

# **TOUR OF EUROPE**

## **Contribution of Austria**

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# **TOUR OF EUROPE**

## **Contribution of Austria**

### **(as of 05/11/2015)**

#### **INTRODUCTION (History, purpose of the review and classification of administrative acts, definition of an administrative authority)**

##### **1. Main dates in the evolution of the review of administrative acts**

Administrative jurisdictional control was a typical concern of the liberal streams in the 19th century. In Austria, “the Reichsgericht”, a predecessor of the Constitutional Court, was created by the December 1867 constitution which also planned creation of a Supreme Administrative Court (“the Verwaltungsgerichtshof”). However, this project was not finalized until 1876. The Supreme Administrative Court played a decisive role in developing the legal system in Austria, establishing fundamental principles for administrative procedural law.

Between 1934 and 1938, the Constitutional Court and the Supreme Administrative Court merged to become “the Bundesgerichtshof”. Several judges were retired for political reasons. The introductions of Chambers with extended composition and of actions for administrative failure to act were significant reforms.

After 1938, “the Bundesgerichtshof” lost its authority as Constitutional Court as well as several of its competencies regarding administrative jurisdiction. Several judges were retired for political reasons. In 1940 “the Bundesgerichtshof” became “the Verwaltungsgerichtshof in Vienna” which was an administrative authority of the Reich. In 1941, the Supreme Administrative Court became the “Vienna Außensenat” of the “Reichsverwaltungsgericht”, which formed an organisational association with the German administrative courts.

A few weeks after the Austrian declaration of independence in 1945, Chancellor Renner commissioned Mr. Coreth to revive the Supreme Administrative Court which took up its duties on 7th December 1945. The legal text on the Supreme Administrative Court was amended and reissued several times but, in substance, it is still in force today.

In 1945, the Constitutional Court was re-established with the same capacities as in 1933 and it began carrying out its duties again in 1946.

With the creation of the "Independent Administrative Tribunals" in 1991, which existed in each *Land*, a first approach was made to establish a two-instance-administrative jurisdiction. Moreover, in 2002 the capacities of these Independent Administrative Tribunals were significantly extended.

These bodies were qualified as independent tribunals by the European Court of Human Rights yet they were not courts in the terms of the Austrian Federal Constitution. In the meantime, more than one hundred of such authorities with quasi-powers of a court came into being, making the administrative jurisdiction provisions more and more complicated.

After more than twenty years of reform discussions, a completely reorganised system of administrative legal review was established in 2012 and 2013 mainly through two major legislative packages (Federal Law Gazettes I 2012/51 and I 2013/33). This reform became effective on 1 January 2014. The Austrian federal legislator adopted a so-called "9+2 model":

one Federal Administrative Court ("Bundesverwaltungsgericht"), one Federal Fiscal Court ("Bundesfinanzgericht"), and nine Administrative Courts of the Provinces ("Verwaltungsgerichte der Länder").

Now, there is (as a rule) only one administrative instance to decide on matters of public law. Against the administrative decision the parties have the right to appeal to one of the administrative courts.

As a consequence of this latest reform, there is no longer a direct appeal against administrative decisions; subject of the review by the Supreme Administrative Court are only the judgements and decisions of the administrative courts. However, the access to the Supreme Administrative Court is limited to cases containing a legal issue of essential importance. The term "legal issue of essential importance" is defined by the Federal Constitution as legal question in which the administrative courts deviate from the settled jurisprudence of the Supreme Administrative Court, where such jurisprudence is missing, or where the legal question was addressed inconsistently by the Supreme Administrative Court in the past. Hence, the Supreme Administrative Court has now transformed into a Supreme Court in the traditional understanding, by ensuring a uniform law practice and reviewing only cases that bring up a question of high importance.

## **2. Purpose of the review of administrative acts**

The rule of law has a central role among fundamental principles of Austrian constitutional law. The concept of rule of law is reflected in the review competencies of the Constitutional Court and the Supreme Administrative Court. Due to the principle of rule of law, the public administration must operate in compliance with law. In order to protect individual subjective rights, the relationship between public administration and law is ensured by control of legality of administrative acts as well as control of administrative action.

## **3. Definition of an administrative authority**

First, it is appropriate to distinguish the acts, which an administrative authority may exercise: public power prerogatives ("Hoheitsverwaltung") and private-sector administration activities ("Privatwirtschaftsverwaltung"). The latter is exercised by public administration bodies using the same forms and means of action as all other private parties (contracts, etc.).

The concept of an administration exercising public power prerogatives in the functional sense also includes public and private corporations that exercise public power prerogatives (i.e. the National Bank, a joint-stock company). In the last twenty years, more and more special companies were created and were conferred control of various markets (i.e. "Austro Control", a limited liability company responsible for control of certain provisions related to air traffic, attribution of flight licenses).

The Constitutional Court highlighted in its jurisprudence that laws must grant the administration a certain influence on these separated institutions. Only the administration exercising public power prerogatives is subject to control by the Constitutional Court and the Supreme Administrative Court. Control of private-sector administration activities is related to the competence of ordinary courts.

## **4. Classification of administrative acts**

The Austrian constitution distinguishes individual normative acts from general normative acts. Individual normative acts are administrative rulings ("Bescheide"), the exercise of direct

administrative power of command and control ("unmittelbare verwaltungsbehördliche Befehls- und Zwangsgewalt") and ordinances ("Weisungen"). General normative acts include enforcement rules as well as rules replacing, completing and amending acts. The latter rules are based on the constitution and apply in particular cases.

## **I – ORGANIZATION AND ROLE OF THE BODIES, COMPETENT TO REVIEW ADMINISTRATIVE ACTS**

### **A. COMPETENT BODIES**

#### **5. Non-judicial bodies competent to review administrative acts**

Due to the reform of the administrative jurisdiction, which came into force in 2014, the Independent Administrative Tribunals and most of the other collegial bodies with quasi-judicial functions were replaced by administrative courts. The Independent Administrative Tribunals were replaced by nine Administrative Courts of the Provinces. The Asylum Court ("Asylgerichtshof") and the Federal Procurement Authority ("Bundesvergabeamt") were incorporated into the Federal Administrative Court, while the Independent Tax Tribunal ("Unabhängiger Finanzsenat") became the Federal Fiscal Court ("Bundesfinanzgericht").

