brings his pregnant wife to the doctor for acute pain and misses his German course

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

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

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

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

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

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

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

4.9. Discrimination based on illness or disability

4.9.1. Television for the hearing-impaired: still a long way to go

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

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

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

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

With respect to the quality of the subtitles, the General Director stated that this depends to a great extent on whether the program is broadcasted live or pre-recorded. Many programs (especially those of the news program) include both live and pre-recorded segments. It may be, he noted, that the live segments were "subtitled into" the pre-recorded part, so that the pre-produced subtitles will sometimes disappear very quickly. On the other hand, in such a situation those subtitles may be inserted again at another time in order to make the program easier for viewers to understand. These problems arise due to technical problems which cannot yet be overcome. Unfortunately, it is not currently possible to resolve these issues for technical reasons. He stated that ORF can only await further technical improvements, and that ORF stays informed about such improvements at all times.

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

4.9.2. Barrier-free public spaces, particularly in public transportation

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

Persons with disabilities are constantly turning to the Ombudsman Board to complain about problems taking advantage of public facilities, and very often these complaints involve the use of public transportation. For example, Mr. K. complained that a new pedestrian bridge had been built over the Westbahn tracks without any climbing aids. As a result, persons in wheelchairs, as well as elderly and disabled persons, persons with baby carriages, bicycles,

etc. cannot use this pedestrian bridge. Mr. K., who lives adjacent to this area, had approached the competent bodies as early as summer of 2004, i.e. prior to completion of the final structure, to notify them that a climbing aid or ramp is necessary for this bridge. Nevertheless, the bridge was built without a ramp.

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

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

4.9.3. Nursing home rooms not adapted to the needs of their occupants

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

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

However, Mr. W found that barrier-free living in nursing homes is unfortunately not yet a reality. He was living in a district home for senior citizens in Upper Austria. Because of his physical disability, he had to use an electrical wheelchair. The use of this wheelchair caused damages in the amount of €3,585.60 to the furniture in his room because his room was not designed for a wheelchair, and was therefore not adapted for its use. After his death, a claim for these damages was asserted against his estate. In an expensive court case, which did not conclude with an overwhelming finding of negligence, an expert was asked to assess which damages to the room would have been unavoidable even if the disabled person had exercised due care and which may be attributable to the carelessness of the occupant. The Ombudsman Board tried in vain to prevent this costly proceeding, calling upon both parties to reach an out-of-court settlement. The welfare association which operates the home was not prepared to settle in this case, however, hoping to win the case in spite of the

fact that the structural condition of the room assigned to the deceased occupant was not suitable for use of an electrical wheelchair.

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

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

4.9.4. Fragmented administrative procedures for persons with disabilities

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

4.9.5. Jobs in workshops for the blind endangered due to sales problems and the loss of public assistance

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

4.9.6. Failure to award an anniversary bonus

Mr. D worked for over 40 years in Austria's Ministry of European and International Affairs. He turned to the Ombudsman Board because he had not received a so-called "anniversary bonus," which is awarded for loyal service upon completion of 40 years of service. The complainant speculated that his failure to receive the bonus was attributable to several ex-

tended leaves which he had to take because of health problems. After the Ombudsman Board became involved, the competent Ministry promised to pay him the anniversary bonus at the next possible date.

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

4.9.7. Integration of disabled children

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

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

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

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

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

Once the Ombudsman Board intervened, the City of Vienna conceded that the administration of care by trained nurses is not actually feasible for the complainant and promised to find an individual solution, as well as to form an additional nursery group in Vienna General

Hospital for similar cases, where trained doctors and nurses would be available in case of emergency.

