

## Austria

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### *Austrian Ombudsman Board (AOB)*

#### **International accreditation status and SCA recommendations**

The Austrian NHRI was reaccredited with B status in May 2011. The SCA underlined the importance of a clear, transparent and participatory selection process to ensure the pluralism and independence of an NHRI. Also, the SCA encouraged the NHRI to seek a broader human rights mandate and to continue its engagement with civil society organisations at the national and regional levels.

In January 2021, an event was organised by the Austrian NHRI in close cooperation with the EU's Fundamental Rights Agency (FRA). Since then, the Austrian NHRI has applied for reaccreditation by the SCA, seeking A-status accreditation.

#### **Impact of 2020 rule of law reporting**

On 12 January 2021 the AOB, in close cooperation with the EU Fundamental Rights Agency (FRA) hosted an exchange to shine a light on human rights protection in Austria in times of Covid-19 and to discuss how to strengthen the independence of National Human Rights Institutions (NHRIs). This event brought together national and international representatives of NHRIs and the core human rights institutions in Austria. It helped raise the awareness of how important strong NHRIs are, especially in light of the current situation regarding the Covid-19 pandemic. The independence of the AOB is enshrined in the constitution and the developments since 2012 were discussed. The Chairperson of the Human Rights Advisory Council, the advisory body of the AOB, that consists of civil society representatives and experts from the main Federal ministries, concluded that in her view the AOB operated independently and fulfilled its broad human rights mandate. In addition, ENNHRI's Secretary General highlighted the positive steps that Austria has undertaken.

#### **Independence and effectiveness of the NHRI**

##### **Changes in the regulatory framework applicable to the Institution**

A part of the constitutional framework regulating the AOB's role as NPM pursuant to OPCAT has changed to the better. In early 2021, the Austrian Parliament amended by constitutional law the

Austrian Ombudsman Act to clarify that the establishment of the AOB's commissions and all related acts of the Ombudsman Board, in particular the appointment and dismissal of the members of its NPM commissions, are attributed to the legislative branch of government. The AOB views this change as a further strengthening and an acknowledgement of the independence of the AOB and its commissions in the role as NPM.

### *References*

- Bundesgesetz, mit dem das Volksanwaltschaftsgesetz 1982 geändert wird, BGBl. I Nr. 56/2021, available online at <https://www.ris.bka.gv.at/eli/bgbl/I/2021/56>

### **Enabling space**

Yes, the AOB possesses a range of powers to independently and effectively fulfil its functions. The AOB may comment on any proposed draft legislation or ordinance (Article 1 (2) item 4 Austrian Ombudsman Act). For these purposes, all drafts must be forwarded to the AOB in a timely fashion (Article 7 (1) Austrian Ombudsman Act). The AOB has exercised this right numerous times; recent examples include comments on the human rights impact and proportionality of several proposals for COVID-19 measures. Additionally, the AOB can recommend legislative reforms (Article 7 (2) Austrian Ombudsman Board). The AOB is endowed with broad investigative powers to pursue its mandate. Thus, all governmental bodies are obligated to support the Ombudsman Board in the performance of its duties, grant it access to files and provide the necessary information upon request. The rules governing confidentiality of official records do not apply to the AOB (Article 148b Federal Constitution). Usually, there is no need to issue formal recommendations as the governmental body concerned complies with a solution mediated by the AOB between the parties. However, in case the AOB issues a formal recommendation, the body concerned must within eight weeks either comply with these recommendations and notify the Ombudsman Board thereof or give reasons in writing why the recommendation has not been complied with (Article 148c Federal Constitution in conjunction with Article 6 Austrian Ombudsman Act).