Although some of the collegial bodies with quasi-judicial functions remain and others may still be formed, they have become increasingly insignificant within the Austrian administrative jurisdiction. Their decisions are now subject to the control of the administrative courts.

#### **6. Organization of the court system and courts competent to hear disputes concerning acts of administration**

In Austria, federal and *Land* administrative jurisdictional control is exercised by the administrative courts.

Decisions or the exercise of direct administrative power of command and control as well as failures to take a decision, can be challenged before one of the eleven administrative courts. As an exception, a two-stage level of appeal within the administration is still used for some matters at the municipal level, such as building procedures.

Depending on what kind of authority (Federal or *Länder*) is enforcing the law in question, either the federal courts or the courts of the provinces are competent. All administrative courts are coequal and cannot overrule the decision of other administrative courts.

A final decision by the administrative courts may be contested before the Supreme Administrative Court. However, access to the Supreme Administrative Court is restricted to the review of legal questions of essential importance.

The Constitutional Court and the Supreme Administrative Court may be referred to in order to control the same administrative decision. While the standard of review of the Constitutional Court is the constitution, the Supreme Administrative Court controls the compliance of administrative decisions with "simple" laws and European Union law.

In principle, the Constitutional Court may hand over a complaint to the Supreme Administrative Court if the applicant has lodged a corresponding request.

In the event that the administrative authority fails to carry out its duties, it is possible to form an action addressing the failure to act before the competent administrative court.

If the administrative court does not act within the legal timeframe - generally within 6 months - the applicant can issue a claim at the Supreme Administrative Court. In such case, the Supreme Administrative Court will order the relevant administrative court to decide within a certain time period.

# Organisation Public Law Courts

Constitutional Court

Supreme Administrative Court

“9+2”

one Federal Administrative Court ("Bundesverwaltungsgericht")  
one Federal Fiscal Court ("Bundesfinanzgericht")  
and nine Administrative Courts of the Provinces

Administrative  
Authority

Administrative  
Authority

Administrative  
Authority

Administrative  
Authority

## **B. RULES GOVERNING THE COMPETENT BODIES**

### **7. Origin of rules delimiting the competence of ordinary courts in the review of administrative acts**

Ordinary courts are as a rule not competent to control administrative acts and actions exercising prerogatives of public power. However, they are competent to control actions taken by public authorities in the private-sector. The competent legislation may however allow an appeal against certain acts of the public authorities to the ordinary courts in single cases; in those cases there is no appeal to the administrative courts.

### **8. Existence and origins of specific rules related to the competence and duties of the administrative courts or tribunals**

The statutory basis for the administrative courts is provided in Articles 129 to 136 of the Constitution. The Proceedings of Administrative Court Act ("VwGVG") contains provisions concerning the procedure before the Federal Administrative Court and the Administrative Courts of the Provinces, the Federal Fiscal Code contains the provisions concerning the procedure of the Federal Fiscal Court. Every court has its own standing rules, e.g. the Federal Administrative Court's rule is the Federal Administrative Court Act ("BVwGG").

The Constitutional Court and the Supreme Administrative Court each have a specific status provided by the Constitution as well as Federal Law, namely the Constitutional Court Act of 1953 ("VfGG") as well as the Supreme Administrative Court Act of 1985 ("VwGG"). Each court has its own standing orders and internal regulations adopted on the basis of federal laws.

