
THE REFORM OF THE ADMINISTRATIVE JURISDICTION IN AUSTRIA - THEORETICAL BACKGROUND AND MAIN FEATURES OF THE SYSTEM

Martin Köhler¹

¹*Austrian Supreme Administrative Court (Österreichischer Verwaltungsgerichtshof)*
E-mail: martin.koehler@vwgh.gv.at

Abstract The Austrian Administrative Jurisdiction has undergone a decisive change by the “Verwaltungsgerichtsbarkeits-Novelle 2012”, BGBl. I 2012/51 (Amendment to the Federal Constitutional Law concerning the Administrative Jurisdiction). There was established a system of two instances of Administrative Courts. At the same time the possibility to lodge an appeal with the higher administrative authority has been abolished. The reform provides for 9 Administrative Courts of First Instance in the Länder (the Austrian Provinces; deciding upon appeals against decisions of authorities of the Länder) and two Administrative Courts of the Federation (deciding upon appeals against decisions of Federal authorities).

The article aims at describing the contents of the reform and its main characteristics.

For the sake of a better understanding of the background of the reform and the principle legal foundations of the new system a short description of the development of the Austrian Administrative Jurisdiction is given in the beginning.

In the main part of the contribution the competences and tasks of the new Administrative Courts are described in detail.

The focus of the description lies on the unique character of the system because of the competence of the Administrative Courts to decide on the substance of the (administrative) matter that makes it different from the ones in other European countries.

Keywords: administrative Courts, administrative judiciary, Austria, Charter of Fundamental Rights of the European Union, EU law, European Convention on Human Rights.

INTRODUCTION

On January 1, 2014, a far-reaching reform of the Austrian legal system with regard to the court protection of the citizens entered into force. By the “Verwaltungsgerichtsbarkeits-Novelle 2012”, BGBl. I 2012/51 (Amendment to the Federal Constitutional Law concerning the Administrative Jurisdiction) there was established a regime of two instances of Administrative Courts. At the same time the possibility to lodge an appeal with the higher administrative authority has been abolished. This also implied that a large number of (specific) authorities which so far had to decide on appeals in the different fields of administration could be dissolved.⁸¹

⁸¹ On the reform as a whole cf. *Thienel*, Neuordnung der Verwaltungsgerichtsbarkeit (Restructuring of the Administrative Jurisdiction), Schriftenreihe der NÖ Juristischen Gesellschaft, Bd 116, *Eberhard*, Änderungen des Rechtsschutzsystems durch die Verwaltungsgerichtsbarkeits-Novelle 2012 (Changes of the judicial review by the Administrative Jurisdiction Reform Act 2012), in: Baumgartner (Ed.), *Öffentliches Recht – Jahrbuch 2013*, 157, *Schmelz*, Revolution im Verwaltungsrechtsschutz: Zweistufige Verwaltungsgerichtsbarkeit, Revision an den VwGH und andere Neuigkeiten (Revolution in the administrative review system: two-instance administrative judiciary, revision to the Administrative Court and other news), *ecolex 2013*, 584; on the new provisions in the Federal Constitutional Law *Faber*, Verwaltungsgerichtsbarkeit (Administrative Jurisdiction; 2013), Fischer/Pabel/Raschauer (Ed.), *Verwaltungsgerichtsbarkeit – Handbuch (Administrative Jurisdiction –*

The reform provides for 9 Administrative Courts of First Instance in the Länder and two Administrative Courts of the Federation, thus attributing to the Länder a share of the jurisdiction that so far lay exclusively with the Federation.

The present contribution aims at describing the contents of the reform and its main characteristics. For the purpose of a better understanding of the background of the reform and the principle legal foundations of the new system a short description of the development of the Austrian Administrative Jurisdiction is put in front of the explanations on the reform.

OUTLINE OF THE DEVELOPMENT OF THE AUSTRIAN ADMINISTRATIVE JURISDICTION

The Austrian Administrative Jurisdiction more or less dates back to the year 1876.⁸² This has to be kept in mind if one wants to understand the significance of the change that has taken place with the entering into force of the Reform Act 2012 on 1st January 2014.⁸³

In one of the so called Basic Laws of 21 December 1867 the establishment of an Administrative Court was provided for.⁸⁴

This Administrative Court was finally erected in 1876.⁸⁵

It had the competence to decide in administrative matters. The Court had to decide on the basis of the facts as they had been established by the administrative authority, but at the same time was entitled to quash the contested administrative act in case of severe breaches of the principles of a procedure ruled by law. The Administrative Court therefore developed a whole set of general principles of a fair procedure that had to be observed in the administrative procedure.⁸⁶ The case-law of the Administrative Court with regard to those principles of an administrative procedure was systematically described by *Tezner* in one volume of his series “Die rechtsbildende Funktion der österreichischen

Handbook; 2014). The authorities that have been dissolved are listed in an Annex to the Federal Constitutional Law.

⁸² *Jablonec*, Verwaltungsgerichtsbarkeit in Österreich: 1867 – 2012 und darüber hinaus, in Holoubek/Lang (Ed.), *Die Verwaltungsgerichtsbarkeit erster Instanz* (The Administrative Jurisdiction of first instance; 2013) 15; for a brief survey on the development of the administrative jurisdiction see also *Olechowski*, *Historische Entwicklung der Verwaltungsgerichtsbarkeit in Österreich*, in Fischer/Pabel/Raschauer (Ed.), fn 1, 3, and in detail *Olechowski*, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (1999), especially pp 82-180.

⁸³ *Holzinger*, *Verfassungsgerichtshof und Verwaltungsgerichtsbarkeit* (Constitutional Court and Administrative Jurisdiction), *ZVG* (Zeitschrift für Verwaltungsgerichtsbarkeit – Journal for Administrative Jurisdiction) 2014, 209: „A milestone in the constitutional reform“.

⁸⁴ Article 15 (2) and (3) of the Basic Law on the Judicial Power, RGBI N°144/1867.

⁸⁵ Law on the Administrative Court, RGBI N° 36/1876.

⁸⁶ Those principles comprise the most important aspects of procedural law, ranging from the right to be heard to the obligation of the authority to give the reasons for the decision and thus can roughly be compared to the principles that are part of the rule of law and “administration under Law” in the United Kingdom; cf. *Lord Woolf*, *The English Legal System*, in Lord Woolf, *The Pursuit of Justice*, 2008, 17 (43), *Rengeling*, *Rechtsgrundsätze beim Verwaltungsrechtvollzug des Europäischen Gemeinschaftsrechts*, 1977, 159. In a similar way, the European Court of Justice (eighty years later) has developed a whole system of principles for the procedure in the implementation of EC-law (Union law) as well by Union authorities as by national authorities; see *Grabitz*, *Europäisches Verwaltungsrecht - Gemeinschaftsrechtliche Grundsätze des Verwaltungsverfahrens* (European Administrative Law- Principles of Community law for the Administrative Procedure), *NJW* 1989, pp. 1776 (right to be heard, right to access to the files, establishing the facts ex officio, principle of confidentiality, obligation to give reasons for the decision, notification, prohibition of the admissibility of illegally obtained evidence).

verwaltungsgerichtlichen Rechtsprechung” and finally resulted in the issuing of the Austrian General Administrative Procedure Act in 1925.⁸⁷

When the Republic of Austria was established after the First World War Articles 129 – 136 of the Federal Constitutional Law of 1920 (FCL) provided for the Administrative Court. The Administrative Court according to Article 129 FCL had the task to “secure the legality of the whole public administration”.⁸⁸

The Administrative Court had the competence to decide on appeals against the decision of the last instance in the administrative procedure as well as in the case of a failure to act of the highest administrative authority.⁸⁹ In the latter case the Administrative Court could decide on the substance of the administrative case (instead of the administrative authority that had not decided in time).

These competences remained more or less unchanged (with slight modifications) until the end of 2013, when the Reform of the Administrative Jurisdiction entered into force.

The Administrative Court in all those years was the one and only *court* to decide in administrative matters. The appeal to the Administrative Court was only possible after the completion of the administrative procedure in which it was possible to appeal to the higher authority, regularly. Normally there were at least two administrative instances, sometimes even three. Exceptions to this rule could be found only in cases in which the decision lay with the highest authority as a first instance (the Government of the Land or the Minister at Federal level) or – very seldom – were the law especially excluded the administrative appeal.

The review of administrative acts had to be carried out with regard to the legality of the contested act. Moreover the Administrative Court had to restrict its examination to the possible breach of the rights of the applicant. It had no competence to decide on the merits of the (administrative) case (instead of the administrative authority) but could only quash the act in case of its illegality.⁹⁰ The administrative authority in this case had to draw the necessary consequences, especially to issue a new decision if this was required (this normally was the case if the party to the case had applied for a decision; if the authority had acted *ex officio* the result of the ruling of the Administrative Court could also be that the administrative authority had to refrain from any further action).

The Administrative Court still had to decide on the basis of the facts as they had been established by the administrative authority.⁹¹

Continuing with the description of the development of the administrative jurisdiction, there has to be mentioned one important amendment to the Constitution: the amendment of

⁸⁷ Allgemeines Verwaltungsverfahrensgesetz 1991 (General Administrative Procedure Act 1991), Federal Law Gazette - FLG N° 389/1925 (abbreviated: AVG, still in force with numerous amendments and newly published in a consolidated version in 1991; latest amendment FLG I 2013/161); cf. *Olechowski*, Die Entwicklung allgemeiner Grundsätze des Verwaltungsverfahrens, in Holoubek/Lang (Ed.), Allgemeine Grundsätze des Verwaltungs- und Abgabenverfahrens (2006), 13.

⁸⁸ Cf. *Schimetschek*, Der Verwaltungsgerichtshof seit der Gründung der Republik bis zur Besetzung (1918-1938), in: Lehne/Loebenstern/Schimetschek, Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit (The development of the Austrian Administrative Jurisdiction) - FS 100 Years Administrative Court (1976), 59.

⁸⁹ With regard to the decision making powers of the Administrative Court cf. *Walter*, Kassatorische oder reformatorische Entscheidung?, in Lehne/Loebenstern/Schimetschek (fn 3) 391. The Administrative Court for a short period even had the competence to fix administrative penalties (to decide on the penalty, not just act as a court of cassation).

⁹⁰ *Olechowski*, Zwischen Kassation und Reformation. Zur Geschichte der verwaltungsgerichtlichen Entscheidungsbefugnis, ÖJZ 1999, 581.

⁹¹ Cf. *Ringhofer*, Der Sachverhalt im verwaltungsgerichtlichen Bescheidprüfungsverfahren (The facts in the procedure before the Administrative Court concerning appeals against administrative acts), in Lehne/Loebenstern/Schimetschek (fn 3) 351.

1988⁹² (entering into force in 1991), that formed a significant step towards a two-instance-administrative jurisdiction: The Independent Administrative Panels were established in 1991.

They had the task to decide on appeals against administrative sanctions (penalties that are imposed by administrative authorities) and in other cases that were attributed to them by law. This additional competence was meant as a possibility to attribute those matters in which the decision of an administrative authority also concerned civil rights in the meaning of Article 6 ECHR to the Independent Administrative Panels.

Moreover, those Panels were competent to decide on complaints with regard to (individual) acts of administrative authorities that had not been issued in the form of a formal “Bescheid” (decree), but consisted in a “mere factual behavior”, e.g. in arresting a person, taking away private property, closing down an industrial plant because of an immediate danger etc (“exercise of direct administrative power and compulsion”).

The members of those Panels were granted more or less the guarantees of a judge (being independent, not subject to instructions by a public authority, no possibility to be removed from their function unless they had broken the law), but as the Panels had not been formally erected as “courts” were not judges.⁹³

As a consequence, the Panels were accepted as “tribunals” in the meaning both of Article 6 ECHR and Article 267 TFEU.⁹⁴

They can be seen as a first step towards a two-instance administrative jurisdiction and in fact those Independent Administrative Panels have been transformed into the Administrative Courts of the Länder by the Reform Act of 2012.⁹⁵

The question of the improvement of the administrative jurisdiction also formed part of the deliberations of the so called “Austrian Convention” that was summoned in 2003 and elaborated detailed proposals for the administrative jurisdiction (see below, chapter 3.)

As a further partial step (not following a comprehensive concept) to improve the legal protection the Asylum court was established in 2008.⁹⁶ This Court took up its work on 1 July 2008. It had the competence to decide on appeals against decisions of the administrative authorities in asylum cases. Its establishment was accompanied with the abolishment of the possibility to lodge an appeal to the Administrative Court and therefore was criticised to a considerable extent.⁹⁷

⁹² FLG N° 685/1988.

⁹³ The most critical issue with regard to the compliance with Article 6 ECHR generally was the appointment of the members of the panels for a certain period of time (at least in case of the first appointment).

⁹⁴ ECJ 4. 3. 1999, case C-258/97, *Hospital Ingenieure (HI)* EU:C:1999:118, § 18, and 5. 3. 2002, case C-515/99 and others, *Reisch and others* EU:C:2002:13; VfGH Slg. 13.958/1994.

⁹⁵ Article 151 (51) n° 5 and 8 FCL. The Independent Administrative Panels were dissolved, but their members had to be granted the right to be appointed as judges of the newly erected Administrative Court of the respective province by the relevant Act of the respective Land.

⁹⁶ There had been established a specific Independent Asylum Panel, organised in the same way as the Independent Administrative Panels in the Länder in 1997 (Article 129c FCL). This Independent Panel was transformed into the Asylum Court in 2008. The judgments of this court could only be appealed against before the Constitutional Court but not before the [Supreme] Administrative Court.