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

4.9.8. Transfer of custody for children of a mother who is under guardianship – Municipality of Linz

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

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

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

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

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

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

The family turned to the Ombudsman Board and complained about the Youth Welfare Office's conduct. Mr. L felt pressured by the methods used by the Office to obtain his signature. They also claimed that the Youth Welfare Office had failed to give them the time and assistance they needed to find ways of keeping the children in the family. The Ombudsman Board found that the complaint was justified in two respects:

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

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

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

4.9.9. Rejection of an application for a departmental assistant in SMZ-Ost

Ms. R turned to the Ombudsman Board in connection with the rejection of her application for a job as departmental assistant at the Social Medical Center East (SMZ-Ost). According to statements made by the complainant, she was invited to an interview in July 2006 and, after completing two trial days, she was assured by the head nurse in the nursing department that she would receive her desired job as departmental assistant in September 2006. In the course of her medical examination at the end of July 2006, additional tests were conducted with respect to the complainant's diabetes. Although she reported the findings to her future employer and although the findings did not disqualify her, the complainant received a

phone call from the human resources department of SMZ-Ost informing her, to her surprise, that she would not be hired after all.

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

4.9.10. Road signs a source of danger to the blind and visually impaired

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

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

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

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

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

4.10. Discrimination based on social status

4.10.1. E-cards for welfare recipients – still no news

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

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

4.10.2. Discrimination against low-income persons through the new pocket money rule for accommodation in homes for the disabled

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

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

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

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

4.11. EC Treaty

4.11.1. Discrimination in cemetery fees in Salzburg

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

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

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

(4) ...

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

According to the rulings of the European Court of Justice, the freedom to provide services extends not only to service providers (active freedom to provide services), but also to service recipients (passive freedom to provide services; ECJ on Article 49 of the EC Treaty, Case Nos. 286/82 and 26/83, *Luisi and Carbone*).

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

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

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

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

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

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

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

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

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

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

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

The Ombudsman Board applauds this amendment since it addresses Ombudsman Board's concerns with respect to the principle of equality in connection with the discriminatory assessment of fees based solely on the criterion of ordinary residence within the municipality

or the country leading to the initiation on 5 August 2005 of an official review of VA S/80-G/05. The amendment also takes into account the rulings of the European Court of Justice on Articles 12 and 49 of the EC Treaty with respect to the privileged treatment of residents over other EU citizens and non-residents in cases involving public cemeteries.

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

4.11.2. Discriminatory prices for boat moorings; recommendation

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

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

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

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

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

all those leasing boat moorings should be charged the preferential rent for the duration of the lease and that they should be reimbursed for the difference between rent paid in the past and the preferential rent; and

that the Municipal Council Resolution of 31 August 2004, Zl. 4/2004, should be repealed.

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

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

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

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

4.11.3. Discriminatory fees for admission to the beach in the Municipality of Breitenbrunn

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

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

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

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

There is clearly no justification for discrimination based on whether the persons in questions maintain their primary residence within the municipality or not. The European Court of Jus-

tice has already heard a case involving fees for the use of a public beach and found that discriminatory admission fees based solely on the place of residence were in violation of the prohibition of discrimination in Article 12 of the EC Treaty. Accordingly, the discriminatory admission fees to Breitenbrunn beach depending on whether the person in question has his or her primary residence within the municipality are unjustified.

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

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5.1. Place-name sign dispute

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

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

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

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

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

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

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

investigation procedure in the matter, pursuant to Article 148a para. 2 in conjunction with Article 148i para. 1 first sentence B-VG.

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

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

The District Commissioner purportedly prepared an ordinance draft dated March 2, 2006, which displayed efforts to provide for the Slovenia place name for Bleiburg to be shown as 'Pliberk' and respectively, that for Ebersdorf as 'Drbeša ves', on the basis of a statement by the Director of the Carinthian State Archive. Subsequently, the ordinance draft containing the posting of bilingual place names on the B 81 in the area of Bleiburg and Ebersdorf was communicated by the District Commissioner to the responsible Deputy State Governor, Gerhard Dörfler, as he had declared an 'approval reservation', with an instruction dated November 8, 2005, for all ordinance procedures relating to town areas for the entire District of Völkermarkt'. However, Deputy State Governor, Gerhard Dörfler, has so far not granted approval. According to media reports, he is purported to have justified this with the draft being based on an 'incorrect VfGH decision' (see: 'Abschiedsgeschenk die Verordnung' in 'Die Presse' dated March 7, 2006; 'Zweisprachige Ortstafeln verordnet' ('Order for bilingual town signs issued') in 'Der Standard' dated March 8, 2006).

