

# DACHVERBAND DER VERWALTUNGSRICHTER - VRV

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## Rule of Law Report to the European Commission

I am giving the contribution as representative of the Umbrella Association of Administrative Judges of Austria

Main areas of work: justice systems

the main areas of presence online: [www.verwaltungsrichter.at](http://www.verwaltungsrichter.at)

Description: Umbrella Association of Administrative Judges of Austria consists of :

- Verwaltungsrichtervereinigung
- Vereinigung der Finanzrichter
- Vereinigung der Bundesverwaltungsrichter
- Vereinigung der Richter des Verwaltungsgerichtshofs

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Publication of our contribution: Public!

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Vienna, 08/03/2021,



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(Dr. Königshofer)

## I. Justice System

### A. Independence

#### 1. Appointment and selection of judges and prosecutors

##### a.\ selection and appointment of presidents of Austrian administrative courts

No changes compared to the RoL Report of the EC of 30 September 2020, SWD(2020) 319 final (hereinafter: AEAJ report 2020).

The selection and appointment of all presidents of all administrative courts (including Supreme Administrative Court) remain in the full (discretionary) power of the executive power and at the same time court presidents have unchanged broad powers and duties in judicial administration matters.

See the opinion CCJE-BU(2019)3 of 29 March 2019.

See the recommendations of GRECO, GrecoEval4Rep(2016)1 on Austria, further evaluation round: GrecoRC4(2018)15 of 17 July 2019 on Austria and now the recent one: GrecoRC4 Interim (2020)7 of 1 March 2021 on Austria.

*One additional remark: Some federal provinces and the Ministry of Finance concerning the Federal Fiscal Court provide for a kind of “expert objectification commission” which has no decision-making powers, does not work transparently and is only involved in the selection process. It can give scores and provides their opinion to the federal government. These committees are formally not subordinated to orders but members of judiciary are underrepresented without majority. Neither any legal protection mechanism nor transparency exists concerning the decisions (opinions) of this committee.*

##### b.\ selection and appointment of judges of administrative courts first instance:

No changes compared to the AEAJ report 2020:

Generally, the general assembly of judges of a court (or a judicial committee, elected by the judges where the court president presides) can make non-binding proposals of three candidates per one vacant judicial post.

There is no uniform selection procedure:

In Vienna, two different selection procedures are done – the first one by the administrative authority of the government of the province and the second one of the judicial committee of the administrative court.

In all other administrative courts first instance the selection procedure is only done by (a kind of) judicial committee of the respective administrative court. Provisions vary considerably (e.g. the court president appoints judges of the court to be member of the selecting panel, in another regional administrative court the selection is done by a judicial senate, however, the local government has a right to give an opinion, in the two federal administrative courts the selection is done only by judicial committees of the respective court).

They lack transparency as well as detailed, clear criteria. Neither exists a right for unsuccessful candidates to challenge the decision of these administrative authorities, nor are even reasoned decisions made available to applicants.

Selection practice of some of the selecting administrative authorities in the provinces (e.g. in Vienna and Lower Austria) shows that there have been cases where they do not follow the recommendations of the judges committee: because not the first (out of three) proposed candidate is selected (but number two or three, although the first choice would have been available), or none of the proposed candidates (but someone else, not listed) was appointed.

See also the recent Interim Compliance Report of GRECO: GrecoRC4 Interim (2020)7 of 1 March 2021, points 27, 30, 33, 35 and 37 concerning concerns raised about the appointment procedures for judges.

Specific comments to points 30 and 35 of the Greco-Report:

The Austrian authorities have reported misleadingly to Greco concerning answer point 30 (the plenary assemblies can NOT guarantee the pre-selection of newly appointed judges, their proposals are NOT binding, see above and see Art. 134 para. 2 Austrian Federal Constitution). The answer of Austrian authorities is not in line with Austrian laws and facts.