⁹⁷ *Feik/Klaushofer*, Die Einrichtung eines Asylgerichtshofes (The Establishment of the Asylum Court), *Öffentliches Recht. Jahrbuch 2008* (2008) 133, *Muzak/Rohrböck*, Der Asylgerichtshof (The Asylum Court) (2008), *Kienast*, Tritt die Ausgestaltung des Asylgerichtshofes den Rechtsstaat mit dem Fuß? (Does the establishment of the Asylum Court spurn the rule of law?), *ecolex* 2008, 185, *Muzak*, Das Verfahren vor dem Asylgerichtshof (The procedure before the Asylum Court), *migralex* 2008, 86, *Muzak*, Ein Jahr Asylgerichtshof – Eine erste Bilanz (One year Asylum Court – A first Balance), *ZfV* 2009, 752, *Wiederin*, Comment to VfGH 7. 11. 2008, U 48/08 (Comment on Constitutional Court 7. 11. 2008, U 48/08), *migraLex* 2009, 27, *Khakzadeh-Leiler*, Zwei Jahre Asylgerichtshof – Von erfüllten und unerfüllten Erwartungen (2 years Asylum Court – On fulfilled and unfulfilled expectations), *ZfV* (Journal for Administration) 2011, 20.

In tax matters of the Federation the competence to decide on remedies against the decisions of the tax authorities was transferred to an Independent Tax Panel (“Unabhängiger Finanzsenat”) in 2004.⁹⁸ This panel was established in the same manner as the Independent Administrative Panels in the Länder. In tax matters legal protection therefore was organised also in the way that an independent instance that formally was not established as a court had to decide before an appeal to the [Supreme] Administrative Court could be lodged.

SHORTCOMINGS OF THE FORMER AUSTRIAN SYSTEM

Although there was an elaborated administrative procedure that contained important guarantees for the parties the system of several *administrative* instances with a review of legality by the Administrative Court had some weaknesses as e.g. there was not provided for an obligatory public hearing in the administrative procedure and public hearings before the Administrative Court were held very seldom and the Administrative Court primarily had to decide on the basis of the facts established by the administrative authorities.

Soon after the accession of Austria to the European Convention on Human Rights in 1958 it became evident that there might arise problems with regard to the compatibility of the Austrian system with the requirements of the Convention.⁹⁹

Austria had declared a reservation to Article 6 of the Convention with regard to the system of administrative penalties. By and by it became evident that this reservation only was valid with regard to provisions already in force in 1958 and moreover did not pertain to fines (as it only mentioned prison sentences).¹⁰⁰

Moreover, Austria had made a reservation in respect of Article 6 of the Convention with regard to the provisions on public hearings.¹⁰¹ The ECtHR in the beginning considered this reservation valid. But in the light of its subsequent case-law¹⁰² the ECtHR finally in the case of *Eisenstecken v. Austria*¹⁰³ declared the reservation invalid because it did not satisfy the requirements of Article 57 § 2 of the Convention.

From the case law of the ECtHR it became clear that there were also a large number of *administrative decisions* concerning “civil rights and obligations” in the meaning of Article 6 of the Convention.¹⁰⁴ As according to the case law of the ECtHR¹⁰⁵ the right to a public hearing and the capacity of a tribunal according to Article 6 ECHR to have full jurisdiction in

⁹⁸ Art. 129c FCL, Independent Finance Senate Act, FLG I 2002/97 as amended by FLG I 2003/124.

⁹⁹ *Machacek*, Die Europäische Menschenrechtskonvention und die Verwaltungsrechtspflege in Österreich (The ECHR and the Administrative Jurisdiction in Austria), in: Pernthaler (Ed.), *Föderalistische Verwaltungspflege als wirksamer Schutz der Menschenrechte (Federalistic Administrative Jurisdiction as a means of Efficient Protection of Human Rights)*, 1986, 43. On the scope of application of Article 6 ECHR and the requirements arising of Article 6 ECHR and the consequences for the Austrian legal system in detail *Grabenwarter*, *Verfahrensgarantien in der Verwaltungsgerichtsbarkeit* (1997) passim and 355.

¹⁰⁰ *Kopetzki*, Zur Anwendbarkeit des Art. 6 MRK im (österreichischen) Verwaltungsstrafverfahren, *ZaöRV* 1982, 1.

¹⁰¹ The reservation read: “The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitution Law.”

¹⁰² ECtHR 29. 4. 1988, *Belilos*, Serie A 132.

¹⁰³ ECtHR 3.10.2000, Appl. 29477/95.

¹⁰⁴ ECtHR 23. 10. 1985, *Bentham v. Netherlands* A 97 (1985); *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights², 210 and 228; *Strasser*, Der Einfluss der EMRK auf das österreichische Verwaltungsverfahrenrecht, in Ress (Ed.), *Entwicklungstendenzen im Verwaltungsverfahrenrecht und in der Verwaltungsgerichtsbarkeit*, 227 (234).

¹⁰⁵ ECtHR 23 June 1981, *Le Compte, van Leuven and De Meyer*, A 43 (1981), 10 February 1983, Appl. 7299/75, *Albert and Le Compte*, 23 September 1982, *Sporrong Lönnroth* A 52 (1982).

the case (both with regard to the facts and the legal aspects of the case) constitute decisive elements of the guarantees enshrined in Art. 6 ECHR¹⁰⁶ the lack of a compulsory public hearing in the administrative procedure together with the afore mentioned procedural provision for the Administrative Court to decide on the basis of the facts as established by the authority resulted in severe doubts as to the compatibility of the Austrian system with the ECHR. According to the ECtHR there has to be an appeal both on the facts and on the law before a tribunal that complies with Article 6.¹⁰⁷

Only in those administrative matters in which specified panels or boards the members of which were independent and had guarantees comparable to those of a judge had to decide on appeals there was a decision of an independent tribunal.¹⁰⁸

A first reaction of the Austrian legislator was the above mentioned establishment of the Independent Administrative Panels.¹⁰⁹ With regard to administrative sanctions (administrative penalties) from 1991 onwards there was a decision of a body that fulfilled all the requirements of Art. 6 ECHR according a procedure meeting the requirements of the Convention.

Moreover, the possibility to assign additional competences to the Independent Administrative Panels enabled the legislator to transfer cases which concerned civil rights to the competence of the Panels.

However, the system with (at least) two administrative instances and the appeal to the Administrative Court often caused problems with regard to the length of the proceedings. The establishment of the Independent Administrative Panels could not remedy those shortcomings.¹¹⁰

Although in later decisions concerning Austria and the judicial review by the Administrative Court the ECtHR took a more pragmatic stand with regard to the compatibility of the Austrian legal system with the ECHR¹¹¹ it could not be denied that there was an urgent need for a reform of the organisation of the administrative jurisdiction to avoid the constant threat of a breach of the requirements of the ECHR.¹¹² The establishment of the Independent

¹⁰⁶ *Grabenwarter*, Europäische Menschenrechtskonvention³, § 24 n° 72-95, *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights², 247 and 271.

¹⁰⁷ Right of appeal, not just of judicial review: *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights², 229, fn 269.

¹⁰⁸ There existed a large number of such tribunals, e.g. the Real Property Transactions Commissions in the Provinces (cf. ECtHR 16. 7. 1971, *Ringeisen* Series A 13), or the Commissions of the Land for damages by hunting and wild animals, e.g. in Lower Austria according to section 118 para 1 of the Lower Austrian Hunting-Law 1974, Lower Austrian Law Gazette 6500, or (at the level of the Federation) the Superior Disciplinary Commission according to section 99 para 1 of the Federal Law of 27. June 1979 on the Law of Professional Civil Servants (BDG 1979), FLG N° 333; later on such bodies were established for regulatory tasks for the media or in the field of telecommunication, like the Federal Communications Board, Section 1 (2) Federal Act on the establishment of an Austrian Communications Authority ("KommAustria") and a Federal Communications Board (KommAustria Act), FLG I 2001/32. Most of those independent bodies could be dissolved with the Verwaltungsgerichtsbarkeits - Novelle 2012, FLG I 2012/51 (See the list in the Exhibit to the FCL).

¹⁰⁹ *Köhler* in: Korinek/Holoubek [Ed.], B-VG Kommentar (Federal Constitutional Law – Commentary), Article 129a FCL, paragraph 1.

¹¹⁰ Cf. ECtHR 3 February 2005, *Blum v Austria*, Appl 31655/02. In this case proceedings lasted for five years and five months before four instances (as the applicant had lodged an appeal with the Constitutional Court before the case could be heard by the Administrative Court), the ECtHR therefore held that there had been a breach of Article 6 § 1.

¹¹¹ ECtHR *Zumtobel v Austria* A 268-A (1993).

¹¹² Cf. *Bumberger*, Der Verwaltungsgerichtshof und die „europäischen Gerichtshöfe“ EGMR und EuGH (The Administrative Court and the „European Courts“ ECtHR and ECJ), in: FS Klecatsky (2010), 105.

Administrative Tribunals was a first step to ease the pressure but of course could not solve the structural problems of the system.¹¹³

This need obviously increased by the time the Charter of Fundamental Rights of the European Union entered into force (1. December 2009).¹¹⁴ Article 47 CFR not only provides for the same guarantees as Article 6 of the Convention but extends the scope of application of those guarantees to all cases in the implementation of Union law. There is no restriction in the application of Article 47 CFR to “civil rights and obligations and criminal charges”.

Besides an intense discussion of the problem in legal literature¹¹⁵ the topic was dealt with in the so called “Österreich Konvent” (Austrian Convention) that was held from 2003 to 2005 and which was established to prepare proposals for a comprehensive reform of the Constitution.¹¹⁶ By and by the concept of “9+1” or “9+2” (administrative courts of first instance) was elaborated and deemed to be the most practical solution. The need for a reform was also recognized in the working programme of the Government Chancellor Alfred Gusenbauer¹¹⁷ and the establishment of a high level working group formed part of this working programme.¹¹⁸

As a first result of the convention 2008 the above mentioned Asylum court was established. After this reaction of the legislator that was highly criticised (especially as there was no remedy to the Administrative Court but only the possibility to appeal to the Constitutional Court because of a violation of fundamental rights) the chances for a comprehensive reform seemed to be marginal as the political will to set further steps seemed to be not overwhelming. The reform of the administrative jurisdiction was adopted in the working programme of the new Government in 2008¹¹⁹ as it had been in previous working programmes. The reform debate on political level concentrated on the concepts of “9+1” or “9+2” (courts)¹²⁰ and for some reasons not to be dealt here in detail led to the historic decision on the Verwaltungsgerichtsbarkeits-Novelle 2012 in Parliament.

THE REFORM ACT 2012 AND ITS IMPLEMENTATION

¹¹³ The competence of the Independent Administrative Panels by and by was broadened, with regard to federal law there has to be mentioned especially the Federal Law Federal Gazette I N° 65/2002, by which there was transferred the competence to decide in administrative matters covered in 27 different (and important) Acts of Parliament. But still, the Independent Administrative Panels only were competent if a specific law provided for it.

¹¹⁴ OJ 2010/C 83/02.

¹¹⁵ Cf. only *Pernthaler/Rath-Kathrein*, Die Einführung von Landesverwaltungsgerichten – eine Alternative zu den „unabhängigen Verwaltungssenaten in den Ländern“, JBl. 1989, 609, *Pernthaler* (Ed.), Unabhängige Verwaltungssenate und Verwaltungsgerichtsbarkeit (1993), *Grabenwarter*, Auf dem Weg zur Landesverwaltungsgerichtsbarkeit, JRP 1998 (Journal for legal politics), 269, *Korinek*, Für eine umfassende Reform der Gerichtsbarkeit des öffentlichen Rechts, in FS Koja (1998), 289, *Jabloner*, Notwendigkeit und mögliche Gestaltung einer Landesgerichtsbarkeit, in Thienel (Ed.), Verwaltungsgerichtsbarkeit im Wandel (1999), 5, Holoubek/Lang (Eds.), Die Schaffung einer Verwaltungsgerichtsbarkeit erster Instanz (2008), *Lienbacher*, Allgemeines zur Einrichtung einer Verwaltungsgerichtsbarkeit 1. Instanz, JRP 2011, 328.

¹¹⁶ *Steiner*, Das Projekt “zweistufige Verwaltungsgerichtsbarkeit”, in Janko/Leeb (Ed.), Verwaltungsgerichtsbarkeit erster Instanz (2013), 1 (3), *Steiner*, Systemüberblick zum Modell „9+2“, in Fischer/Pabel/Raschauer (Ed.), fn 1, 105 (112).

¹¹⁷ Inaugurated on 11th January 2007.

¹¹⁸ Regierungsprogramm für die XXIII. Gesetzgebungsperiode, 24.

¹¹⁹ The Government of Chancellor Werner Faymann (“Faymann I”), inaugurated on 2nd December 2008; Regierungsprogramm für die XXIV. Gesetzgebungsperiode, 248.

¹²⁰ Cf. the Tätigkeitsbericht des Verwaltungsgerichtshofes für das Jahr 2008 (Annual Report of the Administrative Court, 2008), 4.

1. GENERAL SURVEY

In 2012 the Austrian Constitutional Law was amended fundamentally: By means of the Verwaltungsgerichtsbarkeits-Novelle 2012, BGBl. I 2012/51 (Amendment to the Federal Constitution on Administrative Jurisdiction), several decisive changes of the administrative procedure and the Administrative Jurisdiction were inaugurated.