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

regarding the place names, 'St. Kanzian' in Sect. 1 Section B) points 1, 3, 4 and 5 of the ordinance by the Völkermarkt district administration dated May 12, 2005 in respect of traffic restrictions for the L116 St. Kanzianer Strasse, and

the place names, 'Ebersdorf' in Section B), point 3 category 'In the direction of Lavamünd', lit. a and b and category 'In the direction of Sittersdorf', lit. c and d of Article 1 of the ordinance by the Völkermarkt Regional Administrative Authority dated July 15, 1982 in the version of the ordinance dated February 7, 2006, and

the place names, 'Bleiburg' in Section B), point 3 category 'In the direction of Lavamünd', lit. c and d and category 'In the direction of Sittersdorf', lit. a and b of Article 1 of the ordinance by the Völkermarkt Regional Administrative Authority dated July 15, 1982, in the version of the ordinance dated February 7, 2006,

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

With the decision announced on June 26, 2006, the VfGH determined the illegality of the 'place-name sign relocations' and by the power of its previous case law, rescinded the respective sections of the ordinance regarding the place-name descriptions of 'Bleiburg' and 'Ebersdorf', without setting a further deadline. With respect to 'St. Kanzian', the application was rejected with the reasoning that in light of the 1991 and 2001 census, this locality is not

to be regarded as an administrative district any longer, with a mixed population within the meaning of Art. 7 point 3 of the Vienna State Treaty.

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

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

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

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

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

The fact that it mattered a great deal to the responsible member of the Carinthian state government that this, from his point of view, 'creative solution of the place-name sign debate' was actually pursued, is documented by photographs on the homepage of the state government (<http://www.ktn.gv.at/-?siid=33&arid=4556>), which show the State Governor, Dr. Jörg Haider and Traffic Officer, Gerhard Dörfler on November 22, 2006, at the installation of monolingual place-name signs in the locality of Schwabegg/Žvabek. The bilingual place-name signs ordered by the Völkermarkt Regional Administrative Authority at the beginning of May, shortly before the state treaty celebrations, on the occasion of the 50-year anniversary of the Vienna State Treaty, were exchanged on the basis of a new traffic police ordinance, at the instruction of the suspect and replaced by an – offset, blue-outlined – place-name sign with the description 'Schwabegg' and a supplemental sign, with the description 'Žvabek'.

With a decision dated December 13, 2006, V 81/06, the VfGH rescinded the ordinance sections that were disputed by the Ombudsman Board as being illegal. With this, it is now finally clarified that an approach that conforms to the state treaty, the constitution and legislation, in this context, can only exist if bilingual place-name signs are posted wherever it is required according to the now settled case law of the VfGH, regarding the constitutional

term of the 'administrative district with a mixed population within the meaning of Art. 7 Z 3 second sentence of the Vienna State Treaty'.

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

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

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

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

5.2. Fundamental constitutional requirements

5.2.1. Rescission of an approval pursuant to the Aviation Act

An Austrian citizen who, on the basis of the legally stipulated reliability examination by the Federal Ministry of the Interior, based on Article 173 para. 16 Aviation Act (Luftfahrtgesetz - LFG), had his airport pass revoked by the civil airport keeper, approached the Ombudsman Board, after his application for access to files was rejected as being inadmissible by the

Federal Ministry of Transport, Innovation and Technology, with an official notification dated December 23, 2005, with reference to Sect. 134a para. 4 LFG.

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

According to the Ombudsman Board, Sect. 134a para. 4 LFG must be interpreted in conformity with the constitution, such that the person affected by this measure must be granted a right to defence in the proceeding resulting in 'notification' and therefore (also) has a right to receipt of this notification. Any other interpretation result is ruled out, as it would assume unconstitutional content in Sect. 134a para. 4 LFG:

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

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

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

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

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

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

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

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

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

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

Based on the fact that the 'notification' by the Federal Ministry of Transport, Innovation and Technology intervenes in constitutionally guaranteed rights of the civil airport keeper/his contractual partners as employers, as well as in those of the (potential) employee, it must be regarded as an 'official notification' within the meaning of Art. 144 B-VG, in an interpretation conforming to the constitution, because an intervention in constitutionally guaranteed rights may only be carried out in conformity with the constitution by way of a notification, which is ultimately opposable before the VfGH. This official notification must be delivered to the civil airport keeper/his affected contractual partner, as well as the (potential) employee, to whom an airport pass will not be issued/from whom an airport pass must be revoked, due to the results of the security examination.