Additionally, the AOB has the right to apply to the Constitutional Court for a review of the lawfulness of administrative ordinances (Article 139 (1) items 5 & 6 Federal Constitution). The AOB reports annually to the Federal National Council and seven of the Länder Parliaments. This further ensures the AOB's independence, transparency, and accountability. When discussing the annual reports, members of the AOB have the right to take the floor in a special Committee. Likewise,

members of AOB may take the floor in the budget Committee and in the plenary whenever parliament discusses the AOB's budget. The annual report for 2020, usually split in two volumes dealing with ex post investigative work and preventive human rights monitoring respectively, contains an unprecedented third volume detailed the cross-cutting issues related to COVID-19 and the attending governmental measures. Additionally, since 2012, Article 148a (1) Federal Constitution explicitly enshrines a broad human rights mandate of the AOB. Additionally, the AOB and its Commissions act as National Preventive Mechanism pursuant to OPCAT and Independent Authority pursuant to CRPD (see also answer to question 2 above on the effects of this legislation on the AOB's role as the Austrian NHRI). Moreover, the AOB houses the Commission pursuant to the Pensions for Victims of Children's Homes Act (HOG) tasked with the investigation of abuse cases for the award of a so-called home victim's pension.

These mandates complement and inform the AOB's traditional Ombudsman mandate. Crucially, based on the findings of the AOB's NPM commissions, the AOB may issue formal recommendations with the same legal consequences as discussed above.

Since 2012, a Human Rights Advisory Council provides a forum for representatives of civil society and government to exchange views. This body also advises the AOB on human rights issues.

### *References*

- Federal Constitution, available online at <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000138/B-VG%2c%20Fassung%20vom%2018.05.2021.pdf> (German) and [https://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_1930\\_1/ERV\\_1930\\_1.html](https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html) (bilingual); Austrian OMBUDSMAN Act, available online at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000732>

### **Developments relevant for the independent and effective fulfilment of the NHRIs' mandate**

Since its last re-accreditation in 2011, the AOB's legal foundations were amended to further progress its compliance with the Paris Principles. The AOB now has a broad overall human rights mandate, including, beyond its traditional mandate as Ombudsman, those as NPM pursuant to OPCAT, as independent authority pursuant to the CRPD, as national monitoring mechanism for

Police enforcement actions, and under the Austrian Pensions for Victims of Children's Homes Act (HOG) (see also the answer to question 5 above).

Additionally, the appointment requirements were updated to include expertise in human rights and the Constitution now provides for a clear and transparent procedure to dismiss members of the AOB before the Constitutional Court (Article 148g (6) in conjunction with Article 142 (2) (b) Federal Constitution; Article 141 (1) (e) Federal Constitution).

To pursue effectively its new mandates under OPCAT and CRPD, the AOB successfully campaigned for 15 additional staff positions in 2012 and another 10 staff positions in 2020, including necessary funding.

In general, any challenges related the rule of law in Austria in 2021 have not concerned the functioning of the AOB.

### *References*

- Federal Constitution, available online at <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000138/B-VG%2c%20Fassung%20vom%2018.05.2021.pdf> (German) and [https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1930\\_1/ERV\\_1930\\_1.html](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.html) (bilingual)
- For the key findings of the most recent opinion poll study, see Part I of the AOB's Annual Report 2020, pp. 22-24, available online at [https://volksanwaltschaft.gv.at/downloads/46go2/PB-44-Kontrolle%20der%20%C3%B6ffentlichen%20Verwaltung\\_2020.pdf](https://volksanwaltschaft.gv.at/downloads/46go2/PB-44-Kontrolle%20der%20%C3%B6ffentlichen%20Verwaltung_2020.pdf)

## **Impact of measures taken in response to COVID-19 on the national rule of law environment**

### **Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law and human rights protection**

Since the beginning of the pandemic, a multitude of emergency measures impacting nearly all areas of life have been adopted, both on the federal and the regional level. All these acts and regulations have had an immediate impact on fundamental rights, such as the right to private and family life, freedom of movement, freedom of assembly, freedom to carry on a business, freedom

of religion, the right to education etc., because the right to life and right to health have been prioritized. At the beginning of the pandemic, laws and regulations were adopted at very short notice without transparent and extended discussions of the new measures by the Parliament and the different stakeholders concerned before their adoption. It remains the case nowadays to a lesser extent. All emergency measures have always been limited in time and, since a ruling by the Austrian Constitutional Court, the introduction of new lockdowns has to be approved by the main committee of the Austrian National Assembly.