Those changes comprise in short:

- the abolishment of the possibility to lodge an administrative appeal to the higher administrative authority
- the establishment of 9 Administrative Courts of the Länder, one in each province (Land), and two Administrative Courts of the Federation (one for general administrative matters in which the decision lies with Federal authorities, one for tax matters of the Federation) – “9+2 model”
- the competence of the Administrative Courts of First Instance to decide in substance in the administrative matter (on the merits of the case) that is brought before them
- the possibility of a judicial review of the decision of the Administrative Courts of First Instance by the Administrative Court (“Revision”)
- thus installing a system of two instances of administrative jurisdiction
- the restriction of the revision to the Administrative Court to cases in which a “fundamental question of law” arises, thus
- assigning to the Administrative Court the task to serve as a unifying instance
- the dissolution of a large number of specified bodies (competent for specific fields of administration)¹²¹
- the transfer of the competences of those bodies to the Administrative Courts of First Instance
- the transfer of the competence of the Asylum Court to the Bundesverwaltungsgericht (Administrative Court of the Federation), connected with
- the restoration of the competence of the Administrative Court to act as a last instance in Asylum cases

The Supreme Administrative Court according to the new provisions has to decide as a Court of second instance, reviewing the judgments of the Administrative Courts of First Instance. It has to fulfil the task of securing a uniform application of the law and therefore has to decide only if there arises a fundamental question of law. Thus the possibility to lodge an appeal against the decisions of the Administrative Courts of First Instance (“revision”) has been restricted drastically. This changes the role and the function of the Supreme Administrative Court significantly. Moreover, as a consequence of the new regime it seems to be appropriate to speak of the “Supreme Administrative Court”, although the legislator did not change the denomination for the Court.

Besides the revision to the Supreme Administrative Court there still is the possibility to lodge an appeal to the Constitutional Court if the complainant deems to be infringed in his rights derived from the Constitutional Law (Art. 144 FCL).¹²² Insofar the reform has not brought changes with regard to the relation between the (Supreme) Administrative Court and the Constitutional Court. It is still possible to lodge an appeal to the Constitutional Court first

¹²¹ Those bodies are enumerated in an Annex to Article 151 FCL and comprise approximately 120 authorities. In general, those bodies were independent and their members not subject to instruction.

¹²² *Holoubek/Fuchs*, Der VfGH im neuen Gefüge der Verwaltungsgerichtsbarkeit (The Constitutional Court in the new system of the Administrative Judiciary), *ecolex* 2013, 598.

and afterwards (if the appeal is dismissed) to lodge the revision with the Supreme Administrative Court.

As the Administrative Courts of First Instance are established as *courts*, they can also refer the question of the constitutionality of laws (both of the Federation and the Länder) or regulations to the Constitutional Court. Moreover, they can refer questions for a preliminary ruling to the ECJ according to Article 267 TFEU.

2. IMPLEMENTING LEGISLATION

The reform provided for by the amendment to the Federal Constitutional Law (FCL) was enacted by issuing the necessary laws on the establishment of the Administrative Courts of First Instance and the procedural rules for the proceedings before those courts. Furthermore many of the laws of the Federation and the Länder had to be adopted to the new system¹²³ (all provisions on administrative remedies had to be annulled, provisions on the competence of the Administrative Courts of First Instance have been introduced in many of the laws governing the different fields of administration; the Länder had to adopt their Acts on the Administration in the Local Communities¹²⁴). Finally different adaptations with regard to the dissolution of many appeals authorities were necessary.¹²⁵

A comprehensive survey on the implementing measures is to be found in *Steiner, Systemüberblick zum Modell "9+2"*, in Fischer/Pabel/Raschauer (Ed.), *Verwaltungsgerichtsbarkeit - Handbuch* (2014), 105 (133).

2.1. Organisation

a) Administrative Courts of the Länder

According to Article 136 (1) FCL the Länder are competent to provide for the organisation of the Administrative Court in each Land.

The organisation of the Administrative Courts of the Federation according to Article 136 (1) FCL has to be settled by the Federal Legislator.

The Administrative Courts of First Instance in the Länder therefore have been established by a specific Law on the Establishment of the Administrative Court in each Land.

The Acts of the Länder on the establishment of the respective Administrative Court in each Land have been published under the following numbers of the Law Gazette (Landesgesetzblatt – LGBl.) of the respective Land:¹²⁶

Burgenland: LGBl 44/2013

Carinthia: LGBl 55/2013

Lower Austria: LGBl 0015-0

Upper Austria: LGBl 9/2013

Salzburg: LGBl 16/2013

¹²³ Cf the list of Acts in *Steiner, Systemüberblick* in Fischer/Pabel/Raschauer (Ed.), fn 1, 136.

¹²⁴ Cf. *Eberhard, Verwaltungsgerichte und Gemeinden* (Administrative Courts and Communities), in Fischer/Pabel/Raschauer (Ed.), fn 1, 601.

¹²⁵ *N. Raschauer, Die Auflösung (fast) aller Sonderbehörden* (The dissolution of [nearly] all special agencies), in Fischer/Pabel/Raschauer (Ed.), fn 1, 653.

¹²⁶ The list only contains the sources, not the full title of the respective law. On the organisation of the Administrative Courts of First Instance of the Länder see in detail *Ranacher, Das Organisationsrecht der Landesverwaltungsgerichte* (The law on the organisation of the Administrative Courts of the Provinces), in: *Bußjäger/Gamper/Ranacher/Sonntag* (Ed.), *Die neuen Landesverwaltungsgerichte* [The new Administrative Courts of First Instance of the Länder] (2013), 73, and *Fischer/Zeinhofer, Organisation, Besetzung und Zuständigkeit der Landesverwaltungsgerichte* (Organisation, Composition and Competences of the Administrative Courts of the Länder), in Fischer/Pabel/Raschauer (Ed.), fn 1, 151.

Styria: LGBl 57/2013
The Tyrol: LGBl 148/2012
Vorarlberg: LGBl 19/2013
Vienna: LGBl 83/2012.

In most provinces there were also issued specific Acts on the transition of the Independent Administrative Panel into the Administrative Court of the Land and carried out adaptations of the respective Constitutions.

The members of the former Independent Administrative Panels were in general appointed as judges of the new courts, with regard to the now general competence of the courts in all administrative matters with the exception of those falling into the competence of one of the Administrative Courts of First Instance of the Federation there were also appointed additional judges.

b) Administrative Court of the Federation

The Administrative Court of the Federation (“Bundesverwaltungsgericht”) was established by the Federal Act on the Organisation of the Administrative Court of the Federation, FLG I 2013/10 (BVwGG).¹²⁷

It has its seat in Vienna with branches in Linz, Graz and Innsbruck (Section 1 (2) BVwGG).¹²⁸

For the detailed settlement of the handling of the cases the plenary assembly of the judges of the Administrative Court of the Federation has to issue internal rules of procedure.

At the moment there are approximately 180 judges (the greater part of whom are the former members of the Asylum Court, others being chosen both from the administration and from the legal staff of the Constitutional court and other institutions).

c) Federal Finance Court

The Federal Finance Court (“Bundesfinanzgericht”) was erected by the Bundesfinanzgerichtsgesetz (Act on the Federal Finance Court - BFGG), which forms part of the Finanzverwaltungsgerichtsbarkeitsgesetz 2012, FLG I 2013/14.

It has its seat in Vienna with branches in Feldkirch, Graz, Innsbruck, Klagenfurt, Linz and Salzburg (Section 2 (2) BFGG).¹²⁹

The court at the moment comprises approximately 200 judges.¹³⁰

2.2. Procedure

Austria has had an elaborated procedural law for the procedure before the administrative authorities since 1925.¹³¹ The General Administrative Procedure Act (AVG) also contained the procedural rules for the appeals procedure. There has been developed a settled case-law on the different problems of the procedure before the administrative authorities competent to decide on the appeals.¹³²

¹²⁷ Bundesgesetz über die Organisation des Bundesverwaltungsgerichts (BVwGG), BGBl I 2013/10.

¹²⁸ For details on its composition and the organisation cf. *Madner*, Organisation, Besetzung und Zuständigkeit des Bundesverwaltungsgerichts, in Fischer/Pabel/Raschauer (Ed.), fn 1, 203.

¹²⁹ That there are no branches in Lower Austria and the Burgenland has historical reasons, as the appeals authority in tax matters in Vienna also had been competent for Lower Austria and the Burgenland; *Kofler/Summersberger* in Fischer/Pabel/Raschauer (Ed.), fn 1, 629.

¹³⁰ Cf the Allocation of duties of the Federal Finance Court: www.bfg.gv.at/geschaeftsverteilung.

¹³¹ The so called „Verwaltungsverfahrensgesetze“ (Administrative Procedure Acts), consisting of the General Administrative Procedure Act (AVG), the Administrative Penal Act (VStG, containing both general provisions for administrative penalties and for the procedure in administrative penalty matters), the Introductory Act to the Administrative Procedure Acts (EGVG) and the Administrative Execution Act (VVG).

¹³² Especially with regard to the competence of the appeals procedure: VwSlg. 10.317 A/1980, settled case law since then, e.g. Administrative Court 25. 2. 2010, 2008/06/0172, *Wiederin* in Ennöckl/N. Raschauer/Schulev-

According to Article 136 (2) FCL the procedure before the Administrative Courts of First Instance (with the exception of tax matters) has to be provided for in uniform way by a law of the Federation. The procedure in tax matters can be settled in a separate Act of the Federation.

The legislator (both of the Federation and the Länder) moreover in general administrative matters is entitled to issue deviating procedural provisions if they are “necessary”.¹³³ The legislator already has made use of this possibility to a considerable extent.¹³⁴

The procedure before the Administrative Courts of First Instance in case of appeals against a decision of an administrative authority therefore has been provided for in a specific law of the Federation for all administrative matters with the exception of tax matters:

- the procedure in general administrative matters is covered by the Bundesgesetz über das Verfahren der Verwaltungsgerichte (Verwaltungsgerichtsverfahrensgesetz VwGVG), BGBl. I 2013/33 (Federal law on the Procedure before the Administrative Courts),
- the procedure in tax matters has been integrated into the Code on the Procedure in Tax Matters (BAO)¹³⁵ that also contains the procedure for the tax authorities.

The VwGVG is applicable both in the procedure before the Administrative Courts of the Länder and before the Federal Administrative Courts, the Federal Finance Court has to apply the BAO and in tax matters to be decided by them the Administrative Courts of First Instance of the Länder have to apply the BAO.¹³⁶

The applicable rules in the procedure before the Administrative Courts of First Instance therefore primarily depend on the *subject matter* of the case: if the administrative authority had to apply the BAO as the case falls within the scope of application of the BAO the Administrative Court of First Instance has to apply the rules for the court procedure in the BAO (and also the general rules of the BAO).

If this is not the case (the case does not fall within the scope of application of the BAO) the court has to apply the VwGVG (and the General Administrative Procedure Act – AVG).

In both cases (in the VwGVG and in the BAO) the application of the general rules of procedure as laid down in the AVG and the (first parts of the) BAO respectively is explicitly

Steindl/Wessely (Ed.), FS Raschauer (2013), 687, *Walter/Kolonovits/Muzak/Stöger*, *Verwaltungsverfahrensrecht*⁹, § 539, *Mayer*, Präklusion und Prozessgegenstand des Berufungsverfahrens, ZfV 1981, 521, *Ranacher*, Verwaltungsgerichtsbarkeitsreform als Verwaltungsstrukturereform und legistische Herausforderung, ZfV 2013, 359 (363), *Thienel/Schulev-Steindl*, *Verwaltungsverfahrensrecht*⁵, 271-273; concerning the question which law is applicable VwSlg. 9315/1977, also settled case law, *Walter/Kolonovits/Muzak/Stöger*, *Verwaltungsverfahrensrecht*⁹, § 541. *Thienel/Schulev-Steindl*, *Verwaltungsverfahrensrecht*⁵, 272.

¹³³ This provision follows in its wording Article 11 (2) FCL which contains the same authorization for deviating provisions and which has been clarified in the case-law of the Constitutional Court.

¹³⁴ Cf *Lechner-Hartlieb/Urban*, Verwaltungsgerichtsbarkeit neu – Besondere Bestimmungen in Materiensetzen, in Baumgartner (Ed.), *Öffentliches Recht – Jahrbuch 2013*, 117; e.g. with regard to the time limits for lodging of an appeal, the authority to which it has to be addressed, the suspensive effect.

¹³⁵ The amendment of the BAO was also enacted by the Finanzverwaltungsgerichtsbarkeitsgesetz 2012, BGBl. I 2013/14.

¹³⁶ *Fischerlehner*, Das Bescheidbeschwerdeverfahren vor dem Bundesfinanzgericht – Anforderungen und Spielräume für das Verwaltungsprozessrecht (The procedure on appeals against decisions of tax authorities before the Federal Finance Court), in Holoubek/Lang (Ed.), *Verwaltungsgerichtsbarkeit* (fn 2) 315, *Starlinger*, Das Verfahren der Bescheid(Administrativ-)Beschwerde vor dem Bundesfinanzgericht (The Procedure on appeals against decisions of tax authorities before Federal Finance Court), in: Holoubek/Lang (Ed.), *Das Verfahren vor dem Bundesverwaltungsgericht und dem Bundesfinanzgericht* (The procedure before the Federal Administrative Court and the Federal Finance Court; 2014) 33, *Kofler/Summersberger*, Das Bundesgericht für Finanzen im System der Verwaltungsgerichtsbarkeit, in Fischer/Pabel/Raschauer (Eds.), fn 1, 623 (646).

provided for (Section 17 VwGVG; Section 269 (1) BAO). According to Section 17 VwGVG the Administrative Courts of First Instance have to apply also specific procedural rules that had to be applied by the administrative authority.

As a consequence of the abolition of the possibility to appeal to the higher administrative authority the rules of procedure in the General Administrative Procedure Act on the appeals procedure now only apply to appeals procedures in local community matters (as in those matters there still is a remedy to an administrative authority).