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

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

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

In view of these considerations, the Ombudsman Board resolved unanimously, in the collegial meeting on May 12, 2006, that the official notification of the Federal Ministry of Transport, Innovation and Technology, with which the application of the plaintiff for access to files due to lack of right to defence was rejected, represents a grievance in public administration. In order to eliminate this grievance, the Federal Ministry of Transport, Innovation and Technology was issued a recommendation to ensure that the official notification subject to complaint, be officially rescinded, through the application of Article 68 para. 2 AVG 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991 - General Administrative Procedure Act 1991) and the notification dated September 20, 2005, which was delivered to the civil airport keeper, be delivered to the plaintiff, as well as in future cases, to clearly formulate the notification to the civil airport keeper as an official notification and also deliver this to the person affected.

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

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

5.2.2. Non-issuance of an official notification

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

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

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

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

5.3. Right to a fair trial (Art. 6 ECHR)

5.3.1. Excessively long duration of proceedings

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

5.3.2. Fee stipulation after 10 years

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

In its recent case law on the rule of law principle, the VfGH (Verfassungsgerichtshof – Austrian Constitutional Court) takes the general view that the principle that 'the legal system must provide adequate and efficient legal protection' (thus literally VfSlg. 14.702/1996) can be deducted from the rule of law principle. The purpose of legal protection devices required

under constitutional law 'is to provide a certain minimum of actual efficiency to persons seeking legal protection' (cf. in principle, VfSlg. 11.196/1986, 16.772/2002 etc.).

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

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

It must therefore be noted that the constitutional dictate of factual efficiency of legal protection includes a right to legal review within an adequate time period. The adequacy of the duration of proceedings will also need to be assessed according to the circumstances of the individual case, from a constitutional point of view. In doing so, the complexity of the case, from an actual and legal point of view, the behaviour of the party seeking legal protection and the authority in the proceedings and the significance of the matter for the party must be used as a basis for evaluation criteria. In doing so, the legislator is constitutionally obligated to create an authority structure, which can guarantee the handling of administrative proceedings within an adequate period of time. Therefore, regardless of the reasons having caused it (personnel shortage, organisational changes, shifting of responsibilities, unexpected increase in work, etc.), overburdening of the authority may never justify an intrinsic excessive duration of proceedings.

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

5.3.3. Judicial enforcement of the rights of neighbours

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

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

the business premises. With this, the legislator has significantly reduced the scope of responsibility of the trade authority, as well as the neighbourhood protection.

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

In the assessment of the circumstance of 'by non-punishable behaviour', the respective provision of the respective state police law for delineating punishable from non-punishable behaviour must particularly be considered, so that the moving forward of closing hours cannot be ordered, if the behaviour of guests outside of the business premises, e.g. can be sanctioned as undue noisiness, according to administrative penal law provisions. In practice, it is barely possible for the neighbour to prosecute those causing undue noise, as the identity of the respective persons are only known to him in exceptional cases and by the time the security authorities have arrived, they will have departed.

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

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

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

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

means, that such actions are avoided in future. The innkeeper should have prevented the nuisance through suitable measures (refusal to serve alcoholic drinks or threat/imposing of bans from entry, etc.), or at least have significantly contained them (Austrian Supreme Court August 29, 2000, 1 Ob 196/00f).

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

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

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

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

5.3.4. Court proceedings

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

The proceedings in the first legal process, until the hearing with conclusion of the proceedings on March 20, 2003, was characterised by the obtaining of several expert opinions, whereby this resulted in delays, in that the experts appointed by the court requested postponement due to overwork/returned the file without an opinion. It came to a further delay in the proceedings, because after the conclusion of the hearing on March 20, 2003, the

judgement was only prepared with a date of July 28, 2003, in contravention of the standardised period of four weeks in Sect. 415 Zivilprozessordnung (ZPO - Code of Civil Procedure).