Presently, there is no lack of access to the courts in Austria. Remote trials and trials in person under special COVID-19 rules are currently held, to remedy the backlog caused by the impossibility to hold trials in person in the first months of the pandemic. The Austrian Constitutional Court has been able to work without any obstacles and has reviewed many COVID-19-related regulations, including the main one (“COVID-19-Maßnahmenverordnung”) which was deemed unlawful. It consequently had to be adapted according to the Court’s ruling.

Residents of care homes and of homes for people with disabilities have been at first disproportionately affected by the pandemic in comparison with the rest of the population, as they were not allowed to leave the premises and to receive visitors. Due to the intervention of the Austrian Ombudsman Board (AOB) at the Federal Ministry for Social Affairs, Health, Care and Consumer Protection, residents of the above-mentioned facilities are now subject to the same rules as the rest of the population.

As the COVID-19 pandemic is still ongoing, all its long-term implications are not yet known. The AOB would like to underline that restrictions of all kinds of fundamental and human rights should remain an exception and that the population should not get used to these restrictions in the long-term.

The relevant government bodies immediately inform the AOB about the instituted emergency measures on a regular basis. As part of its preventive human rights mandate, the AOB checks the proportionality of the human rights limitations contained in these emergency measures. Additionally, the AOB received a large number of individual complaints related to COVID-19 measures. In cases where it determined that the relevant authorities engaged in maladministration or human rights violations, the AOB took the appropriate steps by reporting its findings and, where necessary, intervening. Although access to institutions (e.g., hospitals) was difficult, the AOB still received individual complaints and could therefore monitor the immediate effects of the instituted measures on individuals. These experiences from the ex-post control also proved valuable for the preventive work of the AOB.

The AOB regularly interacts with its Human Rights Advisory Council, which consists of human rights experts from civil society and government, to assess the impact and proportionality of COVID-19 related governmental measures. Thus, the AOB asked the Council to assess the proportionality of severe health restrictions instituted in detention facilities, and of police action in dispersing peaceful public demonstrations whose participants violate COVID-19 safety standards (e.g., distancing and mask requirements). As far as health restrictions permit, members of the AOB meet and consult with office holders on the federal and regional levels to discuss the ongoing challenges that the COVID-19 pandemic poses to good administration and human rights. In February 2021 for instance, members of the AOB met with the Federal President and the President of the National Council.

For the first time in 2020 the AOB will issue a 3rd part to its Annual Report, specifically dealing with COVID-19 (Part 1 being about the ex-post control of the public administration, and Part 2 about the preventive human rights mandate). This report will be published shortly.

### Most important challenges due to COVID-19 for the NHRI's functioning

The COVID-19 crisis has made preventive human rights monitoring more difficult. Although the monitoring rights of the AOB's commissions, which fulfil the function of OPCAT NPM, have never been in question, in the first lockdown they only temporarily suspended their visits to institutions which fall under the OPCAT mandate for a couple of weeks.

However, the AOB conducted a survey in May 2020 with numerous nursing home managers to better assess the situation in the homes. Additionally, through nationwide telephone interviews, the commissions surveyed the main problems in these facilities during and after the lockdown. In the course of this activity, the commissions earned a certain amount of trust, which paid off in the further course of the pandemic through greater responsiveness on the part of the institutions under review. The commissions found that the shortage of nursing staff created and exacerbated many problems. After four weeks, the commissions' inspection visits could again take place to the usual extent because the government put in place a clear framework for visits by the commissions and by other visiting institutions and representative bodies. These safety protocols created clarity and security for everyone concerned and removed psychological barriers that may have existed in approaching residents directly. Thus, the commissions were able to conduct 431 visits to institutions in 2021, which is only slightly below the mean number of the preceding years. Additionally the AOB also maintained its other monitoring activities throughout the pandemic. Thus, it held nine consultation days in correctional centers during which its members met with 226 inmates in person.

The AOB recently presented these and other findings related to crosscutting issues of the COVID-19 pandemic in a specially dedicated third volume of its 2020 annual report. The report will soon be available in English as well for an international audience.

### *References*

- Austrian Ombudsman Board, Annual Report 2020: COVID-19, available online at <https://volksanwaltschaft.gv.at/downloads/60q2/PB%2044%20Covid-19%202020.pdf>