The procedural rules have been drafted with a view to the requirements of Article 6 ECHR and Article 47 (2) CFR and therefore include detailed rules on the obligation to hold an oral hearing.¹³⁷

According to the VwGVG there is a division of the tasks in appeals cases between the administrative authorities and the Administrative Courts of First Instance. Appeals have to be lodged with the administrative authority that issued the administrative act under appeal. The administrative authority has to examine whether all procedural requirements are met and has to dismiss applications that are not admissible or have been lodged after the expiry of the time limit for the application (Section 13 (5) VwGVG). But the administrative authority moreover has also the possibility to decide in the substance of the case (“Beschwerdevorentscheidung”, preliminary decision; section 14 VwGVG). This instrument is meant as a means to avoid court procedures in cases where the administrative authority after lodging of the appeal realises that it had not taken into account certain aspects that lead to another decision. In such a case it should have the opportunity to take a new decision meeting the concerns of the appellant so that it is not necessary to undergo the procedure before the court. Each party has the right to ask for the submission of the case to the Administrative Courts of First Instance after the administrative authority has issued a “Beschwerdevorentscheidung”. So the case has to be decided by the administrative court if one of the parties does not accept the preliminary decision. That is why the instrument will not be of much importance in cases involving more than one party.¹³⁸

Although the Reform Act abolished the remedies to the higher administrative authority there still is left some room for administrative remedies in case of administrative acts that have been issued upon summary proceedings. Those remedies can only aim at a new decision of the same authority after completion of the normal procedure (especially according to the General Administrative Procedure Act¹³⁹). Such remedies are “remonstrative” remedies (they do not lead to a decision of a hierarchically higher authority).¹⁴⁰

The procedural rules for the Administrative Courts of First Instance in particular comprise provisions on

- the time limit for the appeals
- the authority with which the appeal has to be lodged
- the obligatory contents of the appeal

¹³⁷ For a detailed survey on the procedure before the Administrative Courts of First Instance see *Leeb/Zeinhofer*, *Verwaltungsgerichtsbarkeit neu - Das Verfahren der (allgemeinen) Verwaltungsgerichte*, in: Baumgartner (Eds.), *Öffentliches Recht – Jahrbuch 2014*, 35, and *Pabel*, *Das Verfahren vor den Verwaltungsgerichten*, in: Fischer/Pabel/Raschauer (Eds.), fn 1, 379.

¹³⁸ In Germany such cases are called „mehrpölige Verwaltungsverhältnisse“, in Austria the notion of “Mehrparteienverfahren” is used.

¹³⁹ Section 57 (2) AVG.

¹⁴⁰ *Faber*, *Administrative Rechtsmittel und Rechtsbehelfe unterhalb der Verwaltungsgerichtsbarkeit*, in Holoubek/Lang (Ed.), *Verwaltungsgerichtsbarkeit* (fn 2) 299, *Lechner-Hartlieb/Urban*, *Verwaltungsgerichtsbarkeit neu – Besondere Bestimmungen in Materiengesetzen*, in Baumgartner (Ed.), *Öffentliches Recht – Jahrbuch 2013*, 119.

- the task of the administrative authority in case of an appeal
- the preliminary decision of the administrative authority and
- the remedy against such a decision
- the obligation to hold an oral hearing, that has to be
- a public hearing,
- the reasons for which the court can abstain from holding a hearing,
- the rights of the parties,
- the public pronouncement of the judgment and on
- the decision making power of the court.

They cannot be described here in detail, but it is worthwhile to have a closer look on the scope of review and the decision making power of the Administrative Courts of First Instance (see below, 5.; in this context there will be given further hints on main aspects of the procedure).

It has to be mentioned that the administrative authority that issued the administrative act is also party to the case before the Administrative Courts of First Instance (section 18 VwGVG). Therefore the observation of the right to equality of arms according to Article 6 ECHR might become an issue in these proceedings.¹⁴¹

2.3. Transitional law

Art 151 (51) n° 7 to 11 FCL provides for the principles of the transitional law. According to Article 151 (51) n°11 FCL there has been issued a specific Act on the questions of the application of law in the cases pending before the second administrative instance on the eve of 31 December 2013 or before the Constitutional Court and the Administrative Court: The *Verwaltungsgerichtsbarkeits-Übergangsgesetz* (Administrative Jurisdiction Transition Act), FLG I 2013/33 as amended by FLG I 2013/122.

This Act of Parliament in a very casuistic way provides for solutions of several situations without following a coherent system. In practice the Supreme Administrative Court therefore had (and will have) to find pragmatic solutions for the different cases not covered by the law or the problems arising from this Act.¹⁴²

The general line of the constitutional provisions was to transfer all pending cases into the new system. So cases pending before administrative appeal instances were declared as cases before the Administrative Courts of First Instance (Article 151 (51) n°8 FCL), the Administrative Courts of First Instance took over the status as the involved party in appeals cases before the Supreme Administrative Court.

According to the Administrative Jurisdiction Transition Act actions for failure to act before the Supreme Administrative Court had to be pursued by the Administrative Courts of First Instance (if administrative authorities that had not been dissolved were involved) or were transferred to procedures upon an application for an injunction setting a time limit for the competent administrative court (if the authority responsible for the delay was an independent authority; section 5 (1) and (2) of the Administrative Jurisdiction Transition Act).

Specific problems arise in cases in which the applicant had lodged an action before the Constitutional Court before 1 January 2014 if the Constitutional Court passes the action to the Supreme Administrative Court after the 31 December 2013. In those cases the applicant has

¹⁴¹ *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights², 254.

¹⁴² *Martin Köhler*, Der Zuständigkeitsübergang auf die Verwaltungsgerichte in laufenden Verfahren am 1. 1. 2014 (Transfer of competences to the Administrative Courts in pending cases on 1. 1. 2014), in: Holoubek/Lang (Ed.), *Verfahren* (fn 56), 323. It has to be distinguished which authority has decided and when the act has been issued.

to lodge a revision according to the provisions in force now. The Supreme Administrative Court applies the provision for the ordinary transitional cases in which the time limit for an appeal before the Supreme Administrative Court had not expired on 31 December 2013 (section 4 (5) VwGbk-ÜG).¹⁴³

3. COMPETENCES OF THE ADMINISTRATIVE COURTS OF FIRST INSTANCE IN GENERAL – REVIEWABLE ACTS¹⁴⁴:

The competences of the Administrative Courts of First Instance are provided for in Art. 130 (1) FCL.

a) Remedies against individual administrative acts and measures in the exercise of administrative power

The Administrative Courts of First Instance decide on appeals against

- Individual administrative acts, *decisions* („Bescheid“) – Art 130 (1) n° 1 FCL
- Individual *measures* of administrative authorities, the so called “exercise of direct administrative power and compulsion” (acts *of a factual character*: arrest, acting directly in cases of emergency, without any formal procedure) - Art 130 (1) n°2 FCL,¹⁴⁵
- but not on the lawfulness of regulatory acts of administrative authorities („Verordnungen“).

The competence to examine the legality of regulatory acts and to quash them lies with the Constitutional Court alone. All other courts have to apply regulatory acts (normative acts with a general character) as long as they are in force, they have to refer the question of the legality of an act that they deem not to be in conformity with the Constitution (or in case of a regulation - “Verordnung” - not in line with the law on which the regulation is based) to the Constitutional Court.¹⁴⁶

b) Actions for failure to act

Finally, the Administrative Courts of First Instance are competent to decide upon actions for failure to act (Article 130 (1) n° 3 FCL).

This competence so far rested with the Administrative Court and now has been transferred to the Administrative Courts of First Instance, consequently. In case the

¹⁴³ Supreme Administrative Court 25. 4. 2014, Ro 2014/10/0029, 24. 6. 2014, Ro 2014/17/0083, 12. 8. 2014, Ro 2014/10/0087, and 17. 9. 2014, Ro 2014/17/0107.

¹⁴⁴ *Hauer*, Der Beschwerdegegenstand im Verfahren vor den Landesverwaltungsgerichten, dem Bundesverwaltungsgericht und dem VwGH, in Fischer/Pabel/Raschauer (Ed.), fn 1, 353, *Holoubek*, Kognitionsbefugnis, Beschwerdelegitimation und Beschwerdegegenstand der Verwaltungsgerichte (decision making power, locus standi and reviewable acts in the procedure before the Administrative Courts) in *Holoubek/Lang* (Ed.), Verwaltungsgerichtsbarkeit (fn 2) 129, *Martin Köhler*, Verwaltungsgerichtsbarkeit neu – Die Änderungen im Verfahren vor dem VwGH, in Baumgartner (Ed.), Öffentliches Recht – Jahrbuch 2014, 83.

¹⁴⁵ *Hauer*, Die Zuständigkeiten der Verwaltungsgerichte, in: Janko/Lieb (Ed.), Verwaltungsgerichtsbarkeit erster Instanz (2013) 32, *Kristoferitsch*, Die Maßnahmenbeschwerde an die Verwaltungsgerichte, in *Holoubek/Lang* (Ed.), Verfahren (fn 56), 47. On the notion of „Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt“ see *Martin Köhler* in *Korinek/Holoubek*, B-VG – Kommentar (Commentary to the FCL), Article 129a paragraph 45-55.

¹⁴⁶ Articles 89, 139 and 140 FCL. On the development of the competence of the Constitutional Court for the examination of regulations cf *Adamovich*, Die Prüfung der Gesetze und Verordnungen durch den österreichischen Verfassungsgerichtshof - The examination of Acts of Parliament and regulations by the Austrian Constitutional Court (1923), *Heller*, Der Verfassungsgerichtshof; with regard to Acts of Parliament also *Haller*, Die Prüfung von Gesetzen (The examination of Acts of Parliament), 1979. According to Art 7 of the Basic Law on the judicial power, RGBI N°144/1867, the examination of regulations fell within the competence of the courts as there was no Constitutional Court at those times.

Administrative Courts of First Instance do not decide in time, there has been provided for an application for an injunction by the Administrative Court (the so called “Fristsetzungsantrag”).

In conjunction with the abolishment of any remedy within the administration this competence constitutes a decisive step towards speedier proceedings and therefore has eminent importance with regard to the right of effective access to the courts and the right to a decision by a court within reasonable time.¹⁴⁷ Those guarantees now also have to be observed in the implementation of Union law.

c) Additional competences

According to Art 130 (2) FCL the legislator (both of the Federation and the Länder in their respective field of competences) is entitled to enlarge the competences of the Administrative Courts of First Instance.

It might provide for

1. complaints for illegality of the conduct of an administrative authority in executing the law (“Verhaltensbeschwerde”)¹⁴⁸ or
2. complaints for illegality of conduct of a contract placing authority in matters of public contracts¹⁴⁹ or
3. disputes in civil service law matters of civil servants.

d) Assessment of the competences

The competences described under a) and b) above belong to the traditional competences of the administrative jurisdiction in the Austrian legal system (originally of the [Supreme] Administrative Court alone, since the establishment of the Independent Administrative Panels both of those Panels and the [Supreme] Administrative Court).

The legislator now can transfer other competences (both in general administrative matters where the authorities are acting in their capacity as an authority and in the field of public procurement) concerning measures of the administrative authorities that are not to be seen as a formal “Bescheid” or a measure in the exercise of direct administrative power and compulsion (“Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt”). This means that the so far strict limitation of the judicial review to standardized forms of the exercise of public power¹⁵⁰ in the future can be loosened by the legislator. But as long as there are no such laws the competences of the Administrative Courts of First Instance are restricted to those described under a) and b). This innovation nevertheless is a decisive change of the system as it enables an evolution of the review possibilities.¹⁵¹

The Austrian legal situation thus differs from the German one, as in Germany the competence of the administrative courts pertains to “disputes of a public law character”.¹⁵²

¹⁴⁷ *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights², 236 and 278.

¹⁴⁸ *Holoubek* Die Verhaltensbeschwerde - Das Verfahren über Beschwerden wegen Rechtswidrigkeit sonstigen Verhaltens einer Verwaltungsbehörde, in: *Holoubek/Lang* (Ed.), Verfahren (fn 56), 113, *B. Raschauer*, „Schlicht-hoheitliches Verwaltungshandeln“, in: *Giese/Holzinger/Jablonek*, Verwaltung im demokratischen Rechtsstaat, FS *Stolzlechner*, 547, *Hauer* in *Fischer/Pabel/Raschauer* (Ed.), fn 1, 369.

¹⁴⁹ *Thomas Müller*, Das Verfahren wegen Rechtswidrigkeit eines Verhaltens eines öffentlichen Auftraggebers, in: *Holoubek/Lang* (Ed.), Verfahren (fn 56), 137.

¹⁵⁰ “Formenbindung der Verwaltungsgerichtsbarkeit”; *Grabenwarter* in *Korinek/Holoubek*, B-VG – Kommentar (Federal Constitutional Law – Commentary), Article 130 (1), paragraph 5. On the consequences and the obligation of the legislator to provide for the issuing of a “Bescheid” whenever there is taken a decision concerning the rights of a person Constitutional Court VfSlg. 11.590/1987.

¹⁵¹ *B. Raschauer*, Schlicht-hoheitliches Verwaltungshandeln, in *Giese/Holzinger/Jablonek* (Eds.), Verwaltung im demokratischen Rechtsstaat, FS *Stolzlechner*, 544, *Eberhard*, fn 1, 165.

¹⁵² Section 40 (1) of the German Verwaltungsgerichtsordnung (VwGO; Code on the procedure before the administrative courts); *Erbguth*, Allgemeines Verwaltungsrecht, 3rd Edition, § 5, n°24-27.

The new possibility for the legislator to define additional administrative measures as being appealable before the administrative courts (Article 130 (2) n°1 FCL) is an important step in the development of the review system.¹⁵³ The delegation is limited to acts of the so called “Hoheitsverwaltung” (action of the public body in its capacity as a sovereign body) as opposed to measures taken in the realm of private law (“Privatwirtschaftsverwaltung”).¹⁵⁴ This is a first step to overcome the aforementioned strict limitation to specific forms of administrative action.¹⁵⁵

The FCL thus has kept the traditional definition of the reviewable acts as it stood in 2012 and partly enlarged the possibilities of the legislator to transfer competences upon the Administrative Courts of First Instance. It will be interesting to see in which direction the legal system will develop. The new legal situation might especially provoke new discussions concerning the “verwaltungsrechtliche Vertrag” (administrative agreements)¹⁵⁶, especially in the form of agreements between administrative authorities and the citizen. Although the explanatory memorandum to Article 130 FCL stressed that administrative agreements could not be the subject of a provision assigning additional competences to the Administrative Courts of First Instance (obviously because of the limitation of the new possibility to acts of authorities acting in their capacity as authorities [“Hoheitsverwaltung”]) there are severe doubts as to whether this opinion is well founded (and the argument on which it seems to be based real is a valid one). It can be doubted that the concluding of an agreement on the public duties of citizens should not belong to the “Hoheitsverwaltung” (public administration).