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

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

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

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

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

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

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

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

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

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

5.4.1. 11-year duration of proceedings

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

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

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

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

5.5. Freedom of movement and residence, freedom of access and emigration

5.5.1. No passport or photo identification card for stateless persons

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

The complaints focused mainly on the need for a photo identification card, since such identification is required both by governmental authorities and private individuals, e.g. employers. On the one hand, the persons concerned may even not have the possibility to pick up mail deposited with their postal office. On the other hand, they do not have the possibility to leave Austria. The Fremdenpolizeigesetz (Aliens' Police Act) provides as condition precedent to issuing an alien's passport that 'the Republic of Austria has a positive interest' in issuing such travel document, a requirement that represents a major challenge for many persons concerned.

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

5.6. The Principle of Equality

5.6.1. Legislation

5.6.1.1. Treatment of students of nursing schools

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

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

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

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

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

5.6.2. Execution of the Law

5.6.2.1. Rejection of applications for exemption from the TV and Radio receiver fee on unsubstantiated grounds

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

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

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

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

Although the Federal Ministry of Finance guaranteed in its communication dated September 7, 2004 to implement this recommendation and stated in its communication dated June 20, 2006 that 'the Gebühren Info Service (TV and Radio Fee Information Service) had completed the project of including automatic explanations of the grounds in official notifications rejecting applications for exemption' and that the project had been launched in due time on May 25, 2006, the Gebühren Info Service (TV and Radio Fee Information Service) was not able, by the editorial deadline of this report, to include – in those official notifications which did not fully make allowance for the point of view of the party – a reasoning that complies with the provisions of the AVG and the requirements of the principle of equality. Repeated requests of the Ombudsman Board to the Federal Ministry of Finance concerning the progress made regarding the necessary adaptation of the EDP system have remained unanswered since February 2005 despite several queries (!), which itself represents a (further) administrative grievance. This gives rise to the impression that Gebühren Info Service (TV

and Radio Fee Information Service) is not interested, at least for the time being, in a legally consistent execution of the law which is compatible with the legal interpretation by the Supervisory Authority.

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

5.6.2.2 Limited duration of validity of and/or suspension of driving licences with unsubstantiated reasoning

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

As pointed out above, the VfGH has consistently ruled that official notifications founded on unsubstantiated reasoning are deficient to an extent that violates constitutionally guaranteed rights. An official notification that 'justifies' the limitation of the validity period of and/or the suspension of driving licences merely by reference to the respective legal provision, which allows such limitation and/or suspension, without giving any explanation why the respective requirements are fulfilled in the case at hand, violates the constitutionally granted right of all citizens to stand equal before the law.

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

5.6.2.3 Discrimination against married couples of mixed nationality by the Foreign Nationals Law Package 2005?

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

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

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

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

5.7. Data Protection

5.7.1 Inadmissible Dissemination of Sensitive Health Data

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

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

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

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

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

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

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

5.7.2 Inadmissible dissemination of data

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

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

Since no official notification had come into existence in the above sense in the case at hand, the written submission of January, 28 neither could be regarded as a complaint nor was the transmission of the data necessary for the Federal Pension Authority to exercise its statutory functions. Despite the good intention to facilitate the commencement of a com-

plaint, the forwarding of statements to the Linz Regional Court must therefore be considered as violation of the fundamental right to data protection laid down in Sect. 1 the DSG 2000 from an objective point of view.

5.8 Right to Respect of Private and Family Life

5.8.1 During the gathering of required information, 'incognito adoptions' must be taken into consideration

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

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

For the reasons set out in the Fundamental Rights Section of the 28th Report to the National Council and the Federal Council (p. 344), the Ombudsman Board is of the opinion that the application form does not meet the requirements of Art. 8 para. 1 ECHR. The Federal Ministry of Transport, Innovation and Technology was therefore advised on June 2, 2004 to alter the form in question in a manner that conforms with the Constitution, so that no required entries about 'Family name at the time of birth' nor 'Forenames of biological parents' be requested of the applicant.