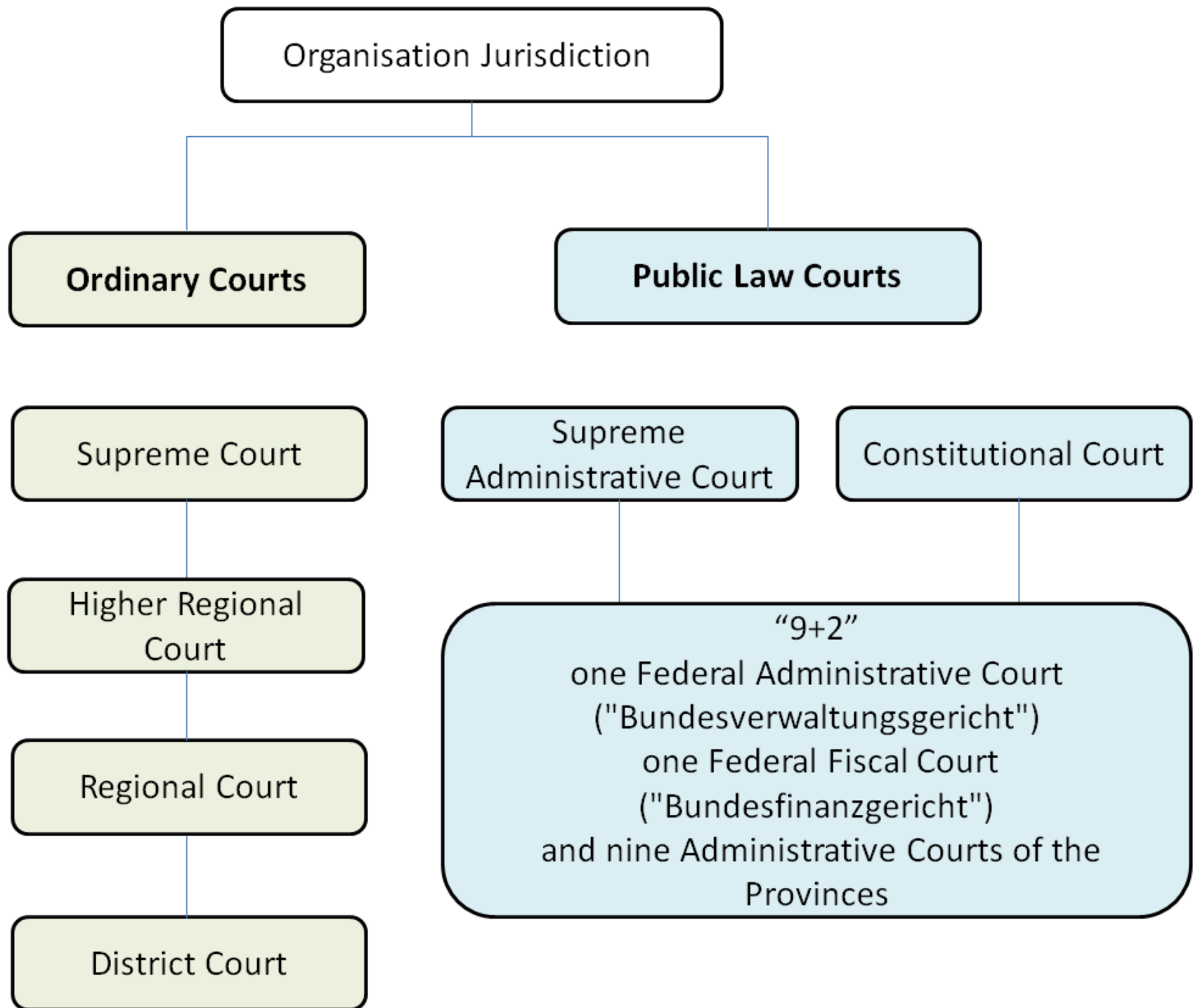
## **C. INTERNAL ORGANIZATION AND COMPOSITION OF THE COMPETENT BODIES**

### **9. Internal organization of the ordinary courts competent to review administrative acts**

Civil and criminal proceedings are handled by district courts ("Bezirksgericht"), regional courts ("Landesgericht"), superior regional courts ("Oberlandesgericht") and the Supreme Court ("Oberster Gerichtshof").

Only ordinary courts (see questions No. 3 and No. 7) ensure control of private-sector administration activities.

Decisions concerning public law matters are made by administrative authorities and are subject to the control of the competent administrative court. Depending on the type of authority (Federal or *Länder*) that enforces the law in question, either the federal courts or the courts of the provinces are competent. All administrative courts are coequal and cannot overrule the decision of other administrative courts (see question No. 6).



## **10. Internal organization of the administrative courts**

The administrative courts consist of a President, a Vice-President and the necessary number of judges.

Depending on the matter, the judgements are made by a single judge or in a chamber. For some matters the constitutional provision allows the contribution of lay judges.

The Supreme Administrative Court also consists of a President, Vice-President and judges.

The Supreme Administrative Court sits in 21 chambers chosen by the plenary session. The sessions of chambers and the plenary session are not public. The cases are distributed in advance between the chambers by the plenary session according to various administrative matters (foreigners, taxes, finances, social security law, urban planning, public service law, etc.).

The chambers are made up of five members (four judges and one chairman of the chamber). The President allocates each case to one judge of the chamber, who acts as rapporteur. Usually, decisions are taken by all five members of a chamber. However, in some cases, e.g. in cases concerning simple legal questions or in administrative penal cases, only three members of a chamber take a decision.

If the decision is not in accordance with well-established jurisprudence or if jurisprudence does not provide unanimous response to legal problems which require solving, the Supreme Administrative Court sits in a chamber with extended composition made up of nine members.

A documentation and research office collects the Supreme Administrative Court's decisions.

The Constitutional Court is made up of a President, a Vice-President, twelve permanent members and six substitute members. The Constitutional Court reaches decisions in plenary sessions. The President distributes cases to one of the eight rapporteurs on duty, who are appointed for three years. The Court meets four times a year for sessions of about three weeks.

## **D. JUDGES**

### **11. Status of judges who review administrative acts**

Members of the Supreme Administrative Court and the administrative courts are professional full-time judges. They are independent, irreplaceable and their contract cannot be terminated.

The Constitutional Court members do not function as professional judges. They are granted the status of judge guaranteed by the constitution. The formation of the Constitutional Court assembly does not vary according to the matter at stake.

### **12. Recruitment of judges in charge of review of administrative acts**

The President, the Vice-President and the judges of the Administrative Courts of the Provinces are appointed by the governments of the *Länder*. Concerning the judges, the governments of the *Länder* decide upon a list of three applicants agreed upon in the plenary

session or the President, Vice-President and five members of the Administrative Court of the Province.

The President, the Vice-President and the judges of the Federal Administrative Court and the Federal Fiscal Court are appointed by the President of Austria following proposals of the federal government. Concerning judges of the Federal Administrative Courts, the federal government decides upon a list of three applicants agreed upon in the plenary session or the President, Vice-President and five members of the respective Federal Court. The federal government is not bound by the list of three applicants.

The President, the Vice-President and the judges of the Supreme Administrative Court are appointed by the President of Austria following proposals of the federal government. Concerning the judges, the federal government decides upon a list of three applicants agreed upon in the plenary session. The federal government is bound by the list of three applicants. Constitutional Court members include the President, the Vice-President, twelve members and six substitute members appointed by the President of Austria. The appointment follows proposals of the federal government (concerning six members and three substitute members), of the national assembly (concerning three members and two substitute members) and of the federal assembly (concerning three members and one substitute member).

### **13. Professional training of judges**

Generally, the judges at the administrative courts must have completed their law studies and have at least five years of experience in a legal profession. Judges at the Federal Fiscal Court may also have completed their economic studies and have at least five years of experience in an economic profession.

Members of the Supreme Administrative Court must have completed their law studies and have at least ten years of experience. At least one fourth of the members of the Supreme Administrative Court shall be recruited from the administration of the *Länder*.

The Constitutional Court members must have completed their law studies and have at least ten years of experience. They generally come from four types of professional backgrounds: civil servants, judges, professors of law and lawyers.

### **14. Promotion of judges**

Judges of the Federal Administrative Court as well as of the Federal Fiscal Court are remunerated according to the Judges' and Public Prosecutors' Service Act. Judges of the Administrative Courts of the Provinces are remunerated according to laws of the respective *Land*.