Finally, it has to be stressed that the administrative courts still have no competence to examine *general normative* acts of administrative authorities (regulations; “Verordnungen”).¹⁵⁷ It is still the sole competence of the Constitutional Court to examine the legality of regulatory acts of administrative authorities.

4. DISTRIBUTION OF COMPETENCES AMONG THE ADMINISTRATIVE COURTS OF FIRST INSTANCE

a) General rule¹⁵⁸

The competences of the Administrative Courts of First Instance are distributed by Article 131 FCL.

The Federal Constitutional Law explicitly attributes (enumerates) specific competences to the Administrative Courts of the Federation (mainly by referring to the method of

¹⁵³ B. Raschauer, in Giese/Holzinger/Jablonek (Ed.), FS Stolzlechner, 547.

¹⁵⁴ On the slightly different view concerning the separation of public administration (and the review of acts by the administrative courts) and measures of administrative authorities in the realm of private law *Erbguth*, Allgemeines Verwaltungsrecht, 3rd Edition, § 12, n°8.

¹⁵⁵ Eberhard, fn 1, 165.

¹⁵⁶ Eberhard, Der verwaltungsrechtliche Vertrag (2005), Öhlinger, Der verwaltungsrechtliche Vertrag, in: Melichar (Ed.), Rechtsfragen des Verwaltungsverfahrens (1979) 45, Supreme Administrative Court 19. 4. 1982, Slg 5678 F/1982, 19. 6. 1997, 95/20/0538, 16. 11. 1998/94/17/0009.

¹⁵⁷ This is another significant difference to the German legal system; *Erbguth*, Allgemeines Verwaltungsrecht, 3rd Edition, § 24a, n°1.

¹⁵⁸ Janko, Bundesfinanzgericht, Bundesverwaltungsgericht oder Landesverwaltungsgerichte, in Janko/Leeb (Ed.), Verwaltungsgerichtsbarkeit erster Instanz (2013) 63, Wiederin, Das Bundesverwaltungsgericht: Zuständigkeiten und Aufgabenbesorgung, in Holoubek/Lang (Ed.), Verwaltungsgerichtsbarkeit (fn 2), 35, Pavlidis, Die sachliche Zuständigkeitsabgrenzung der Verwaltungsgerichte erster Instanz: Probleme und Widersprüche, ÖJZ 2013, 805, Martin Köhler, Die Zuständigkeit der Landesverwaltungsgerichte in Steuersachen, in Holoubek/Lang (Ed), Verwaltungsgerichtsbarkeit (fn 2), 85.

execution of the law on administrative level; see in detail below), adding that all cases that do not fall within the competence of the two Administrative Courts of First Instance of the Federation have to be decided by the Administrative Courts of First Instance of the Länder (Article 131 (1) to (3) FCL). The Administrative Courts of First Instance in the Länder therefore have a general subsidiary competence. All cases that are not assigned to one of the Courts of the Federation fall into the competence of the Administrative Courts of First Instance of the Länder.

b) Competences of the Administrative Court of the Federation (of first instance)¹⁵⁹

The main criterion according to which the Constitution distributes the competences between the Administrative Courts of First Instance of the Länder and the Administrative Court of the Federation is the way in which the executive power is exercised in the matter.

The Administrative Court of the Federation decides in cases in which the competence to execute Federal Law lies with *federal authorities* (Art 102 (2) FCL; “unmittelbare Bundesverwaltung” – direct federal administration) unless the competence lies with the Federal Finance Court (according to Art 131 (3) FCL).¹⁶⁰ In public procurement cases the Administrative Court of the Federation has to pronounce judgment on complaints against decisions on behalf of the Federation, in civil service matters the competence pertains to cases concerning civil servants of the Federation.

So the competence of the Administrative Court of the Federation generally depends on the competence of the administrative authorities, the way in which the executive power is exercised. If the execution of a federal law is carried out by a federal authority – and it is not a tax matter, for which the Federal Fiscal Court is competent – the appeal has to be decided by the Administrative Court of the Federation. Direct federal administration can be based on Article 102 (2) FCL or on specific constitutional provisions that enable the administration by federal authorities under the direct control of the competent Federal Minister.¹⁶¹

It has to be stressed that it is decisive in which way the law in fact provides for the competence of the authorities and not in which way the matter could be administered by the Federation according to the FCL. So, in cases in which the law *could* be executed by the Federation in direct Federal administration (“unmittelbarer Bundesverwaltung”) but in fact the law provides for a competence of the authorities of the Länder (in which case one speaks of “mittelbarer Bundesverwaltung” - indirect Federal administration - as the authorities of the Länder in this case are subject to instructions by the Federal Ministers that could be transferred via the respective Governor of the Land) there is no competence of the Administrative Court of the Federation.

The same applies in cases where the Federal Minister (exceptionally) is competent to issue an administrative act and the executive power in other cases in this field of administration according to the law is exercised in indirect Federal administration.

¹⁵⁹ *Wiederin*, Das Bundesverwaltungsgericht: Zuständigkeiten und Aufgabenbesorgung, in Holoubek/Lang (Eds.), Die Verwaltungsgerichtsbarkeit erster Instanz (2013) 36, *Madner* in Fischer/Pabel/Raschauer (Ed.), fn 1, 203,

¹⁶⁰ *Pavlidis*, ÖJZ 2013, 808 (Zivildienstagentur), *Köhler*, Die neue Verwaltungsgerichtsbarkeit und das Energierecht, in: Stöger/Storr (Eds.), Schwerpunkte Energieeffizienz und Verfahrensrecht, 95 (111; regulatory authorities in the energy sector).

¹⁶¹ It is settled practice of the legislator to provide for direct administration of the Federation in certain fields of administration which are of special importance even if this is not enabled by Article 102 (2) FCL by issuing a specific constitutional clause (in the respective Act of Parliament, thus amending the Constitution as it is laid down in the FCL. Cf. Section 1 Energielenkungsgesetz 2012 – EnLG 2012, BGBl. I 2013/41, Section 2 (1) E-ControlG, BGBl. I 2010/110; *Köhler*, Die neue Verwaltungsgerichtsbarkeit und das Energierecht, in: Stöger/Storr (Eds.), Schwerpunkte Energieeffizienz und Verfahrensrecht, 95.

On the other hand, if the competence lies with an authority established by the Federation or that has been vested with administrative power by federal law the competence to decide on appeals against such decisions lies with the Administrative Court of the Federation.

Finally, the Administrative Court of the Federation is also competent to decide on appeals against the decisions of a Federal Minister if the matter falls within the scope of Article 102 (2) FCL and there are no other decisions to be taken in this field of administration in indirect federal administration.

Examples for the competence of the Administrative Court of the Federation are cases in banking law or stock exchange questions (which fall in the competence of the Austrian Finance Supervisory Authority, a federal authority). The same applies to decisions of regulatory authorities established by the Federation and acting under the direct control of the Federal Minister (e.g. in energy matters). In those fields of administration the competence of the Administrative Court of the Federation also comprises the decisions of the Federal Minister in the respective field.

On the contrary, in the Federal Gaming Monopoly administration that could be executed in direct federal administration, but in fact is executed by the authorities of the Länder in indirect federal administration the competence of the Administrative Courts of First Instance of the Länder also pertains to decisions of the Federal Minister if there should be provided for such a decision exceptionally. This, e.g., is the case with regard to the granting of certain licenses.¹⁶²

c) Competences of the Federal Fiscal Court¹⁶³

The Federal Fiscal Court according to Article 131 (3) FCL has to decide in *tax matters* if the authority that has decided is a *Federal Tax authority*.

The competence of the Federal Fiscal Court therefore depends *both* on the fact that

- the matter pertains to “taxes” in the meaning of Art. 13 FCL *and*
- on the competence of the administrative authority.¹⁶⁴

Thus, the Federal Fiscal Court can also be competent to decide in tax matters of the Länder as according to Article 11 (3) Constitutional Law on Financial Matters the Länder can also confer the competence to administer tax laws of the Länder to the tax authorities of the Federation (on the further possibility to transfer the competence see below, e).

d) Competences of the Administrative Courts of First Instance of the Länder¹⁶⁵

As a consequence of the explicit transfer of the above mentioned competences to the Federal Administrative Courts according to the general clause in Article 131 (1) FCL the Administrative Courts of First Instance of the Länder have to decide in all the other cases.

The Administrative Courts of First Instance of the Länder therefore primarily decide on appeals against decisions of the authorities in the Länder, based both on laws of the Länder and of the Federation (“indirect federal administration”). Their competence therefore is very broad as a great part of administrative law (e.g. the Water Act, Forestry Act, Industrial Act and many others) is executed in indirect federal administration. Besides those fields of administration the whole administrative law of the Länder (Nature protection, Construction law, hunting and fishery etc.) falls into the competence of the Administrative Courts of First

¹⁶² Sections 14 and 21 of the Gaming Act (Glücksspielgesetz), FLG 1989/620 as amended by FLG I 2012/112 and I 2013/70.

¹⁶³ Köhler, Die Zuständigkeit der Landesverwaltungsgerichte in Steuersachen, in Holoubek/Lang (Ed), fn 2, 85.

¹⁶⁴ On the notion of „taxes“ in the meaning of the constitution in general and the Finanz-Verfassungsgesetz (Act on Financial Matters) in particular Ruppe in Korinek/Holoubek, B-VG, § 5 F-VG, paragraph 6-15.

¹⁶⁵ Pürgy in Holoubek/Lang (Ed.), Verwaltungsgerichtsbarkeit(fn 2), 49 [54].

Instance of the Länder. Finally, the authorities of the Länder are also competent in matters according to Article 11 FCL (in which the Federation issues the Acts and the execution lies with the Länder; e.g. in road traffic matters).

It has to be stressed that the Administrative Courts of First Instance of the Länder are also competent in the tax matters of the Provinces. Contrary to the tax matters of the Federation, for which there has been erected the Federal Finance Court, there is no specific court (“finance court”) with regard to taxes levied by the Länder.

It is, however, possible that the described competences can also be shifted by law (see below, e). Such a shift of competences e.g. has been provided for with regard to most of the Viennese tax matters. By amendment of the Viennese Act on the Organisation of the Tax Administration, Viennese LG N°45/2013, the competence in those matters was transferred to the Federal Finance Court.

e) Shift of competences¹⁶⁶

The Federal Constitution also provides for a shift of the competences of the Administrative Courts of First Instance. Both the Federal legislator and the legislator of the Provinces can explicitly declare one of the other courts competent to decide in a specific matter. Such an act requires the consent of the Provinces in the case of a federal law and the consent of the Federation in case of a law of one of the Länder.

Vienna has made use of this possibility and transferred the competence for a large number of tax matters to the Federal Finance Court.¹⁶⁷

THE SCOPE OF THE REVIEW BY THE ADMINISTRATIVE COURTS OF FIRST INSTANCE AND THEIR COMPETENCES TO DECIDE IN THE CASE¹⁶⁸

1. PRINCIPLES AT CONSTITUTIONAL LEVEL

One of the core elements of the reform is the specific construction of the task of the Administrative Courts of First Instance. Although they act as a court and have the task to review the acts of the administrative authorities they at the same time have been vested with the duty to decide in the administrative matter in substance.

With regard to the competences of the Administrative Courts of First Instance and their limits there have to be mentioned two important constitutional provisions:

1. First, the Administrative Courts of First Instance – in the same way as this had been provided for with regard to the Administrative Court so far – upon an appeal of a party according to Article 132 (1) n° 1 FCL are limited to the examination whether there has been a breach of subjective rights of the applicant.¹⁶⁹
2. Secondly, the Administrative Courts of First Instance according to the constitution (on the other hand) are not limited to a cassation function, but they are entitled to decide on the substance of the case in the sense of deciding in the case instead of the

¹⁶⁶ *Madner* in Fischer/Pabel/Raschauer (Ed.), fn 1, 233-236.

¹⁶⁷ (Viennese) Verwaltungsgerichtsbarkeits-Anpassungsgesetz Abgaben (Administrative Jurisdiction Adjustment Act - Taxes), Viennese Law Gazette 2013/45, containing an amendment of the Act on the Organisation of the Tax Administration and amendments to certain tax laws.

¹⁶⁸ *Merli*, Die Kognitionsbefugnis der Verwaltungsgerichte erster Instanz, in: Holoubek/Lang (Ed.), Schaffung (fn 35), 65, *Holoubek*, Kognitionsbefugnis, Beschwerdelegitimation und Beschwerdegegenstand der Verwaltungsgerichte (decision making power, locus standi and reviewable acts in the procedure before the Administrative Courts) in Holoubek/Lang (Ed.), Verwaltungsgerichtsbarkeit (fn 2), 129.

¹⁶⁹ Article 132 (1) n°1 FCL: „...who alleges infringement of his rights”.

administrative authority (and as the administrative authority would do, issuing the acts at stake in the legal form of a judgment).

The Administrative Courts of First Instance *have* to decide in the substance of the case if certain conditions are met (Article 130 (4) FCL). Those conditions are:

- the relevant facts have been established sufficiently
- or the establishment of those facts can be done more efficiently by the Administrative Courts of First Instance themselves.