The Austrian authorities have also reported misleadingly to Greco concerning answer for administrative judiciary, last sentence of point 35 (the appointment procedures of administrative courts are clearly NOT governed by the existing rules for the Supreme Administrative Court – the plenary assembly of the Supreme Administrative Court could always make binding proposals). The answer concerning administrative judiciary is not in line with Austrian laws and facts

In some administrative courts, a new trend seems to emerge that the respective court president selects judicial assistants who are supposed to be better qualified for later applications as judges. This system does not cushion negative effects: again it is only the court president having de facto main influence (on court presidents see CCJE-BU(2019)3 of 29 March 2019) and would be similar weakness like in the Austrian ordinary judiciary (see Wiener Zeitung of 14 January 2021, Univ.Prof. Peter Hilpold, "Unabhängigkeit der Gerichte vor Gericht", <https://uvsvereinigung.wordpress.com/2021/01/18/independence-and-efficiency-1-unabhaengigkeit-der-gerichte-vor-gericht/> [requested on 06.03.2021]).

See also the draft judicial reform of Hungarian Administrative Judiciary (so far put on ice) – which specifically took the Austrian system as role model: The European Commission for Democracy Through Law (Venice Commission) took a clear stand against provisions which would be less weak than the Austrian respective provisions on judicial appointments

(see Opinion no. 943/2018, CDL-AD(2019)004, para. 56 et seq.).

*When Austrian authorities argue that changes of the system would not be in line with the Austrian Constitution, priority of EU law and Art. 6 ECHR being as well in the rank of an Austrian constitutional law must be kept in mind. Recent developments in jurisprudence of*

*ECtHR and CJEU show that there is a need to make legislative changes in line with European standards.*

## **2. Irremovability of judges, including transfers of judges and dismissal**

No dismissal of administrative judges has taken place – yet.

However, the evaluation system may automatically (!) lead to a dismissal of a judge (at the Federal Administrative Court and Federal Fiscal Court: obligatory retirement). See below under A.6.

### **Promotion of judges and prosecutors**

Practically no promotion within judiciary is available, except to apply for posts in the ordinary judiciary.

Organizationally, the systems of administrative courts first instance and the Supreme Administrative Court are not linked. One third of the members of the Supreme Administrative Court must have served as ordinary judges before as well as 25% of the judges of the Supreme Administrative Courts must have served in public administrations in the provinces before. Administrative judges can also apply and in these cases, the respective court presidents provide informal, non-formalized statements on judges to the Supreme Administrative Court (again, see opinion CCJE-BU(2019)3 of 29 March 2019).

3. ...

4. ...

## **5. Independence (including composition and nomination of its members), and powers of the body tasked with safeguarding the independence of the judiciary (e.g. Council for the Judiciary)**

- See above under A.1., below under A.6, B.12
- In some of the Austrian provinces no legislation exists, that the president of the administrative court is not subordinated to orders of the government of the province, in these provinces (e.g. Vienna) justice administration is done by the governments of the provinces to a great extent (see opinion CCJE-BU(2019)3 of 29 March 2019). In those provinces where the court president is clearly not subordinated to orders, the president is obliged to report on all matters to the local government (which acts in its function as judicial administration authority).
- At the Austrian (Federal) Fiscal Court – which primarily does the legal control of administrative acts of the Minister of Finance – any invitation to tender for vacant judicial posts requires the approval of the Minister of Finance. This is not even in line with the national service rules for ordinary judges (which applies – in principle - also to all federal administrative judges). Thus, calls for vacancies do not take place in a timely manner and the replacement period takes about 12 months. In addition, several months pass after the

judicial senate of the Fiscal Court has provided the proposals until the appointment is done. By then quite many candidates are no longer available after this long period - generally with exception of candidates who work already in the financial administration anyway. This practice leads to a permanent reduction of about 10 % of the judiciary as well as appointment of primarily public servants of the public financial administration.

Also all personnel and material resources for the ongoing operation including judicial and non-judicial personnel as well as IT-hardware and software are provided by the Minister of Finance, thus the (legally controlled) administration decides on the equipment with personnel and material resources of the court (which is competent to do the legal control). This weakness combined with weaknesses enumerated above under A.1 turn out to be problematic. See also below under B.12.

## **6. Accountability of judges and prosecutors, including disciplinary regime and ethical rules.**

- No code of ethics exist for administrative judges.

Compliance Guidelines, i.e. a code of conduct and issued by the Minister of Justice, apply to the Federal Administrative Court. These guidelines apply to all staff of the Ministry of Justice. This is not in line with European standards. Ethic rules should primarily be drafted by peers, see also CCJE Opinion 21(2018), point 31 and CCJE Opinion 3(2002), point 49).