Remuneration of the Supreme Administrative Court judges is in accordance with modalities concerning judges of the Supreme Court.

Since judges at the Constitutional Court are not professional full-time judges, they are only paid a so-called "pecuniary compensation".

### **15. Professional mobility of judges**

Judges of the administrative courts are free to change to a different court, leave the administrative jurisdiction or – if they meet the requirements – apply to the Supreme Administrative Court or to the Constitutional Court.

Members of the Supreme Administrative Court and of the Constitutional Court are appointed for life and compulsorily retired when reaching a certain age, which is 65 years for the Supreme Administrative Court and 70 years for the Constitutional Court.

## **E. ROLE OF THE COMPETENT BODIES**

### **16. Available kinds of recourse against administrative acts**

Against a decision of an administrative authority, the petitioner has the possibility to lodge an appeal before the competent Administrative Court. The Administrative Courts are obliged to carry out hearings.

Against a decision of an administrative court, the petitioner has the possibility to file a complaint with the Constitutional Court and to lodge a final complaint with the Supreme Administrative Court. Only the Constitutional Court and the Supreme Administrative Court can approve or quash a decision of the administrative courts.

Disputes related to contracts concluded between the administration and private individuals generally lie within the competence of ordinary courts.

A petitioner prejudiced by administrative detrimental action may request recourse before the ordinary courts in order to be granted damages. If a decision by the competent court depend on the legality of an administrative decision and if the court considers the administrative decision in question is contrary to law, it must suspend a judgement and request that the Supreme Administrative Court determine legality of the administrative decision.

### **17. Existence of mechanisms for the delivery of a preliminary ruling apart from the procedure under the Article 234 of the EC Treaty**

There is no formal mechanism comparable to prejudicial questions provided for in Article 267 TFEU (ex Article 234 TEC).

In addition, concerning similar questions of law that may also arise in another legal procedure, Article 271 of the Federal Fiscal Code ("BAO") stipulates, that this authority may defer judgement if paramount interests of parties are not opposed thereto. Nevertheless, these provisions do not provide authorities with the possibility of introducing amendment proceedings aiming to determine the nature, validity and scope of an act towards certain types of bodies.

### **18. Advisory functions of the competent bodies**

Due to the principle of separation of the three powers, judges are neither allowed to carry out duties related to administration or legislation nor to carry out activities as legal consultant in the administrative or legal field. The Austrian Courts, including the Austrian Supreme Administrative Court, do not have advisory functions comparable to that of the Council of

State of other countries like France. During the legislative procedure the Constitutional Court or the Supreme Administrative Court may be invited to express their opinion on a draft law.

## **19. Organization of the judicial and advisory functions of the competent bodies**

For further information, see question No. 18.

## **F. ALLOCATION OF DUTIES AND RELATIONSHIP BETWEEN THE COMPETENT BODIES**

### **20. Role of the supreme courts in ensuring the uniform application and interpretation of law**

The instrument enabling supreme jurisdictions to ensure harmonization and equalization of the application and interpretation among lower jurisdictions is the right of review of the decisions of administrative courts by the Supreme Administrative Court and the Constitutional Court. The compulsory effect of decisions by the Constitutional Court and the Supreme Administrative Court is limited to the context of the relevant case. However, administrative authorities usually follow higher jurisdiction jurisprudence.

To ensure well-established jurisprudence, the composition of the chambers of the Supreme Administrative Court increases from five to nine members in case the decision runs counter to well-established jurisprudence or when jurisprudence does not provide any unanimous response to the legal question at stake. In any case, a decision diverging from a decision made in a chamber with extended composition must also be made in a chamber with extended composition. The head of the Supreme Administrative Court's documentation and research office must refer legal questions subject to divergence from jurisprudence to the President of the Supreme Administrative Court.

In case several final complaints are pending before the Supreme Administrative Court regarding similar legal questions, then the Supreme Administrative Court may issue a ruling, which puts on hold all pending proceeding related to this legal matter (see Art. 38 a VwGG). This measure ensures the uniform application and interpretation of the law in similar legal matters.

## **II – JUDICIAL REVIEW OF ADMINISTRATIVE ACTS**

### **A. ACCESS TO JUSTICE**

#### **21. Preconditions of access to the courts**

Every physical or legal person, whose right might be violated by an administrative decision may appeal against that decision at the competent administrative court. In the event that the administrative authority fails to carry out its duties, every physical and legal person may form an action addressing the failure to act before the competent administrative court.

## **22. Right to bring a case before the court**

See question No. 21.

## **23. Admissibility conditions**

When lodging a complaint with an Administrative Court, the petitioner must assert that s/he is aggrieved in her/his rights by the relevant individual administrative act or by refusal or abstention to enact it.

The Supreme Administrative Court reviews rulings by administrative courts if the appeal involves a legal issue of essential importance. A "legal issue of essential importance" means that there is no jurisprudence of the Supreme Administrative Court on the matter yet, or that the jurisprudence is inconsistent, or that the respective administrative court has disregarded the relevant jurisprudence.

In its decision the administrative court declares whether a final complaint is admissible or not. If the final complaint is admissible, see for more details on the requirements of a final complaint question No. 27.

In case the administrative court has ruled out the admissibility of a final complaint, the petitioner has to explain in her/his final complaint additionally why, contrary to this decision, the final complaint is admissible. Hence, the appellant has to state specifically which legal question the Supreme Administrative Court is being asked to resolve and why the outcome of the case depends on it.

When lodging a complaint with the Constitutional Court, the appellant must explain, which of her/his fundamental rights are violated by the decision of the respective Administrative Court. In case there seems to be a violation only of rights emanating from "ordinary" laws and not from constitutional laws, the Constitutional Court may hand over a complaint to the Supreme Administrative Court if the applicant has lodged a corresponding request (see therefore question No. 6).