Moreover, it is possible that the legislator provides for further decisions in the substance of the case (instead of a mere cassation in case of illegality of the contested decision). In those cases the Administrative Courts of First Instance are *entitled* to decide in the case (according to the VwGVG they have been *obliged* to decide on the merits in certain further cases; see below, 5.2.).

According to Article 132 (5) FCL the law can also provide for the right to appeal against administrative decisions because of illegality (“*Amtsbeschwerde*”; appeal of an institution). In such cases the Administrative Court of First Instance is not limited to the examination of the breach of subjective rights. It has to exercise its control with regard to the legality of the act on the whole (and therefore can decide on the substance also with regard to questions not pertaining to subjective rights of a party).

2. IMPLEMENTATION IN THE PROCEDURAL LAW

In the Code on the Procedure before the Administrative Courts of First Instance (VwGVG) section 28 provides for the details of the decision making powers of the Administrative Courts of First Instance.

The legislator has made use of the possibility to add further cases in which the Administrative Courts of First Instance have to or can decide on the substance of the (administrative) case and enlarged the duty of the Administrative Courts of First Instance to decide on the merits of the case.(on the substance of the administrative matter by issuing the act itself, instead of the authority).¹⁷⁰

Section 28 paragraph 2 VwGVG obliges the Administrative Courts of First Instance to decide on the merits of the case under the conditions laid down in Article 130 (4) FCL. It thus defines the cases in which the Administrative Courts of First Instance are *obliged* to decide on the substance of the case.

Section 28 paragraph 3 VwGVG (Code on the Procedure before the Administrative Courts of First Instance) in addition provides for a decision of the Administrative Courts of First Instance on the substance of the case unless the administrative authority did not object to such a decision. In those cases the legislator has opened a certain margin of appreciation for the Administrative Courts of First Instance as they are entitled to quash the administrative act and refer the case back to the administrative authority if relevant facts have not been

¹⁷⁰ On the competence to decide in the substance in tax matters *Sutter*, Die Entscheidung in der Sache im Steuerverfahren, in Holoubek/Lang (Ed.), Verfahren (fn 56), 267, *Kofler/Summersberger*, Das Bundesgericht für Finanzen im System der Verwaltungsgerichtsbarkeit, in Fischer/Pabel/Raschauer (Eds.), fn 1, 623 (649), *Martin Köhler*, Die Zuständigkeit der Landesverwaltungsgerichte in Steuersachen, in Holoubek/Lang (Ed.), Verwaltungsgerichtsbarkeit (fn 2), 85 (121). According to the BAO there is a compulsory preliminary decision on the appeal (section 262 BAO), the decision making power of the Administrative Courts of First Instance in tax matters is provided for in Articles 278 and 279 BAO. According to them the Administrative Courts of First Instance also in tax matters have to decide in the (tax) case itself in a broader way as it would be necessary according to Article 130 (4) FCL; cf. *Sutter*, Die Entscheidung in der Sache im Steuerverfahren, in Holoubek/Lang (Ed.), Verfahren (fn 56), 270.

established correctly. As the Supreme Administrative Court has already ruled this exception to the rule of a decision on the substance has to be applied carefully and must not be made use of in cases where there has not been a severe negligence of the duty to establish the facts by the administrative authority.¹⁷¹

The VwGVG insofar goes beyond the minimum requirements of the constitution.

As a result the Administrative Courts of First Instance in general have to decide on the substance of the administrative matter (within the limits described above). They in fact now fulfil more or less the function that had to be exercised by the appeals authorities up to the end of 2013.

This distinction moreover is of special importance with regard to the competence of the Administrative Courts of First Instance to exercise discretionary power (see below).

From the VwGVG read in conjunction with the AVG (General Administrative Procedure Act that is applicable also in the procedure before the Administrative Courts of First Instance as far as there are no specific rules for the procedure before the Administrative Courts of First Instance) follows the obligation of the administrative courts to establish the relevant facts (section 37 and 39 AVG), to hold a public oral hearing, to ensure the exercise of the right to be heard by the parties and (in case there has been held an oral hearing) the principle of immediacy. There are no restrictions as to the way how evidence can be gathered (section 45 AVG) and new submissions and new evidence can be brought in the proceedings before the court (new evidence is not excluded). The settled case law with regard to the application of the law in force by the time of the decision of an appeals authority¹⁷² will be applicable also in the procedure before the Administrative Courts of First Instance.

3. LIMITS TO THE COMPETENCE OF THE ADMINISTRATIVE COURTS OF FIRST INSTANCE TO DECIDE IN THE MATTER

a) Although the Administrative Courts of First Instance according to the legal situation described above are entitled to decide in the administrative matter and thus function in a similar way as the administrative authorities as appeals authorities had to so far, there are decisive limits to this competence.

b) As has been pointed out already the task of the Administrative Courts of First Instance is primarily and upon an appeal of a party according to Article 132 (1) n° 1 FCL (parties relying on subjective rights) *only* to protect the subjective rights of the appellant. Therefore, the possibility to decide “in the administrative matter” does not comprise the whole administrative matter, but only as far as the subjective rights of the appellant are concerned.

To clarify the decision making power of the Administrative Courts of First Instance there has to be explained one important distinction in the Austrian legal system.

In Austrian law there is made a distinction between legal provisions issued in the interest of third persons (e.g. the neighbors of a planned construction), that confer so called “subjektive Rechte” (subjective rights) upon the beneficiary, and provisions serving only the public interest (“objektives Recht”, e.g. a provision in construction law according to which a building has to fit in its surroundings with regard to its appearance). It is a long lasting

¹⁷¹ Supreme Administrative Court 26. 6. 2014, Ro 2014/03/0063, and 27. 8. 2014, Ro 2014/05/0062. Cf. *H.P. Lehofner*, Die Grenzen der Zurückverweisung durch das Verwaltungsgericht (Limits for the referring of cases to the administrative authority by the Administrative Court), ÖJZ 2014, 705.

¹⁷² Beginning with (Supreme) Administrative Court 9315 A/1977, since then settled case-law.

discussion in Austrian literature and a never ending task of the judiciary to clarify, which provisions are of which character (the protective character of the norms has to be assessed). That is why the legislator in many cases has turned to the technique to specify explicitly (enumerate), which provisions confer (subjective) rights to citizens (neighbours, third persons that are affected by the decision of the authority, that might also be competitors of an undertaking that is the addressee of an administrative act, e.g. in telecommunication matters).¹⁷³

This distinction according to the case law of the Administrative Court not only played a dominant role with regard to the competence of the Administrative Court but also in the administrative procedure and therefore also for the competence of the Independent Administrative Panels in their capacity as an appeals authority. According to the Administrative Court an appeal authority under Section 66 (4) of the General Administrative Procedure Act (AVG) was only entitled to decide on questions concerning the applicant's subjective rights.¹⁷⁴

This system of a restricted competence of the appeal authority (now: the Administrative Courts of First Instance) as a result has been resumed by the Reform Act. The Administrative Courts of First Instance just like the (Supreme) Administrative Court so far have the task to protect the subjective rights of the citizens. But they are not entitled to change administrative acts that do not interfere with those rights. As a consequence, they cannot quash an act of an administrative authority just because it is illegal "only" with regard to a provision of objective right.

Thus the competence to decide on the merits of the case does not pertain to the whole administrative case but has to be understood as limited to the sphere of the subjective rights of the applicant.

To give an example:

If a plant is to be erected or some construction work is to be carried out the authority granting the building license (according to the substantive laws applicable) has to take into account a number of aspects prescribed by law. Third persons whose rights might be affected by the decision can only rely on such provisions of law that confer subjective rights on them. In an appeals procedure the higher administrative authority was only entitled to change the challenged act with regard to those subjective rights. In the future (under the new system) this also pertains to the Administrative Courts of First Instance.

As a result in cases with more than just one party ("mehrpölige Verwaltungsverhältnisse" in the German legal terminology) the scope of the review is limited to those questions that have an influence on the rights of the appellant according to Article 132 (1) n° 1 FCL. An exception to this rule is the appeal of an institution according to Article 132 (5) FCL ("Amtsbeschwerde"); here the Administrative Courts of First Instance have to decide on the legality of the act as a whole without the restriction to subjective rights.

Therefore, the Administrative Courts of First Instance can only decide in the whole administrative matter as it had been at stake before the administrative authority in cases with just one party (or more precisely: with parties that have the same interest, as there could be several owners of a property or more than one person obliged to pay the same tax etc.).

This limitation follows from the legal basis of the competences of the Administrative Courts of First Instance in the FCL.

¹⁷³ E.g. section 26 (1) of the Styrian Building Law 1995, Styrian Law Gazette 1995/59 as amended (enumeration of the subjective rights).

¹⁷⁴ VwSlg. 10.317 A/1980, settled case law; e.g. Administrative Court 25. 2. 2010, 2008/06/0172, *Wiederin* in FS Raschauer (fn 52), 687, *Walter/Kolonovits/Muzak/Stöger*, *Verwaltungsverfahrenrecht*⁹, Rn 539.

It has been duly taken into account in the procedural law in the VwGVG (§ 28 VwGVG that does not contain any hint to a possibility to “change the challenged act in any way”, thus taking over the described narrow competence of the Administrative Courts of First Instance with regard to appeals of parties to the administrative case).

c) Besides the restrictions that are based on the constitutional provisions there is another limitation of the competences of the Administrative Courts of First Instance that follows from the procedural provisions in the VwGVG:

According to Section 27 VwGVG the Administrative Courts have to examine the act under appeal “on the basis of the action (section 9 (1) n° 3 and 4)” or on the basis of the scope of application in the action (unless the court comes to the conclusion that the administrative authority was not competent to issue the act).

Whereas there are no severe doubts as to the meaning of the latter wording (if there are different parts of a decision that can be separated from each other it is also possible to appeal just against one part of the decision) there has arisen an intensive debate over the meaning of the first part of the provision. According to Section 9 (1) n° 3 and 4 VwGVG the appellant is obliged to give reasons why he is appealing against the decision and to submit a formal application (a specific motion). Whereas some of the authors¹⁷⁵ are of the opinion that section 27 read in conjunction with section 9 (1) n° 3 VwGVG (which is referred to in section 27) leads to a limitation of the decision making power of the Administrative Courts of First Instance in the sense that the courts were limited to examine the act under appeal solely on the basis of the reasons given by the appellant, others are pleading for a wider interpretation.¹⁷⁶ This latter interpretation is based both on the reference to 9 (1) n° 4 VwGVG (the specific motion) and the aim of the legislator to enable an effective remedy against administrative decisions without strict formal requirements (as they can be found in the procedure before the Supreme Administrative Court). The opinion, that the Administrative Courts of First Instance were limited to the reasons given in the appeal (that can be submitted without legal aid!) would lead to the situation that the law concerning the appeal against administrative decisions nowadays was more severe than it had been before with regard to the appeal before the Supreme Administrative Court, which had to be submitted by an advocate. Such an interpretation would run counter the declared will of the legislator. Moreover it can be argued that the legislator deliberately refrained from prescribing that the applicant had to refer to a certain *right* that was breached by the decision. It should be avoided that the court was limited to a certain right in its examination. The result that the court should be restricted to a specific “*reason*” would lead to an even more severe restriction and therefore would not be in line with the intention of the legislator. It has to be admitted, that the legislator unfortunately expressed its will unclear. It will be interesting and decisive for the effect of the whole reform in which way the clause will be understood in the case-law of the Supreme Administrative Court.

In penal matters there is still the rule of a prohibition of a *reformation in peius* (section 42 VwGVG).

¹⁷⁵ *Pabel* in Fischer/Pabel/Raschauer (Ed.), fn 1, 401, *Leeb/Zeinhofer* in Baumgartner (Ed.), *Öffentliches Recht - Jahrbuch* 2014, 65.

¹⁷⁶ *Martschin/Schmid* in: Eder/Martschin/Schmid, *Das Verfahrensrecht der Verwaltungsgerichte* (2013), section 27, K 7, *Köhler*, *Der Zugang zum Verwaltungsgerichtshof im System der zweistufigen Verwaltungsgerichtsbarkeit* (Access to the Supreme Administrative Court in the system of the two-tier administrative jurisdiction), *ecolex* 2013, 589 (592, Fn 16), *Storr*, *ZVR* 2013, 439; carefully weighing and pleading for a wider interpretation especially with regard to the examination under aspects of Union law *Fister* in *Fister/Fuchs/Sachs*, *Das neue Verwaltungsgerichtsverfahren* (2013) section 27 VwGVG, note 5.

4. THE EXERCISE OF DISCRETIONARY POWER

A specific problem in the implementation of the reform arose with regard to the handling of cases in which administrative authorities can exercise discretionary power.

It will not be surprising that there were uttered severe doubts and also opposition on political level with regard to the potential exercise of discretionary power (“Ermessen”) by the Administrative Courts of First Instance.¹⁷⁷ That is why the Federal Constitutional Law also contains a general rule on the decision making powers of the Administrative Courts of First Instance in cases of discretionary powers of administrative authorities. The legislator obviously wanted to clarify the competence of the Administrative Courts of First Instance in those cases. If, on the other hand, one looks at Section 28 VwGVG there arise doubts as whether the legislator had a clear concept with regard to the judicial control or the exercise of discretionary power by the courts.

According to Article 130 (1) FCL there is no illegality when the law allows for a margin of discretion of the administrative authority and the authority has made use of this discretionary power in the sense of the law. It is not possible to deal with the long discussion on the problem of the meaning of the Constitutional clause on “discretionary power” that in the same sense exists since 1920 and was applicable for the Administrative Court (alone) so far.¹⁷⁸ Despite some slight changes in the wording the new provision according to the intent of the legislator has to be read in the same sense as the provision has been understood so far.¹⁷⁹

The consequences of the new provisions in Article 130 (3) and 130 (4) FCL (discretionary power of the administration and restricted review with respect to it on the one hand; decision on the merits of the administrative case on the other hand) will have to be discussed in Austria thoroughly. This discussion only has started and at the moment concentrates on the interpretation of section 28 of the General Administrative Procedure Act as amended by the law FLG I 2013/33.¹⁸⁰ This provision distinguishes between cases in which the Administrative Court of First Instance is *obliged* to decide on the substance of the case (section 28 paragraph 2 VwGVG) and cases where it is entitled to decide in the

¹⁷⁷ On the discretionary power of the administrative authorities in France cf. *Grabenwarter*, *Verfahrensgarantien in der Verwaltungsgerichtsbarkeit*, 128 – 135 and 181 – 186.