- No body exists where judges can turn to when they have problems concerning possible infringements of their independence (see point 8 of the CM/Rec 2010(12). Furthermore, in many areas of judicial administration – which also affect independence of judges – no subjective right exists and thus many areas are not justiciable.

- All administrative courts first instance have an event-related evaluation system, done by a judicial senate of the respective court.

As the evaluation is processed by a judicial senate (which in most courts the president presides) either no or only a limited judicial control is available (as it is regarded to be an expertise. Thus, roughly spoken, the standards of judicial control by the Constitutional Court and Supreme Administrative Court are arbitrariness and violation of constitutional provisions/fundamental rights). However, it is not clarified yet, if and in which scope a judicial control exists against decisions of the judicial senate (for the Federal Administrative Court probably no judicial control at all exists).

In the course of ongoing evaluation proceedings at the Federal Administrative Court no fundamental principles of a fair trial (i.e. right to be heard, right to involve a person of trust) apply. Probably no judicial control at all is available against the evaluation decision of the judicial panel.

In addition, it is highly problematic that two subsequent negative evaluations automatically lead to an ex lege (!) dismissal of this judge (Federal Administrative Court and Federal Fiscal Court: obligatory retirement). This is a clear violation of Art. 6 ECHR, CCJE Opinion

17(2014), point 29, 39 and 49 (12).

## 7. Remuneration/bonuses for judges and prosecutors

### remuneration of judges:

The situation concerning the Federal Administrative Court and the Fiscal Court of remains unchanged.

According to point 54. of the CM/Rec (2010)12 judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.

The maximum salary of a judge at the Federal Administrative Court of Austria and the Federal Fiscal Court adds up to € 7.876,60 pre-tax. The maximum retirement remuneration of a judge adds up to € 3.477,42 pre tax. Judges of that court are therefore entitled to a maximum pension of only 44 % of their previous salary.

The amount of the pension was previously calculated on the basis of the salary of the last month in the job. Now the amount of the pension is calculated on the basis of the earnings during the whole professional life including the periods of education and the early years of professional life with low income as well as the times of maternity or paternity leave. This leads to the shocking result that nowadays academics are not able to reach the maximum pension. On average, the pension of judges only adds up to **30 % of the previous salary**.

This fact **violates point 54 of the CM/Rec (2010)12**: The judicial independence guaranteed by point 54 of the CM/Rec (2010)12 must also be safeguarded through the remuneration of the judge. The size of the remuneration of retired judges should reflect the special nature of service and the heavy responsibility borne by judges.

The Austrian government is therefore obliged to appropriately compensate judges and their families throughout the judges' lives, and afford them an appropriate living standard according to their service rank, responsibilities of office, the value of their judicial power and their civil service to the public.

But the Austrian government does not fulfill this obligation: The salaries of retired judges of the Federal Administrative Court and the Federal Fiscal Court are evidently insufficient, as pointed out before. The Austrian legislator inappropriately reduced the income of retired judges through cutbacks to pension scheme especially by transferring judges from the previous pension scheme for civil servants into the general pension system which does not reflect the specifics of the working life of judges, e.g. the long periods of training and low wages at the beginning of the professional life which lead to an inappropriate reduction in retirement pension funds for judges compared to the previous system.

The fact that this pension level is inappropriate for an office that should be attractive to highly qualified personnel shows when comparing remuneration packages of judges to the remuneration packages of equally qualified employees in the private sector. On the one hand, the salaries in the private sector are much higher compared to that of judges, especially in the early years of the professional life. On the other hand, private employers do substantially invest in supplementary

private pension fund provisions for their employees to match their retirement pension to their working salary, whereas the investments in supplementary private pension fund provisions by the Austrian Government are by far not sufficient to match pension of judges to their working salary. This difference is aggravated by the fact that judges being civil servants do not enjoy severance packages as employees in the private sector do.

8. ...

9. ...