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

5.8.2 Notification of closure of ban on residence proceedings

In connection with a complaint concerning the duration of ban on residence proceedings the Federal Ministry of the Interior informed the Ombudsman Board that official residence proceedings were initiated ex officio and that therefore the authority was under no obligation to render a decision pursuant to Sect. 73 AVG (Allgemeines Verwaltungsverfahrensgesetz - General Administrative Procedure Act). According to the Ministry of the Interior, Austrian legislation does not provide for an obligation to notify persons concerned of the stay of

proceedings. It argued that such notification was a service provided merely on a voluntary basis. The Ministry of the Interior argued that it was not necessary to regulate, by way of decree, the compulsory notification of persons concerned of stays of proceedings. This would also apply to expulsion proceedings.

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

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

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

5.9 The United Nations Human Rights Pacts

5.9.1 UN Convention on the Rights of the Child

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

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

Upper Austria, Vorarlberg and Salzburg have incorporated the UN Convention on the Rights of the Child into their constitutions.

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

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

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

5.9.2 Anonymous birth

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

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

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

Pursuant to the above-mentioned decree the 'anonymous birth' option is admissible in emergencies which might pose a serious threat to the health or life of the mother and/or her

child (e.g. in hopeless situations). The youth welfare agency has to conduct, if possible, a private conversation with the mother-to-be, who is not obliged to disclose her identity, and to inform her, among other things, about consultative institutions. In individual provinces of Austria, the youth welfare agency is expressly obliged under provincial legislation to inform women about the consequences of an anonymous birth of their children and to provide for any identification required later upon the mother's request (see e.g. Sect. 21 para. 1 lit. a NÖ Krankenanstaltengesetz (Federal Hospitals Act of Lower Austria)).

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

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

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

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

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

In the Ombudsman Board's view, it is extremely serious if such complex issues, which touch fundamental rights, are regulated merely by way of decrees issued by the Austrian Ministry of Justice and dealt with differently in each province (see Verschraegen in ÖJZ

2004, p. 1). Such a basic issue as that of anonymous birth should be harmonized between all provinces and regulated by a public legal act which provides legal claims for the persons concerned. The Ombudsman Office therefore encourages the creation of a clear legislative base for the 'anonymous birth' option.

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

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

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

5.9.3 Respect for the religious background of children

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

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

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

The City Administration Head Office informed the Ombudsman Board in its statement of February 28, 2006 that efforts are made to take the religious, ethnic, cultural and linguistic background of children duly into account. Since, in most cases only Austrian families take on tasks as adoptive or foster parents who mostly belong to the Catholic or Protestant denomination or have no denomination, there is a lack of families with the same religious, eth-

nic, cultural and linguistic background. However, the authorities have been instructed to ensure that the selected adoptive and foster parents are unbiased to the different cultures and denominations and that they show the children placed in their care the family background of their original families without prejudice.

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

Knowledge of one's own background including the protection of one's religious background and identity is an elementary need of every human being. This must be taken into account also when selecting a foster or adoptive family. It is clear that the various interests in issue have to be balanced and fulfilled as far as possible: on the one hand, the interests of the natural parents and the child in protection of their religious background, on the other hand the child's interest in being integrated into the community of his foster or adoptive family. Therefore, a family with the same denomination will be preferred in the selection process of a foster or adoptive family, where possible. Where this is not possible, it must be ensured that also in a foster or adoptive family belonging to another denomination the religious background of a child is adequately taken into account

5.10 Action to combat discrimination

5.10.1. Discrimination on the ground of sex

5.10.1.2 Congratulations only to male Olympic athletes?

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

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

In practical terms, the Ombudsman Board pointed out also the need for a gender-sensitive use of language for every form of information provided by the government. The term Olympionike used in the advertisement at issue linguistically clearly refers to male participants in Olympic Games; therefore, male and female linguists recommend to use the term Olympi-

onikin, Olympionikinnen for female athletes. Apart from the name and the 4-year intervals, such sporting events have nothing in common with the competitions staged in ancient Olympia in which exclusively men were allowed to participate.