## **24. Time limits to apply to the courts**

The deadline for complaints against administrative decisions before the administrative courts is four weeks from the date the complainant was made aware of the decision, except in some matters, where the time limit is two weeks (e.g. Asylum matters).

Legal remedies against decisions of administrative courts need to be filed before the Constitutional Court and/or before the Supreme Administrative Court within six weeks after the petitioner was notified of the decision.

Legal remedies need to be sent by mail on the last day of the deadline. The postmark date is pivotal. Judges are not empowered to extend deadlines.

A party may complain with the administrative courts for alleged delay of an administrative authority to hear her/his case.

A party may in a specific case file a motion before the Supreme Administrative Court to set a deadline for violation of the breach of the duty to reach a decision by an administrative court.

## **25. Administrative acts excluded from judicial review**

In principle, all administrative decisions, which infringe personal rights, may be contested before the competent administrative court.

The Constitution states in its Art. 94 that judicial and administrative powers shall be separate at all levels of proceedings, which means that a recourse before an ordinary court shall not be possible except if federal or provincial legislation provides for an appeal from the administrative authority to an ordinary court instead of an appeal to the administrative court. In matters of execution of the Federation, which are not directly handled by federal authorities, as well as in matters of Art. 11, 12, 14 para 2 and 3 and 14a para 3 and 4 of the Constitution, federal laws may, in accordance with the first phrase, only be published upon approval by the provinces.

Decisions of administrative courts can be appealed against before the Constitutional Court and/or before the Supreme Administrative Court. The Supreme Administrative Court is not competent in matters within the jurisdiction of the Constitutional Court.

The Constitutional Court is in charge of controlling administrative acts regarding their compatibility with the Constitution.

## **26. Screening procedures**

Both at first instance and at the level of the Supreme Administrative Court /Constitutional Court, the application lodged is normally first considered on the basis of the documents filed by the claimant without a hearing. During the screening procedure, the court checks whether the application is receivable regarding form requirements (see question 27) and whether it has jurisdiction over this matter.

The screening procedure at the Supreme Administrative Court includes checking whether the final complaint against the ruling of an administrative court is admissible, is to say if the solution depends from a legal question of essential importance, mainly because the ruling deviates from the established court practise of the Supreme Administrative Court, such established court practise does not exist or the legal question to be solved has not been answered in uniform manner by the previously established court practise of the Supreme Administrative Court. If the ruling only is on a small fine, federal law may provide that the final complaint is inadmissible.

## **27. Form of application**

A complaint at administrative courts of first instance must be made in the appropriate form in accordance with § 9 VwGVG. The following requirements need to be fulfilled:

- ✓ a statement on who rendered the decision or the act
- ✓ a statement regarding the authority involved
- ✓ a statement of grounds for bringing a claim for judicial review
- ✓ a statement on the individual request
- ✓ a statement on the timeliness of the complaint

In the case of motions to set a deadline for violation of the breach of the duty to reach a decision by an administrative court, the petitioner has to show which authority is unnecessarily delaying the decision and has to give information regarding the delay.

A final complaint at the Supreme Administrative Court must include the following (§ 28 VwGG):

- ✓ a statement on the decision which infringes rights

- ✓ a statement on which administrative court rendered the decision
- ✓ a statement of the facts relied upon
- ✓ a precise designation which rights were infringed by the decision
- ✓ the reasons why the decision is unlawful
- ✓ a statement on the individual request
- ✓ a statement on the timeliness of the final complaint
- ✓ include a copy of the decision which the petitioner seeks to overturn

In cases where the lower court has ruled out the admissibility of a final complaint, the petitioner has to explain why contrary to this decision the final complaint is admissible.

A final complaint at the Supreme Administrative Court has to be drafted and submitted by a lawyer.

Recourse against the ruling of an administrative court before the Constitutional Court must include the following elements (§ 15 VfGG):

- ✓ a statement of the facts relied upon
- ✓ a statement on the infringement of a constitutional right
- ✓ a statement on the individual request
- ✓ include a copy of the decision which the petitioner seeks to overturn

Recourse at the Constitutional Court has to be drafted and submitted by a lawyer.

## **28. Possibility of bringing proceedings via information technologies**

Before the administrative courts, the Supreme Administrative Court and the Constitutional Court, proceedings may be filed by different means e.g. by mail or via electronic legal communication.

Each court has its own regulations regarding the admissibility of bringing proceedings via information technology.

## **29. Court fees**

The cost of submission to the Administrative Courts of the Regions lies between 15-30 Euro.

The cost of submissions to the Federal Administrative Court is generally 30 Euro.

A fee of 240 Euro is payable to the Supreme Administrative Court and the Constitutional Court upon submission.

Payment of this fee is not a prerequisite for the admissibility of the complaint and has no influence on the course of the proceedings.

A claimant who has not the means to pay these fees may be relieved of the liability to pay them (see question 31).

## **30. Compulsory representation**

Before the administrative courts, it is not necessary that the claimant be represented by a lawyer. The administrative court will hear litigants who act in person and wish to argue the claim themselves, which many frequently do.

Before the Supreme Administrative Court, the review has to be drafted, signed and submitted by a lawyer. Once the review was submitted, the case can be advanced in Court by a lawyer or the petitioner her/himself

Recourse before the Constitutional Court has to be drafted, signed and submitted by a lawyer.

## **31. Legal aid**

Legal aid can be granted for proceedings before the Supreme Administrative Court or the Constitutional Court. Legal aid is granted by the court itself. Access to legal aid depends on the applicant's financial resources. It is also necessary to show that it is reasonable to take the proceedings in question.

Legal aid can include exemption from court fees as well as assistance of a lawyer appointed by the Bar Association.

No review is foreseen against the decision regarding legal aid.

Legal aid can also be granted in administrative criminal matters before the Federal Administrative Court. In other matters before the administrative courts no legal aid is foreseen. This legislative provision was voided by the Constitutional Court by its decision of 25 June 2015, (G 7/2015-8). The legislator has to change the law regulating legal aid before the administrative courts until 31 December 2016.