#### **10. Significant developments capable of affecting the perception that the general public has of the independence of the judiciary**

Already in the past, several public political statements against judges and judicial decisions were part of an open public debate, affecting the perception of the public:

- a) In the media a timely unexpected tender to start a call for a selection procedure for a new president of the administrative court Burgenland was initiated end of July 2018. The running president was due to retire within approximately the following 1.5 years.  
This was heavily and publicly criticized as being politically influenced.  
Under these circumstances the running president of the administrative court Burgenland — together with most of the judges of this court (many of them have posed a candidature in this application procedure) — has organized a press conference in December 2018, openly addressing these deficiencies (manner of the call for applications for the post as court president). As a reaction to this the (at that time) designated governor of Burgenland (who is now governor of Burgenland) has openly criticized the judges and the current president of the administrative court Burgenland, also openly stating that this circumstance would disqualify them for the future position as court president "according to his personal opinion". See <https://uvsvereinigung.wordpress.com/2018/12/17/griss-weist-aussagen-von-landesrat-doskozil-scharf-zurueck/> [requested on 06.03.2021] In fact none of the judges of the court has been appointed.
- b) A publicly highly disputed case concerned the complaint against the administrative decision to allow a third runway on the Vienna Airport. The Federal Administrative Court denied this and quashed the administrative decision. As a reaction to this all nine governors of the provinces publicly demanded to abolish certain procedural rights/duties of judges (namely to decide in the merits of the case). The nine provincial governors are not only heads of those administrations, legally controlled by the administrative judges, but at the same time are also heads of the respective authority, selecting judges and partly for judicial administration of the administrative court in this province. See [https://uvsvereinigung.files.wordpress.com/2017/04/brief\\_lh.pdf](https://uvsvereinigung.files.wordpress.com/2017/04/brief_lh.pdf) [requested on 06.03.2021]
- c) In February 2020 the running Federal Chancellor told journalists – off records – that the anti-corruption public prosecution service (which is part of the Austrian ordinary judiciary) would be a network of red (i.e. social- democrats) public prosecutors which specifically would attack conservative politicians. See e.g. [https://www.kleinezeitung.at/politik/innenpolitik/5763959/Causa-Casinos\\_Wirbel-um-KurzAussagen](https://www.kleinezeitung.at/politik/innenpolitik/5763959/Causa-Casinos_Wirbel-um-KurzAussagen) or <https://www.sueddeutsche.de/politik/oesterreich-des-kanzlers-kampf-mit-der-justiz-1.4793333> and the public call of presidents of Higher Courts: <https://uvsvereinigung.wordpress.com/2020/02/20/olg-praesident-sieht-politisch->

motiviertere-angriffe-auf-die-justiz/ [each requested on 06.03.2021]

<https://www.nzz.ch/international/oesterreichs-afsaeren-die-oevp-von-kurz-kaempft-mit-der-justiz-ld.1603931?reduced=true>

Recent developments:

- d) In February 2021 the anti-corruption public prosecution service (which is part of the Austrian ordinary judiciary) started investigations against the running Minister of Finance because of corruption allegations. Allegedly, also the Federal Chancellor could be involved in this. The Federal Chancellor wrote a public letter to the prosecution service warning the public prosecutors that they would ruin the Austrian reputation because of falsehoods and false assumptions. He could testify so. See e.g. <https://www.eurotopics.net/de/256830/oesterreich-mischt-sich-kurz-in-die-justiz-ein> and <https://www.capital.de/wirtschaft-politik/versinkt-kanzler-kurz-im-ibiza-sumpf> [requested on 06.03.2021]
- e) In 2020, the Minister of Justice was appointed as judge at the Austrian Constitutional Court with no cooling off period. This judges as well as several other judges of the Constitutional Court also exercise (lawful) sideline activities as solicitors (lawyers). <https://uvsvereinigung.wordpress.com/2018/02/14/richterernennung-2-ex-justizminister-soll-verfassungsrichter-werden/>  
In February 2021, the public prosecution service started investigations against this specific judge (the former Minister of Justice) who allegedly provided some inside information to his client – in his function as solicitor.
- f) Another judge of the Constitutional Court is also active solicitor for a sideline activity (or vice versa is deputy judge and is legal representative for the Austrian Minister of Finance (who is under suspect of corruption ) <https://twitter.com/fschweitzer/status/1360344015560970245> and see in general: <https://diepresse.com/home/recht/rechtallgemein/5561473/Verfassungsrichter-soll-nicht-mehr-Anwalt-sein-duerfen>

This is a violation of point 13 of the CM/Rec (2010)12 and of point 18 of the CM/Rec (2010)12 as well as of point 52 CCJE Opinion 18 (2015), because members of the Austrian executive power continuously show public criticism against judiciary in a way, which undermined public confidence in the judiciary and have publicly acted which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal. For the public perception, it is irrelevant if the criticism is addressed against administrative judges or ordinary judges. In all cases, all judges are affected.