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

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

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

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

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

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

5.10.2. Discrimination on account of nationality or ethnicity

5.10.2.1. Discriminatory Limitation of Family Allowance for Non-Austrian Parents

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

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

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

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

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

Art. 12 of the EC Treaty prohibits any discrimination of EU citizens on the ground of nationality. With regard to welfare law, Art. 3 of Regulation (EEC) number 1408/71 provides that persons resident in the territory of one of the Member States to whom this Regulation applies are subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State. This prohibition of discrimination applies in particular to family benefits.

In the course of the investigation procedure of the Ombudsman Board, the competent Bundesministerin für Soziale Sicherheit, Generationen und Konsumentenschutz (Federal

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

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

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

In its meeting of October 13, 2006, the Ombudsman Board therefore agreed by unanimity that the limitations of the claims to family allowance represent grievances in the administration of public affairs in both cases. The uncontested statement of the competent secretary of the tax authority that there is no law prohibiting the authority to require non-Austrian recipients of family allowance to submit supporting documents on a regular basis represents another grievance.

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

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

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

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

5.10.2.2. Family benefits for children of third-country nationals

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

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

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

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

5.10.2.3. Efficient prosecution of discriminatory job and housing advertisements?

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

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

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

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

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

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

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

5.10.3. Discrimination on the ground of illness or disability

5.10.3.1 Prohibition to use public transport in the case of compulsorily notifiable disease

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

In the course of its official review, the Ombudsman Board compared and systematically reviewed the relevant legal bases for the transportation of persons. Furthermore, it obtained a medical opinion to clarify which diseases bear an actual risk of contagion in public transport vehicles. On the basis of these investigations, the Ombudsman Board concluded that only open pulmonary tuberculosis bears a direct risk of contagion for other persons in public transport vehicles. In the case of all other existing and compulsorily notifiable infectious diseases there is no direct risk potential in means of public transport, taxis, leased cars etc. The Ombudsman Board is therefore of the opinion that an exclusion of all these persons from carriage in public service vehicles on the basis of legal provisions and/or transport conditions constitutes a discrimination on the basis of a disease. The Ombudsman Office addressed the competent Federal Minister for Transport, Innovation and Technology and recommended an amendment of the transport conditions.

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

Furthermore, the Ombudsman Board informed the transport undertakings participating in the public transport association about its efforts and requested them to apply for an

amendment of any deviating transport conditions within the meaning of the above-mentioned regulation.

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

5.10.3.2 Sign language interpreter for deaf people as requirement for a fair trial

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

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

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

A basic element in every fair trial is the active participation and the opportunity of persons concerned, who are not the object but subject of the proceedings, to state their case. The 'right to good administration' pursuant to Article 41 of the Charter of Fundamental Rights of the European Union therefore includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. It would not comply with the principle of a 'fair trial' to not provide persons who do not understand the language of the proceedings with the services of an interpreter (see Hauer/ Leukauf, Handbuch des österreichischen Verwaltungsverfahrens, 2003, p. 430).

Accordingly, Sect. 39 AVG (Allgemeines Verwaltungsverfahrensgesetz - General Administrative Procedure Act) provides that a party or a person to be heard who does not understand German, is deaf-mute, deaf or mute shall be provided with the services of an interpreter, where necessary. The tasks of a 'labour trainer' should be clearly distinguished from

those of a qualified interpreter. Therefore, qualified sign language interpreters must be appointed in proceedings which directly affect the rights of deaf or hard of hearing people.

5.10.3.3 Barrier-free access to open-air metro

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

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

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

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

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

State), the Ombudsman Board calls for a fast implementation of barrier-free access and participation in public transport for people with disabilities.

5.10.3.4 Ticket-vending machines of ÖBB

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

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

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

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

5.10.3.5 Trains for people with special needs

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

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

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

5.10.3.6 No fare reduction for invalidity pensioners

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

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

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

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

5.10.3.7 Fragmented procedures for people with disabilities

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

Also in that reporting year, the Ombudsman Board was faced with many complaints of persons concerned. It provided help in connection with purchases or adaptations (see Case Section, Chapter on People with Disabilities and Austrian laws on protection for special victims, p. 212, point 10.1.3, German version).