### **32. Fine for abusive or unjustified applications**

In proceedings before the administrative courts and the Supreme Administrative Court, a person, who in an apparently frivolous manner request the service of the Courts or who gives false information in order to delay a matter, can be fined up-to 726 euros (§ 35 AVG).

The Constitutional Court may sanction abusive or unjustified applications with a fine of up to 109 EURO or if the fine is irrecoverable with three days imprisonment. (§ 28 VfGG).

## **B. MAIN TRIAL**

### **33. Fundamental principles of the main trial**

The following fundamental principles of trial are enshrined for proceedings in administrative matters:

- ✓ The organization and competence of administrative courts is laid down by law
- ✓ Judges are independent and impartial
- ✓ The ECHR and the EU Charter of Fundamental Rights ("the Charter") form an integral part of Austrian law and are enshrined on constitutional level, hence all fundamental principles found there (eg. art. 6 ECHR and art. 47 of the Charter) are directly applicable.

All substantive judgments of the administrative courts, the Supreme Administrative Court and the Constitutional Court are posted on the Internet (see question 69).

### **34. Judicial impartiality**

Judges at the administrative courts of first instance, the Constitutional Court and the Supreme Administrative Court are independent and impartial. These guarantees are enshrined in the constitution and in federal law.

Judges, lay judges and judicial officers of the administrative courts have to make a self-declaration to the President of the court if they deem themselves to be biased in a case.

Judges of the Constitutional Court are excluded from proceedings if they took part in the legal procedure and in cases related to their own interests or interests of their relatives or where they are the legal guardian of a party. Members of the Constitutional Court cannot be challenged on grounds of bias by a party, however they can declare themselves biased and step down in this particular case.

Judges and legal associates of the Supreme Administrative Court must compulsorily abstain from carrying out their duty in cases where they took part in the legal procedure or in cases relating to their own interests or the interest of their relatives or where they are the legal guardian of a party (§31 VwGG). On these grounds, parties may challenge the judge on grounds of bias.

### **35. Possibility to rely on the new legal arguments in the course of proceedings**

The petitioner may claim new legal means. The other parties in legal proceedings are notified of the petitioner's explanatory memorandum and have the possibility of replying on the new means claimed by the petitioner.

### **36. Persons allowed to intervene during the main hearing**

In proceedings before the administrative courts of first instance the claimant, the administrative authority that had issued the challenged decision and other persons whose interests are affected by the outcome of the proceedings, are parties and allowed to intervene during the main hearing.

The claimant, the administrative authority, that issued the decision which was contested at the Administrative Court as well as the persons whose interests are affected by the success of the proceedings are parties in legal proceedings before the Supreme Administrative Court.

In matters of federal administration and Land administration respectively, the competent Federal Minister and the Government of the Land may intervene.

### **37. Existence and role of the representative of the State ("ministère public") in administrative cases**

There is no Ministère Public intervening in administrative cases. A public authority may intervene in the same circumstances as any other litigant: see question 36.

### **38. Existence of an institution or a person with a role analogous to the French "Commissaire du gouvernement"**

No such institution exists.

### **39. Termination of court proceedings before the final judgment**

In general, proceedings can come to an end at any time before a decision is reached by the Court.

The proceeding can come to an end if the claimant withdraws the proceedings.

Furthermore the proceedings can come to an end if the court, at any stage of the proceedings, finds out that the claimant no longer has a legal interest in pursuing the case, e.g. the

contested decision was modified by the court of first instance or the legal and factual circumstances justifying the claim have changed significantly.

#### **40. Role of the court registry in serving procedural documents**

The communication of claims and procedural documents during legal proceedings is made by the registry service.

#### **41. Duty to provide evidence**

In general, parties are responsible for providing evidence to the Court.

The administrative courts of first instance decide on the merits and lead the investigations needed in order to determine the decisive facts. They shall convene hearings, where the parties, witnesses and expert witnesses can be heard. However, if the authority, whose decision is being contested, has not adequately established the facts of the case, the courts may set aside the decision in question and remand the case to the administrative authority for a new decision.

The Supreme Administrative Court is bound by the facts and evidence established by the administrative courts of first instance and the administrative authority. Before the Supreme Administrative Court, parties can no longer bring up new facts. If the Supreme Administrative Court considers that the administrative court's decision lacks essential material elements, it quashes the administrative court's decision. The administrative court is then obliged to establish the necessary facts and to render a new decision.

#### **42. Form of the hearing**

As a general rule, all hearings are public. Exceptions to this rule can be found in the respective court organisation acts (§ 25 VwGVG, § 40 VwGG). In principle a hearing shall not be public for the following reasons:

- ✓ Public morality
- ✓ Public order
- ✓ National security
- ✓ Protection of professional or business secrecy
- ✓ In the interest of a minor, the private life of a party, a witness or a third party

The decision to exclude the public is taken by ruling of the court either by its own motion or the parties' motion.

#### **43. Judicial deliberation**

Judicial deliberation takes place at a time considered appropriate by the Court, in camera. Members of the chamber in charge of the case come together on a monthly basis for their deliberations. A judicial officer participates in these meetings and prepares the minutes.

### **C. JUDGMENT**

#### **44. Grounds for the judgment**

Judgments have to set out a deliberation of the arguments of the parties, and address the points in issue. A judgment should set out all arguments on which the decision is based.

The main legal issues need to be addressed and reasons have to be given for legal conclusions. The reasons given in the judgment should enable petitioners to understand the meaning and scope of the decision.

#### **45. Applicable national and international legal norms**

The applicable national laws are all laws relevant in the case. Regarding proceedings before the Constitutional Court, the decision has to be checked for its compatibility with the Constitution. Furthermore, the ECHR is directly applicable, as well as other international treaties on constitutional level. EU law in cases concerning Community law may be directly applicable as well.

#### **46. Criteria and methods of judicial review**

According to Article 130 of the Constitution, recourse may be brought before the administrative courts against any administrative decision. The administrative courts exercise comprehensive control of the conduct of the entire administration. They decide on the merits and have full powers to carry out investigations.