## **B. Quality of Justice**

### **11. ...**

### **12. Resources of the judiciary (human/financial)**

- a) The situation remains unchanged, see AEAJ report 2020: presidents enjoy broad and unbalanced powers concerning the court organization, infrastructure and management of court staff and material

resources (see in detail [opinion CCJE-BU\(2019\)3 point 25, 26 and 36](#)). Judges have no consultation or participation rights in these main areas of judicial administration, which are exercised by the president. Concerning the specific situation of the Federal Fiscal Court for calls and tenders of selection, proceedings see also above under A.5.

- b) A lack of human resources exists in some of the administrative courts first instance: specifically at the Courts situated in Vienna, i.e. the Federal Administrative Court, Administrative Court of Vienna (here: court staff, see e.g. <https://www.diepresse.com/5940441/richter-beklagen-personalnot> ), Federal Fiscal Court.

Concerning the Federal Fiscal Court see also above under A.5. In addition, there is a remarkable lack of court staff, the number of vacant posts for court staff – which are scheduled in the budgetary plans for the court - have been reduced and transferred to the Minister of Finance and its budget. Judges have to perform many additional administrative tasks in order to administer justice. In addition, the Austrian Court of Auditors has openly monitored these deficiencies and issued specific recommendations for a better IT and staff support for the Federal Fiscal Court (see e.g. final recommendations 1, 4, 6, 7, 9, 11, 13 in [https://www.rechnungshof.gv.at/rh/home/home/Bund\\_2021\\_1\\_Bundesfinanzgericht.pdf](https://www.rechnungshof.gv.at/rh/home/home/Bund_2021_1_Bundesfinanzgericht.pdf)

### 13. Training of justice professionals

- a) The facts reported by AEAJ in 2020 remain unchanged: No independent authority exists, which ensures in-service training programs for the approximately 750 administrative judges.

The "Austrian Academy of Administrative Justice for Law, Management and Innovation" – founded by all presidents of the administrative courts (see again [opinion CCJE-BU\(2019\)3](#)) and two Austrian universities – does not have a legal foundation and is regarded to be an informal organization (see President of the Supreme Administrative Court, Rudolf Thienel, *Zeitschrift für Verwaltungsgerichtsbarkeit*, ZVG 2020, 35, Heft 1, page 36 "Qualifikation von VerwaltungsrichterInnen – System und Entwicklung").

This construction lacks basic standards to fulfil the criteria of a proper training institution for judges: not chaired by a judge and it is not an independent institution.

The lack of an independent authority to ensure in-service training programs violates points 56 and 57 of the CM/Rec (2010)12 and European standards (see [CCJE Opinion No. 4 \(2003\)](#) as well as point 8 of Magna Carta of Judges.

- b) no initial training at all is provided by law nor is such a training practically available for newly appointed administrative judges due to the lack of an independent training institution. For newly appointed administrative judges specific – voluntary – trainings organized by the above mentioned Academy are offered. This fact is not in line e.g. with point 8 Magna Carta of Judges which foresees that initial training is (also) a right for judges.
- c) Continuous trainings on the European level (EJTN):

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- c) Continuous trainings on the European level (EJTN):

Undoubtedly, trainings on the European level gain more and more importance in the multi-level legal regimes as well as needs to fulfil the tasks as a European judge.

Due to the weaknesses of the Austrian system (lack of training institution and see above under A.1 and A.5 as well as federal structures in Austria), the Austrian Association of Administrative Judges (formerly Association of Members of Independent Administrative Tribunals) had signed an agreement with the Austrian Minister of Justice (who is member of EJTN) in 2006.

Since then it was agreed that Austrian administrative judges could fill “vacant places” in the continuous judicial training programs of EJTN (always being mediated by the Minister of Justice who is member of EJTN). This co-operation has worked well and all administrative judges were well informed on the programs with options to apply. Approximately 10% of the Austrian administrative judges have participated in seminars and exchanges until March 2020.