¹⁷⁸ Cf. *Ringhofer*, *Der Verwaltungsgerichtshof* (The Administrative Court, 1955), 117, *Rill*, *Ermessensprüfung/Beurteilungsspielraum/ Kontrolle von Prüfungsentscheidungen*, in *Ress* (Ed.), *Entwicklungstendenzen im Verwaltungsverfahrensrecht und in der Verwaltungsgerichtsbarkeit* (Tendencies in procedural law and in the Administrative Jurisdiction, 1990), 115, *Bernard*, *Gebundenheit und Ermessen*, in: *Ermacora et alii* (Ed.), *Allgemeines Verwaltungsrecht*, FS Antonioli (1979) 89.

¹⁷⁹ Article 130 (2) FCL *before* FLG I 2012/51, cf. *Fuchs*, *Verwaltungsermessen und Verwaltungsgerichtsbarkeit: Rückblick und Ausblick*, in *Holoubek/Lang* (Ed.), *Verfahren* (fn 56), 231 (263).

¹⁸⁰ *Holoubek*, *Kognitionsbefugnis, Beschwerdelegitimation und Beschwerdegegenstand der Verwaltungsgerichte* (decision making power, locus standi and reviewable acts in the procedure before the Administrative Courts) in *Holoubek/Lang* (Ed.), *Verwaltungsgerichtsbarkeit* (fn 2), 129 (137), *Eberhard*, fn 1, 172, *Köhler*, *Die Zuständigkeit der Landesverwaltungsgerichte in Steuersachen* (The Competences of the Administrative Courts of the Provinces in tax matters), in *Holoubek/Lang* (Ed.), *Verwaltungsgerichtsbarkeit* (fn 2), 122, *idem*, *Die neue Verwaltungsgerichtsbarkeit und das Energierecht* (The New Administrative Jurisdiction and Energy Law), in: *Stöger/Storr* (Ed.), *Schwerpunkte Energieeffizienz und Verfahrensrecht* (Energy efficiency and procedural law), 95 (125 ff), *Leitl-Staudinger*, *Energieregulierung nach der Verwaltungsgerichtsbarkeits-Novelle 2012 – Auswirkungen auf Organisation und Rechtsschutz* (Regulating in the Energy Sector after the Reform of the Administrative Jurisdiction – Consequences for the administrative organisation and judicial protection), in: FS *Raschauer* (fn 52), 2013, 313, *Pabel* in *Fischer/Pabel/Raschauer* (Eds.), fn 1, 415. It is important to note that in the Explanatory Memorandum to Article 130 (3) FCL quoted above the legislator stated that the provision meant that the Administrative Courts of First Instance were not entitled to *change* an administrative act as long as the authority had not exceeded its margin of appreciation.

substance if the authority that issued the contested act did not object to such a decision (Section 28 paragraph 3 VwGVG). The meaning of the provision is not very clear and it would go too far to explain it in all its details here. There arise doubts whether the legislator had a clear concept.

One has to keep in mind that the procedural rules have to comply with the principles that can be derived from Article 130 (3) FCL and Article 130 (4) FCL. But there is already uncertainty as to the meaning of Article 130 (3) FCL and Article 130 (4) FCL. This makes the understanding of section 28 VwGVG not easier.

The most reasonable interpretation of Section 28 of the Code on the Procedure before the Administrative Courts of First Instance leads to the result that the Administrative Courts of First Instance are entitled to exercise the discretionary power in case they *have* to decide in the substance of the case, but that they are not entitled to do so, if they only *could* decide in the substance (but are not obliged to do so). If they find the act that has been appealed against illegal as the authority has exceeded its margin of appreciation (and perhaps also: if the act is illegal for some other reason but in deciding the case there would have to be exercised discretionary power) they only can quash the act and refer the case back to the administrative authority.

THE NEW COMPETENCES OF THE ADMINISTRATIVE COURT¹⁸¹

1. REVISIONS AGAINST DECISIONS OF THE ADMINISTRATIVE COURTS OF FIRST INSTANCE¹⁸²

a) Requirements for the admissibility of the revision

According to Article 133 paragraph 1 FCL the Administrative Court decides on “revisions against the decision of an Administrative Court for illegality”.

The revision is not admissible in any case, but subject to certain conditions:

According to Article 133 paragraph 4 FCL the appeal on questions of law is admissible,

- if the solution depends on a legal question of essential (or fundamental) importance (“grundsätzliche Bedeutung”),
- as the decision deviates from the settled case law of the (Supreme) Administrative Court, or
- such case law does not exist or
- the legal question to be solved has not been answered in uniform manner by the case law of the (Supreme) Administrative Court.

Such a question could also be a question of Union law. As a question of Union law need not necessarily be a question of fundamental importance,¹⁸³ it could be doubtful whether (or

¹⁸¹ For a comprehensive survey on the new competences of the Administrative Court see *Thienel*, Neuordnung der Verwaltungsgerichtsbarkeit (Restructuring of the Administrative Jurisdiction), Schriftenreihe der NÖ Juristischen Gesellschaft, Bd 116, *Thienel*, Die Kontrolle der Verwaltungsgerichte erster Instanz durch den Verwaltungsgerichtshof, in Holoubek/Lang (Eds.), *Die Verwaltungsgerichtsbarkeit erster Instanz* (2013) 331, *Kahl*, Rechtsschutz gegen Entscheidungen der Verwaltungsgerichte erster Instanz beim VwGH, in Fischer/Pabel/Raschauer (Ed.), fn 1, 434, *Martin Köhler*, Verwaltungsgerichtsbarkeit neu – Die Änderungen im Verfahren vor dem VwGH, in Baumgartner (Ed.), *Öffentliches Recht – Jahrbuch* 2014, 83.

¹⁸² *Kahl*, Rechtsschutz gegen Entscheidungen der Verwaltungsgerichte erster Instanz beim VwGH, in Fischer/Pabel/Raschauer (Ed.), fn 1, 433, *Martin Köhler*, Der Zugang zum Verwaltungsgerichtshof im System der zweistufigen Verwaltungsgerichtsbarkeit (Access to the Supreme Administrative Court in the two-tier system of Administrative Jurisdiction), *ecolx* 2013, 589.

under which conditions) the Administrative Courts of First Instance have to be understood as a last instance court in the meaning of Article 267 (3) TFEU.

The Administrative Courts of First Instance have to add a decision on the admissibility of the revision according to the described principles to each of their decisions (Section 25a (1) VwGG; leave to appeal).

The Administrative Court, however, is not bound by the opinion of the court of first instance (it can dismiss the revision as inadmissible if it does not share the view of the court of first instance concerning the existence of a question of fundamental importance). The legal situation thus differs from the one in the German administrative jurisdiction.

If the Administrative Court of First Instance has declared the revision inadmissible, the party nevertheless can launch a revision (“extraordinary revision”), but in this case it has to state the reasons why it thinks there is a question of fundamental importance (Section 28 (3) VwGG).

b) The function of the (Supreme) Administrative Court in the new system

The task of the (Supreme) Administrative Court therefore now is to secure the uniform application of the law. A decision of the (Supreme) Administrative Court has only to be taken in cases of a fundamental character that is important for the legal system on the whole.

The (Supreme) Administrative Court has to review the legality of the judgment of the Administrative Courts of First Instance. It decides on the basis of the facts as they have been established by the Administrative Court of First Instance. The (Supreme) Administrative Court, however, still is entitled to quash the contested judgment because of the breach of procedural rules if the court of first instance could have come to another solution if it had complied with the rules of procedure.

The (Supreme) Administrative Court, nevertheless since 2012 is also entitled to decide in the administrative case brought before him if this is possible as there are no further facts to be established (be it that the facts have been established sufficiently by the Administrative Court of First Instance or that there are only needed minor additional steps that can be carried out by the [Supreme] Administrative Court economically).¹⁸⁴

This competence to decide also in the substance of the case has to be understood as a subsidiary means for cases in which it were not efficient to oblige the Administrative Court of First Instance to take a formal decision after a judgment of the (Supreme) Administrative Court that could have been taken easily by the (Supreme) Administrative Court itself.¹⁸⁵ The competence of the Administrative Court has been provided for to avoid further delay in cases where the decision can easily also be taken by the (Supreme) Administrative Court.

In this context it has to be stressed that the Administrative Court still is entitled to quash a decision of the Administrative Court of First Instance because of a relevant breach of the rules of procedure. Therefore, although the revision is only admissible under strict conditions

¹⁸³ Cf. (German) BVerwG 12. 6. 2014, 3 B 12.14 (Common Organisation of Markets). In a case in which the Administrative Court of First Instance intends to declare the revision inadmissible it can be understood as a court that is obliged to refer a question of Union law to the ECJ if the conditions for a reference are met.

¹⁸⁴ Section 42 para 3a Administrative Court Act as amended by Federal Gazette I N° 51/2012, now Section 42 para. 4 Administrative Court Act as amended by Federal Gazette I 2013/33.

¹⁸⁵ Examples could be the quashing of an administrative decision that in the very case was illegal anyway, so that there is no necessity to establish new facts, or (vice versa) the granting of the license or right the party to the case had applied for, if all the requirements already had been established; the Administrative Court indeed made use of this possibility several times so far: Supreme Administrative Court 16.5.2013, 2010/06/0195, 26.6.2013, 2013/13/0007, 25.7.2013, 2010/07/0213, 15.10.2013, 2010/02/0161, 23.10.2013, 2012/03/0102, 13.11.2013, 2012/12/0130, 14.11.2013, 2013/21/0046, 21.11.2013, 2011/11/0106 .

the failure to comply with the obligation to hold an oral hearing by the Administrative Court of First Instance might also be appealed (successfully) in the future.¹⁸⁶

c) Procedural questions

With regard to the procedure in revision cases the Administrative Court Act (VwGG) provides for various competences of the Administrative Courts of First Instance¹⁸⁷: the revision has to be launched with the Administrative Court that took the decision that is appealed against (judgment or order). Moreover, the Administrative Court of First Instance is entitled to reject the revision as inadmissible (because of the lack of competence of the Administrative Court, of the lack of locus standi of the applicant or the expiry of the time limit applicable; Section 30a (1) VwGG). The Administrative Court of First Instance also is competent to decide on appeals concerning the suspension of the decision (Section 30a (3) VwGG). Those competences, however, pass over to the (Supreme) Administrative Court as soon as the revision has been submitted to the Administrative Court.

The parties can ask for a decision of the (Supreme) Administrative Court if the Court of first instance has made use of its competence (“Vorlageantrag”, “motion for submission of the case”; Section 30b VwGG). In this case the Administrative Court decides definitely on the question.¹⁸⁸

The Administrative Courts of First Instance moreover can decide on applications for legal aid or the granting of provisional court protection.

The relevant provisions on the distribution of competences between the Administrative Courts of First Instance and the (Supreme) Administrative Court are very casuistic and will cause a lot of complicated questions of interpretation.

If the (“ordinary”) revision is not to be dismissed because one of the reasons mentioned above the Administrative Court of First Instance has to serve a copy of the revision to the parties to the case which have the possibility to bring in written observations (“Revisionsbeantwortung”, Section 30a (4) VwGG).

Those observations have to be submitted with the Administrative Court of first Instance as well. This court passes them on to the Administrative Court together with the revision and the files of the case. The Administrative Court from this stage of the procedure leads the proceedings. It can ask the parties for additional comments on relevant facts or questions of law. The holding of an oral hearing is provided for in Section 39 VwGG in a similar way as it has been so far. The problem of the compliance with the requirements of Article 6 ECHR and Article 47 (2) ChFR now is not as crucial as it used to be as the Administrative Courts of First Instance in general have to hold such a hearing.¹⁸⁹

2. LOCUS STANDI IN REVISION CASES

The right to lodge an appeal primarily depends on the status as a party to the case before the Administrative Courts of First Instance. Anyone claiming a breach of his rights can lodge a revision if the other conditions for a revision are met (Article 133 (6) n° 1 FCL).

¹⁸⁶ Sutter, Ablehnungsbefugnis und Sachentscheidung – neue Entscheidungsbefugnisse für den VwGH, in: Holoubek/Lang (Ed), Verwaltungsgerichtsbarkeit (fn 2), 199 (204), Köhler, Der Zugang zum Verwaltungsgerichtshof im System der zweistufigen Verwaltungsgerichtsbarkeit, ecollex 2013, 589 (596).

¹⁸⁷ Grabenwarter/Fister, Verwaltungsverfahrenrecht und Verwaltungsgerichtsbarkeit⁴, 281, Matthias Köhler, Neues im VwGH-Verfahren, ecollex 2013, 499 (500).

¹⁸⁸ Administrative Court 24. 3. 2014, Fr 2014/01/0002.

¹⁸⁹ Harris/O’Boyle/Warbrick, Law of the European Convention on Human Rights², 271, Grabenwarter, Europäische Menschenrechtskonvention³, § 24, n° 92, ECtHR 12. 11. 2002, Döry, N° 28.394/95, § 37, 8. 2. 2005, Miller, N°55.853/00, § 30, 13. 10. 2011, Fexler, N°36801/06, § 58.

Insofar there has been no change compared with the situation for the lodging of an appeal to the (Supreme) Administrative Court against the decision of the highest administrative authority in the former system.