If recourse is brought before the Supreme Administrative Court it can either be in form of an ordinary or an extraordinary final complaint.

The administrative courts need to decide in their judgment whether the parties may present a final complaint to the Supreme Administrative Court (ordinary final complaint) or not (extraordinary final complaint). The admissibility of the final complaint is checked by the administrative courts regarding ordinary final complaints and by the Supreme Administrative Court regarding extraordinary final complaints.

The decision on the admissibility of the final complaint has to be motivated. The Supreme Administrative Court however is not bound by the decision taken by the administrative courts.

The Supreme Administrative Court exercises detailed control on questions of law raised by the final complaint and makes an overall appreciation of the facts, legal aspect and the respect for procedural standards.

In principle, the Constitutional Court exercises a total control regarding constitutional rights.

#### **47. Distribution of legal costs**

According to the rules governing the procedures of the administrative courts (VwGVG), the Supreme Administrative Court (VwGG) and the Constitutional Court (VfGG), each party involved in an administrative proceeding shall, as a general rule, bear its own costs. The rules and regulations determine whether and to what extent a person involved is entitled to claim reimbursement of costs from another person/authority involved. The amount of costs to be reimbursed will be fixed by the Court, which may also determine a lump sum amount. Unless provided differently by law, the authority shall bear the costs incurred for its activities performed in the administrative proceeding *ex officio*.

#### **48. Composition of the court (single judge or a panel)**

The administrative courts take their decisions through individual judges, in specific cases a chamber of judges decides the case.

Decisions by the Constitutional Court and the Supreme Administrative Court are taken in chambers.

At the Supreme Administrative Court, the rapporteur in charge of the case has the discretion to decide on granting legal aid and suspensive effects to a request. S/he also has certain decision-taking power in the pre-trial phase.

#### **49. Dissenting opinions**

Separate opinions are not authorised – neither before the administrative courts, nor the Constitutional Court, nor the Supreme Administrative Court. Regarding decisions taken in chambers, the results of voting and opinions of the judges are written down in a protocol but not published.

#### **50. Public pronouncement and notification of the judgment**

Judgments may be pronounced orally at the end of a hearing, however, in practice, most judgments are pronounced in writing.

### **D. EFFECTS AND EXECUTION OF JUDGMENT**

#### **51. Authority of the judgment. Res judicata, stare decisis**

The effect of res iudicata only applies to the parties themselves and has no erga omnes function. The judgment has no formal precedent authority (see, however question No. 20, notably Article 38a VwGG).

#### **52. Powers of the court in limiting the effects of judgment in time**

The court has no power in limiting the effects of a judgment in time.

#### **53. Right to the execution of judgment**

The right to execution of decisions is formally ensured by law. If an administrative decision is quashed by the Constitutional Court or by the Supreme Administrative Court, administrative authorities and administrative courts must use all means available to establish a judicial situation corresponding to the Court's legal opinion. In case the Supreme Administrative Court itself decides on the matter, it must determine the court or administrative authority that will be in charge of execution of the judgment according to provisions governing proceedings before these institutions (Article 63 VwGG).

The Supreme Administrative Court has no power of injunction and cannot pronounce on penalties. To date, such power was not required to ensure execution of Court decisions.

#### **54. Recent efforts to reduce the length of court proceedings**

After years of intense efforts to reduce the length of court proceedings, a significant change of the Austrian administrative jurisdiction was introduced mainly by two major legislative packages (Federal Law Gazette I 2012/51 and I 2013/33), which aimed making proceedings faster and more efficient.

The reform introduced a new final complaint system which restricts access to the Supreme Administrative Court to the review of legal questions of essential importance. That is a novelty of significant impact for the Supreme Administrative Court as it will no longer be possible to file complaints about basically every decision of an authority or the administrative courts at the Supreme Administrative Court. Thereby the Supreme Administrative Court will now for the first time have the function of a real supreme court in the traditional sense by ensuring a uniform law practice and reviewing only cases that bring up questions of fundamental importance.

## **E. REMEDIES**

### **55. Sharing out of competencies between the lower courts and the supreme courts**

See question No. 54

Since the 1st of January 2014 there is only one administrative instance to decide on matters of public law and Austria now has a two-staged administrative jurisdiction: decisions or other administrative acts of direct enforcement ("Akte unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt") taken by the public authorities, also failures to take a decision, can be challenged before one of the eleven administrative courts.

The distinction between federal courts and courts of the *Länder* is based on the jurisdiction depending on what kind of authority (*Land* or federal) is enforcing the law in question. Besides that, the courts are coequal and cannot overrule the decision of each other.

The Supreme Administrative Court now only deals with the final complaint against the ruling of an administrative court if the solution depends on a legal question of essential importance, mainly because the ruling deviates from the established court practise of the Supreme Administrative Court, such established court practise does not exist or the legal question to be solved has not been answered in uniform manner by the previously established court practise of the Supreme Administrative Court. If the ruling only is on a small fine, federal law may provide that the final complaint is inadmissible.

### **56. Recourse against judgments**

A party can file a complaint to the Constitutional Court against judgments from the administrative courts, in particular for alleged infringements of constitutionally-guaranteed rights or the application of an unconstitutional law or an unlawful ordinance. For further details see question 16.

## **F. EMERGENCY AND SUMMARY PROCEEDINGS / APPLICATIONS FOR INTERIM RELIEF**

### **57. Existence of emergency and/or summary proceedings**

In public procurement matters, the Federal Administrative Court may issue injunctions. In certain matters, where EU law is directly applicable, injunctions may be foreseen. Furthermore, the administrative courts, the Supreme Administrative Court and the Constitutional Court may grant suspensive effect to a recourse or final complaint so as to avoid a prejudice difficult for the petitioner to rectify.

The Constitutional Court and the Supreme Administrative Court generally give priority to cases raising questions requiring an urgent decision because of their actual importance and significance (e.g. with regard to elections and community law, etc.).

### **58. Requests eligible for the emergency and/or summary proceedings**

See question No. 57.

### **59. Kinds of summary proceedings**

See question No. 57.