However, the Austrian Minister of Justice quit this agreement without a proper clarification beforehand and since December 2020 the presidents of the administrative courts organize the selection and ranking of candidates for European continuous EJTN trainings.

Since then the judges of several administrative courts first instance have not received any news, any information on ongoing seminar- programs of EJTN and are cut off European trainings. Judges of the Federal Fiscal Court have received the training schedule only recently so that some seminars could no longer be attended.

***14. Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic)***

Digitalization in general needs to be boosted within administrative judiciaries.

However, in fact on the level of administration measures to digitize administrative proceedings do not take into account that courts would review the administrative decisions later on. Administrative authorities do not adequately consider the needs to have an effective judicial protection. The different administrative courts apply different technological systems.

Several administrative courts use electronic file systems, but not all yet.

Digitalization based on the pandemic requirements was only partly boosted.

Due to COVID-19 restrictions the Federal Fiscal Court in Vienna has access only to two rooms to be used for oral hearings. Firstly, the amount of rooms is by far not sufficient to grant an effective judicial protection within reasonable time and secondly, the Ministry of Finance needs to approve each time when the rooms are needed for oral hearings. In certain cases the Ministry has denied so for own demands.

**15. ...**

**16. Geographical distribution and number of courts/jurisdictions (“judicial map”) and their specialisation**

For the judges of two federal administrative courts first instance, the Federal Administrative Court<sup>1</sup> and the Federal Fiscal Court, the same service rules apply as for ordinary judges (Service Act for Judges and Public Prosecutors).

Greco recommended adequate measures to be taken so that administrative judges of the federal courts and of the provincial courts are subject to appropriate and harmonized safeguards and rules (see GrecoRC4 Interim (2020)7 of 1 March 2021 on Austria).

No such efforts have taken place so far. That the Federal Administrative Court functions as disciplinary court for judges of the Viennese Administrative Court does not constitute an adequate measure to make the rules more unified, transparent and clear. See point 19 of Greco Report 1 March 2021, recalling the need of reforms in the administrative judiciary because attempts of political interference in the judiciary remain a reality.

Although the Constitutional Court has pronounced that there is a homogenous notion "judge" in the understanding of the Austrian Constitution (see point 21 of Greco, 1 March 2021), neither the federal nor the provincial Austrian legislators have made further efforts. Greco, point 25 of the report of 1 March 2021, also confirmed this. Very often the specific service rules, specific organizational provisions are not transparent; it is hard work to find out about specific judicial structures of other administrative courts. The only joint provisions are the few provisions of the Austrian Constitution.

Concerning Federal Administrative Court and Federal Fiscal Court:

Even though the service rules applying for judges of the Federal Administrative Court and Federal Fiscal Court are unified with judges from ordinary judiciary, certain adverse exceptions exist (e.g. that the judicial association has no participation rights in the continuous training program and selection of new judges and e.g. that for the new tender for selection proceedings the president of the Federal Fiscal Court needs to get the approval of the Minister of Finance).

C. ...

17. ...

## II. Anti-Corruption framework

A. ...

18. ...

### B. Prevention

#### 19. Integrity framework including incompatibility rules (e.g.: revolving doors)

For administrative judges no code of ethics exist. No specific continuous training exists (with exception of the compliance guidelines of the Minister of Justice), no initial training exists in which

integrity. In the course of trainings offered by the above-mentioned “Austrian Academy of Administrative Justice for Law, Management and Innovation” a three hours training on judicial ethics is offered (see above, B.13).

**20....**

#### **21. Rules on preventing conflict of interests in the public sector**

So far, rules exist for all administrative judges that prohibit holding a judicial office and an office in the executive or legislative branch at the same time. In addition, specific provisions to regulate the exercise of any sideline activities exist.

However, recently the provisions for incompatibilities for justices at the Austrian Constitutional Court give rise to certain public negative perceptions concerning judiciary as such (see above, A.10).

**22....**

**23....**

#### **24. Measures taken to address corruption risks in the context of the COVID-19 pandemic.**

- State aid measures:

The Federal Fiscal Court is not yet involved in state aid or tax law issues.

The emergency financial grant programs/subsidies are generally granted based on by-laws. There is no justiciable individual right to receive such a grant. In addition, there is no parliamentary control on the way of distribution of these grants.