5.10.4. Discrimination on the ground of age

5.10.4.1 Nobody responsible for alleged discrimination on the ground of age?

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

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

Since the employer requested a reply from the complainant within a few days, she immediately turned to several members of the Federal Equal Treatment Commission, which is responsible for the public service, and to the Anwaltschaft Gleichbehandlung-Bund für Bundesbeamte (Ombudsman for Equal Treatment of Federal Officials) in the Federal Ministry of Finance. All these bodies, however, declined a treatment of her complaint on the grounds that they were not responsible for public employees working for hived-off undertakings. The complainant then turned to the Anwältin für Gleichbehandlung in der Arbeitswelt (Ombudsman for Equal Treatment in the World of Work), responsible for the private sector of commerce and industry, who also declined a treatment of her complaint on the same

grounds, but then took action for the complainant without finally resolving the responsibility issue.

In most cases of alleged discrimination, the competent bodies must take immediate action. This also applies to the present case: The reduction in weekly working hours announced by the employer and rejected by the complainant and/or the envisaged transfer to a pool was to be implemented with immediate effect. The Bundes-Gleichbehandlungsgesetz (Federal Act on Equal Treatment in the Public Service) provides a range of contact points for these cases: Equal opportunities advisors act as first contact points in the individual sectors. Their tasks include the treatment of requests, complaints or notices. They are, in particular, entitled to immediately and directly lodge disciplinary notices with the competent civil service authority (Sect. 27 para. 4 of the Federal Act on Equal Treatment in the Public Service).

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

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

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

In each case of transfer in the interests of the service, officials must be enabled to raise objections within two weeks (Sect. 38 BDG - Beamtendienstgesetz - Civil Service Act). Since the complainant was not only employed under public law, but also assigned to a hived-off undertaking ('split employment'), she was protected against her transfer under both public service regulations and the works constitution. The latter preserves older employees against a deterioration of their situations. Sect. 105 para. 3 ArbVG (Arbeitsverfassungsgesetz - Labour Constitution Act) provides that older employees must be granted special pro-

tection in view of the fact that their employment has been uninterrupted and lasted for many years and that their age is expected to make their reintegration in the labour market difficult. Furthermore, transfers which result in a deterioration in the working conditions, require the approval of the works council (Sect. 101 ArbVG - Arbeitsverfassungsgesetz - Labour Constitution Act), which had not been obtained in advance.

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

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

Finally, we would like to point out the following in connection with this case: Under the EU discrimination directives the Member States are obliged to establish independent bodies for the protection of persons who have been subject to discrimination, which deal with complaints, review cases, give recommendations, carry out research on discrimination and perform proactive public relations work. The directives expressly provide that these bodies may be part of an independent institution that is responsible for the protection of human rights or the rights of individuals (e.g. Art. 13 of the EU Directive on Racism at national level; see also the 29th Report of the Ombudsman Board to the National Council and the Federal Council, page 307). With the adoption of the 'Paris Principles' - Principles relating to the status of national institutions (GV-Res.48/134, 1993) in 1993, the United Nations established quality standards for independent, autonomous, non-judicial human rights bodies. The criterion of independence, however, does not apply to the institutions established by the Austrian laws on equality.

Both the equal opportunities commissions for the public service and the private sectors and the ombudspersons for equal opportunities are established within the Bundesministerium für Gesundheit und Frauen (Federal Ministry of Health and Women), which pays the personnel and operating expenses from its budget. This case shows how important the provision of prompt and qualified advice to persons concerned is. At present, there is only one ombudsperson responsible for the protection against discrimination in the private sector (protection against discrimination on the basis of sex excepted) in all federal government institutions. Also only one ombudsperson has been made responsible for discrimination on

the ground of ethnicity, in social protection, in the residential and education sector and in other sectors in all federal government institutions. At present, both share one employee. This lack of personnel shows that there is still a long way to go to establish efficient and effective protection against discrimination.

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

5.10.4.2 Expensive bus ride within a school excursion

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

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

5.10.5. Discrimination on the ground of social status

5.10.5.1 No electronic health card for social assistance recipients

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

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

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

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

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

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

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

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

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