## **III – NON-JUDICIAL SETTLEMENT OF ADMINISTRATIVE DISPUTES**

### **60. Role of administrative authorities in the settlement of administrative disputes**

No settlement of administrative disputes is foreseen.

### **61. Role of independent non-judicial bodies in the settlement of administrative disputes**

The Austrian Constitution provides for an independent institution called “Volksanwaltschaft” (Ombudsman) inspired by the Scandinavian ombudsman model. Any person affected by a failure of the public administration with no further possibility of recourse may bring the matter before the “Volksanwaltschaft”. The “Volksanwaltschaft” must examine the case and communicate the result of its examination. It can propose recommendations to higher federal administrative bodies, who must, should they not follow these recommendations, give an explanation in writing.

### **62. Alternative dispute resolution**

Austrian administrative law foresees in some specific areas possibilities of alternative dispute resolution (e.g. public procurement, environmental law or energy law).

## **IV – ADMINISTRATION OF JUSTICE AND STATISTIC DATA**

### **A. FINANCIAL RESOURCES MADE AVAILABLE FOR THE REVIEW OF ADMINISTRATIVE ACTS**

### **63. Proportion of the State budget allocated to the administration of justice**

In 2014 the State budget allocated approximately 910 million Euro to the ordinary courts.

In the same year, the State budget allocated to the Federal Administrative Court approximately 45,5 million Euro and to the Federal Fiscal Court approximately 32 million Euro. The State budget allocated to the Supreme Administrative Court approximately 18,5 million Euro and to the Constitutional Court approximately 14,7 million Euro in 2014.

#### **64. Total number of magistrates and judges**

In 2014 the total number of judges was about 2.470 judges. Approximately 1.700 judges worked for ordinary courts and 770 judges worked for the public law courts.

#### **65. Percentage of judges assigned to the review of administrative acts**

About 31 percent of Austria's judges are assigned to administrative matters.

#### **66. Number of assistants of judges**

There are respectively 36 and 40 young jurists working at the Constitutional Court and the Supreme Administrative Court. Assistant jurists work for the documentation office, assist judges in their research and in elaboration of their decisions. About 25 to 40 jurists assist the 68 Supreme Administrative Court members, while each of the eight Constitutional Court judges in charge of legal inquiries are assisted by two to three jurists. The assistants must have completed their law studies. Apart from this, their training can vary.

#### **67. Documentary resources**

The Supreme Administrative Court and Constitutional Court have libraries with a wide range of national and international legal works, texts and documents as well as comprehensive documentation on legal sources.

#### **68. Access to information technologies**

All judges have access to a computer, and through the computer to information technologies, which provide them with law reports published on the Internet.

#### **69. Websites of courts and other competent bodies**

The Constitutional Court, the Supreme Administrative Court and the lower administrative courts all have a website to announce and inform about news relating to both courts. The websites are the following:

Supreme Administrative Court: <https://www.vwgh.gv.at/>

Constitutional Court: <https://www.vfgh.gv.at/>

Federal Administrative Court: <https://www.bvwg.gv.at/>

Federal Fiscal Court: <https://www.bfg.gv.at/>

Administrative Court of the province Vienna:

<http://www.verwaltungsgericht.wien.gv.at/Content.Node/>

Administrative Court of the province Lower Austria: <http://www.lvwg.noe.gv.at/>

Administrative Court of the province Upper Austria: <http://www.lvwg-ooe.gv.at/>

Administrative Court of the province Salzburg: <http://www.lvwg-salzburg.gv.at/>

Administrative Court of the province Tyrol: <https://www.lvwg-tirol.gv.at/>

Administrative Court of the province Vorarlberg: <http://www.lvwg-vorarlberg.at/>

Administrative Court of the province Kärnten: [https://www.ktn.gv.at/286502\\_DE-LAND\\_UND\\_POLITIK-Landesverwaltungsgericht](https://www.ktn.gv.at/286502_DE-LAND_UND_POLITIK-Landesverwaltungsgericht)

Administrative Court of the province Styria: <http://www.lvwg-stmk.gv.at/>

Administrative Court of the province Burgenland: <http://verwaltungsgericht.bgld.gv.at/>

## **B. OTHER STATISTICS**

### **70. Number of new applications registered every year**

From 2011 to 2014, the following numbers of new applications were registered at the Supreme Administrative Court registry:

2011: 4.599

2012: 4.477

2013: 4.970

2014: 3.938

### **71. Number of cases heard every year by the courts or other competent bodies**

From 2011 to 2014, the following numbers of files were processed by the Supreme Administrative Court:

2011: 6.249

2012: 5.800

2013: 5.615

2014: 5.479

### **72. Number of pending cases**

From 2012 to 2015 the Supreme Administrative Court had the following number of pending cases from the previous years:

2011: 8.238

2012: 6.591

2013: 5.268

2014: 4.623

2015: 3.082

### **73. Average time taken between the lodging of a claim and a judgment**

As concerns recourse against administrative decisions, the average time for judgement at the Supreme Administrative Court was 23 months in 2011; throughout the last years the average has been reduced to 10,6 months in 2014, also due to the reform in 2014.

### **74. Percentage and rate of the annulment of administrative acts decisions by the lower courts**

Before 2014, Austria had no administrative courts as such. As concerns administrative decisions contested before the Supreme Administrative Court, the rescission rate was 34,03

percent in 2011, 33,40 percent in 2012, 30,06 percent in 2013. In 2014, 24 percent of decisions of the newly established administrative courts were contested before the Supreme Administrative Court and quashed.

#### **75. The volume of litigation per field**

Due to recent reform, new statistics per field will be elaborated in the course of 2015, which will reflect the current situation per field.

### **C. ECONOMICS OF ADMINISTRATIVE JUSTICE**

#### **76. Studies or works concerning the influence of judicial decisions against the administrative authorities on public budgets**

There is no scientific study demonstrating the influence of very severe sentences on public budgets or for jurisdiction concerns about consequences of their decisions regarding costs for government finance.