- Vaccination program:

Unlike in Germany no by-law/ordinance or law exists to regulate the number, amount and local distribution of vaccines. The Minister of Health has issued a vaccination program, which is adapted regularly. The execution of this program is not transparent. The public prosecution investigates certain cases in which other persons than the respective priority group were vaccinated.

**25. ...**

#### **C. Repressive measures**

**26- 28. ....**

### **III. Media authorities and bodies**

**29- 37 . ...**

#### **IV. Other institutional issues**

##### **A. The process for preparing and enacting laws**

**Stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), transparency of the legislative process, rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions).**

38. No change of reported facts, see report AEAJ 2020. See also point 9 of the recent Greco report, 1 March 2021. participation rights or other consultation mechanisms would be important in order to balance the broad powers of court presidents.

39...

##### **40. Regime for constitutional review of laws.**

No changes to 2020, see AEAJ report 2020.

##### **41. COVID-19: provide update on significant developments with regard to emergency regimes in the context of the COVID-19 pandemic:**

###### **- judicial review (including constitutional review) of emergency regimes and measures in the context of COVID-19 pandemic**

The Austrian system of constitutional control provides for the Constitutional Court to be the only and central "negative legislator". Thus, also in COVID-19-cases the administrative courts must not leave unconstitutional provisions unapplied but have to refer the question of constitutionality (legality) of a legal norm to the Constitutional Court.

Unlike in Germany, administrative courts are not involved in the direct legal control of ordinances/by-laws, because also the control of legality of by-laws/ordinances lies only in the hands of the Constitutional Court.

Due to the fact that legal provisions change, are adapted, or they are newly issued approximately all 10 days, the question of constitutionality (legality) of each legal norm in each single version needs to be referred to the Constitutional Court. For the time being, administrative judges are involved to adjudicate in administrative criminal cases as well as some compensation proceedings.

No procedural framework for a kind of urgent proceedings or interim relief exists for proceedings pending before the Constitutional Court.

Before the Constitutional Court the proceedings to review the proportionality of these measures (under certain conditions a direct application can be made before the Constitutional Court without making the detour via administrative court proceedings) took and takes months without any procedural possibility to suspend these measures or parts of them by an interim order in case they are unproportioned. The Constitutional Court has quashed several ordinances topic-wise which had been in force in spring 2020.

No effective – namely timely at most in order to protect fundamental rights - remedy exists (like “urgent procedures”) to challenge the lawfulness of such measures. The need to provide individuals with effective recourse in the event that the government violates their human rights has also been stressed by the Venice Commission (CDL-AD(2020)014 of 19 June 2020, point 87). Also the Associations of Austrian Administrative Judges have openly demanded that urgent proceedings should be established. (see e.g. <https://uvsvereinigung.wordpress.com/2020/04/13/verwaltungsrichter-fordern-rascheren-rechtsschutz/> [requested on 07.03.2021]).

This is even more relevant as the administrative measures (had to) exclude or widely limit fundamental freedoms and fundamental rights of the citizens.

The executive power knew about this fact but did not show concern or initiated any legislative proposals to fill this legal gap (e.g. by providing urgent procedures, involving other courts to do the legal control (see <https://uvsvereinigung.wordpress.com/2020/04/27/corona-krise-verfassungsausschuss-vertagt-antrag-zu-eilverfahren-vor-dem-verfassungsgerichtshof/> [requested on 07.03.2021]).

Already in April 2020, the Federal Chancellor has even publicly wiped away criticism and argued that the regulations would be out of force until the Constitutional Court would rule on them (question of effectiveness of rule of law). See e.g. <https://orf.at/stories/3161820/> [requested at 06.03.2021]

## **- oversight by Parliament of emergency regimes and measures in the context of COVID-19 pandemic**

Since autumn 2020, changes of the emergency by-laws/ordinances are subject to approval of the main committee of the Austrian National Council.

A...

42. ...

### **B. Accessibility and judicial review of administrative decisions**

#### **Modalities of publication of administrative decisions and scope of judicial review**

#### **43. Transparency of administrative decisions and sanctions and judicial review**

a. Publications of decisions:

No changes since 2020, see AEAJ report 2020. Lack of public access to all court decisions in many administrative courts first instance and if so it often still lies still in the discretionary powers of a court president which decisions to be published.

b. \scope of judicial review:

no changes to 2020.

44. – 46. ...