Moreover, the authority that issued the administrative act at stake in the procedure before the Administrative Court of First Instance has the right to lodge a revision.

Finally, the legislator can still transfer the right of revision to (other) institutions (be it an organ responsible for certain public interests, like the protection of the environment, be it the Federal Minister in charge of the matters at stake; Article 133 [8] FCL; “Amtsrevision”).

In some cases (where the competence to execute federal law lies with the Länder, Article 11 FCL) the competent Federal Minister is entitled to lodge a revision (Article 133 [6] n°3 FCL).

In the same way as in the procedure before the Administrative Courts of First Instance the revision of an institution (in the case of a “Amtsrevision”) leads to an examination of the judgment at stake without any restriction (as to the subjective rights of the appellant).

3. REMEDIES IN CASE OF FAILURE TO DECIDE

As a remedy against the failure to decide in time by the Administrative Courts of First Instance the legislator has provided for a new institute in the Austrian administrative jurisdiction, the so called “Fristsetzungsantrag” (motion for an order to decide within a certain time limit). Upon such a request the (Supreme) Administrative Court has to set a time limit (not exceeding 3 months) within which the Court of First Instance has to decide (section 38 (4) VwGG). The time limit might be extended once. If the Court does not take the decision within the allowed time the (Supreme) Administrative Court by judgment has to issue an order setting a new time limit within which the court has to take the missing decision (section 42a VwGG). Further consequences are not prescribed explicitly by law.¹⁹⁰

4. OTHER COMPETENCES OF THE (SUPREME) ADMINISTRATIVE COURT

According to Art 133 (1) n°3 FCL the Supreme Administrative Court has to decide in cases pertaining to the conflict of competences between Administrative Courts of First Instance or Administrative Courts of First Instance and the Supreme Administrative Court. Such conflicts arise when two Administrative Courts either deny their competence (and one of them is competent) or both claim to be competent.¹⁹¹ As might have become clear from the description of the distribution of competences there might well arise uncertainties as to the question which Administrative Courts of First Instance is competent in a specific matter. If the motion is admissible (as there indeed) is a conflict of competences) the (Supreme) Administrative Court has to declare which court is competent. As far as there has already been a decision of the court that is not competent the (Supreme) Administrative Court has to quash its decision.¹⁹²

Finally the legislator according to Art 133 (2) FCL can provide for motions of the ordinary courts in State liability cases aiming at the review of the legality of administrative acts the legality of which is prejudicial in a case pending before the ordinary court. The

¹⁹⁰ Eder in: Eder/Martschin/Schmid, fn 96, Section 38 VwGG, especially K 6 and 7, and Section 42a VwGG, K 1-3, Köhler Verwaltungsgerichtsbarkeit neu – Die Änderungen im Verfahren vor dem VfGH, in Baumgartner (Ed.), Öffentliches Recht – Jahrbuch 2014, 83 (100).

¹⁹¹ Grabenwarter/Fister, (fn 107) 299.

¹⁹² Section 71 VwGG, that refers to the Act on the Constitutional Court - VfGG (section 51 VfGG).

(Supreme) Administrative Court according to section 11 of the Act on State Liability has been exercising this competence under the former system. It had to be clarified in the new system whether the legislator was still competent to attribute this task to the Administrative Courts and if so, which court in the future should be competent for those motions. The FCL still attributes this competence to the Supreme Administrative Court (alone); so there is no choice of the legislator.

CHARACTERISTIC FEATURES OF THE SYSTEM

1. The characteristic feature of this new system first of all is the specific construction of the competences of the Administrative Courts of First Instance.

Those Administrative Courts not only have to function as courts of cassation, but are entitled to decide in the administrative matter in which the appeal has been lodged. At the same time, though, the legislator has adopted the requirements prescribed by law for the Administrative Court so far, i.e. the restriction of the Court to review the case with a view to a (possible) breach of the subjective rights of the applicant.

The Administrative Courts of First Instance as a result more or less take over the function of the appeals authorities.¹⁹³ This is a decisive difference compared with the legal situation e.g. in Germany or in France.

Exceptions (administrative remedy possible; Administrative Courts of First Instance functions as court of cassation):

- administration in local communities;
- remedies in “fast track-procedures” addressed to the same authority;
- cases in which the administrative authority has objected to a decision in the substance of the case.

2. After the decision of the Administrative Courts of First Instance there is only a limited possibility to appeal to the Administrative Court if there is a fundamental question of law.

Therefore the main responsibility for the protection of the citizens rests upon the Administrative Courts of First Instance.

On the administrative level there is only one instance in the future. The role of the higher authorities has to be redefined as a consequence. To some extent in the implementing legislation it was tried to establish new forms of a kind of review within the framework of the new system. As there is the possibility of a preliminary decision of the administrative authority in the appeals procedure before the Administrative Courts of First Instance there are attempts to make use of this possibility to enable certain bodies to take part in the procedure as a substitute for the competence of an appeals body.¹⁹⁴

3. From the legal foundations in the Constitution for the competences of the Administrative Courts of First Instance follows a kind of “hybrid character” of the

¹⁹³ Eberhard, Kassation und Reformation, in Holoubek/Lang (Ed.), Verfahren (fn 56), 217.

¹⁹⁴ This is the case in University law. Section 46 (2) of the University Act as amended by FLG I 2013/79 (opinion of the Senate to the appeal; the opinion has to be “taken into account” in the issuing of a so called “preliminary decision on the appeal” [“Beschwerdevorentscheidung”] by the authority that had issued the act under appeal (the “preliminary decision on the appeal” is provided for in Section 14 VwGVG as a mere possibility of the administrative authority, Section 46 (2) therefore raises the question whether it should mean that the authority could be *obliged* to take such a decision in case the opinion of the Senate requires a modification of the decision of the administrative authority the decision of which has been appealed against).

Administrative Courts of First Instance as an instance for the judicial control of the acts of the administrative authorities and at the same time deciding body in the administrative cases.

4. There is only one administrative instance now; after the decision of the administrative authorities there is established a two-tier administrative jurisdiction as described above.

5. The court protection aims at the protection of the subjective rights of the citizen. Therefore the scope of judicial review is limited in cases involving parties with adversarial interests.

6. There is the possibility for the legislator to provide for appeals of institutions and for the right

ASSESSMENT OF THE NEW SYSTEM

As might have become already clear from the description above, the new system of administrative jurisdiction has very distinct features that distinguish the Austrian system from that in other EU Member States.

The reform not only abolished the possibility for a review of administrative decision within the administration. The legislator as a consequence of this reduction of the administrative instances transferred to the courts the power to decide in the substance of the matter.¹⁹⁵

After the decision of the one and only administrative instance the Administrative Courts of First Instance not only has to review the legality of the administrative act and act but has to take the act itself if it finds that the subjective rights of the applicant have been infringed.

It is not this limitation to the sphere of the subjective rights of the applicant that makes the difference. Such a limitation is common to many systems of administrative jurisdiction.¹⁹⁶ But it is the function of the Administrative Courts of First Instance as a deciding body in the administrative matter itself:

The Administrative Courts of First Instance do not only review the legality of the acts contested before them, but they have the competence to issue the act the applicant had applied for with the administrative authority. Contrary to the German procedure in the case of a

¹⁹⁵ Reading the contributions of persons that were involved in the legislative process one gets the impression that there was no discussion of different possibilities in the end but the chosen solution seems to have been accepted as a kind of “necessary consequence” of the introduction of first instance courts; cf. *Steiner*, Systemüberblick “9+2-Modell”, in Fischer/Pabel/Raschauer (Ed.), fn 1, 105, paragraph 2 to 4. According to those reports on the political discussion a solution as the one in Germany has not been taken into account.

¹⁹⁶ For Germany see section 42 (2) VwGO (Code on the Administrative Jurisdiction) on the “Klagebefugnis” (locus standi); in Germany the distinction between subjective rights and objective rights as it is drawn in Austria similarly is covered by the concept of the “drittschützende Norm” that in the same way asks for the legal purpose of a provision; *Happ* in Eyermann, VwGO, 10th Ed, 1998, section 42, §§ 71-100, *Kopp* VwGO, 10th ed., section 42, §§ 37-100a, and section 113 § 21, *Schmidt* in Eyermann, VwGO, 10th Ed, 1998, section 113, §§ 18-20; a slightly different approach, perhaps, could be seen in the French system in which the “interêt pour agir” might lead to a broader possibility of review (that on the other hand seems to be accompanied with a kind of judicial self restraint with regard to the replacing of decisions of the administrative authorities on the basis of the evaluation of the court; cf. *Woehrling*, Die französische Verwaltungsgerichtsbarkeit im Vergleich mit der deutschen (The French administrative jurisdiction in comparison to the German one), NVwZ 1985, 21, *Woehrling*, Die deutsche und die französische Verwaltungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert (The German and French administrative jurisdiction at the dawn of the 21. Century), NVwZ 1998, 462, *von Danwitz*, Die Eigenverantwortung der Mitgliedstaaten für die Durchführung von Gemeinschaftsrecht (The responsibility of the Member States for the implementation of Community Law, DVBl. (German Gazette for Administration) 1998, 421, *Groß*, Konvergenzen des Verwaltungsrechtsschutzes in der Europäischen Union (Convergencies in the legal protection in the EU), Die Verwaltung, 2000, 415 (426).

“Verpflichtungsklage”¹⁹⁷ the courts are not restricted to the task to *order* the administrative authority to issue an act with a certain contents, the Administrative Courts of First Instance can (and in many cases: are obliged to) issue the act itself.¹⁹⁸

The system therefore is also different from the one in France, where the principle of separation of powers is seen more strictly than in the Austrian Constitution. As has been already mentioned above, also the (Supreme) Administrative Court as it had been established in 1920 had competences to decide on the merits of the case (on the one hand when it had to decide upon action for failure to act, on the other hand with regard to administrative penalties for some time). Therefore, it was generally seen as compatible with the Austrian Constitution, especially with Article 94 FCL on the principle of separation of powers, to assign the competence to an Administrative Court to decide on the merits of the (administrative) case.

That is why, the Reform Act of 2012, that is a Constitutional Law, was not qualified as a “total revision” (a fundamental change) of the Constitution that should have been submitted to a referendum according to Article 44 (3) FCL.

Problems might arise from the interplay of administrative decisions and judgments of the Administrative Courts of First Instance. The relations of the decisions of the Administrative Courts of First Instance and the administrative authorities have to be examined and it will be necessary to develop practical means to cope with this completely new situation. One of the crucial questions will be the problem of the becoming final of decisions (the law in many cases refers to a final decision; under the new system there arises the question whether such a “final decision” can be assumed after the decision of the administrative authority even in the case there has been lodged an appeal to the Administrative Court of First Instance).

The legislator has found different solutions in the AVG and VwGVG (where those problems practically are not addressed at all) and the BAO (for tax matters) according to which e.g. there is also the possibility of the finance authorities to issue administrative acts deviating from final court decisions if the later development so requires.

CONCLUSION

The Verwaltungsgerichtsbarkeits-Novelle 2012 brought about the most drastic constitutional reform since the amendment of the Federal Constitutional Law in 1929, FLG 1930/1. It has an impact not only on the administrative jurisdiction but also on administration as a whole. It can be understood as the final point of a long lasting struggle for an improvement of the Austrian administrative jurisdiction. And it is, indeed, a great success with regard to the legal protection of the citizen. On the other hand, as might have become clear to some extent in the survey given above, there are arising a lot of questions in detail concerning the consequences of the reform. It will be those questions that will occupy the Supreme Administrative Court in the upcoming years.

¹⁹⁷ Section 42 (1) (German) VwGO (Code on the procedure in the Administrative Jurisdiction); *Erbguth*, Allgemeines Verwaltungsrecht, § 19a, paragraph 18. The action aims at the issuing of an administrative act that has been refused by the authority. *Erbguth* refers to the separation of powers as the reason behind the German solution.

¹⁹⁸ On the decision making powers in the Administrative Jurisdiction in Germany and Austria in general *Ress*, Entscheidungsbefugnis in der Verwaltungsgerichtsbarkeit (Decision making powers in the Administrative Jurisdiction, 1968).

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11. Cf. *Lechner-Hartlieb/Urban*, Verwaltungsgerichtsbarkeit neu – Besondere Bestimmungen in Materiengesetzen, in Baumgartner (Ed.), Öffentliches Recht – Jahrbuch 2013, 117; e.g. with regard to the time limits for lodging of an appeal, the authority to which it has to be addressed, the suspensive effect.
12. *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights², 254.
13. *Köhler*, Die Zuständigkeit der Landesverwaltungsgerichte in Steuersachen, in Holoubek/Lang (Ed.), fn 2, 85.
14. *Pürgy* in Holoubek/Lang (Ed.), Verwaltungsgerichtsbarkeit(fn 2), 49 [54].

ADMINISTRACINIŲ TEISMŲ SISTEMOS REFORMA AUSTRIJOJE. TEISMŲ SISTEMOS TEORINIS PAGRINDIMAS IR PAGRINDINIAI BRUOŽAI

Martin Köhler*

Austrijos Aukščiausiasis Administracinis Teismas

Santrauka

2012 metais Austrijos administracinių teismų sistema buvo reformuota iš esmės, nustatant dviejų instancijų administracinių teismų sistemą. Nuo 1876 metų, kada buvo įkurtas Administracinis Teismas, Austrijoje veikė tik vienas administracinis teismas, nagrinėjęs skundus dėl galutinių administracine tvarka priimtų sprendimų. Įvykdytos reformos esminiai bruožai:

- Įkurti devyni žemės administraciniai teismai (po vieną kiekvienoje federalinėje žemėje) ir du federaliniai administraciniai teismai (Federaliniame administraciniame teisme sprendžiami visi bendrieji administraciniai ginčai dėl federacijos lygmeniu priimtų valdžios sprendimų (*vok.* Bundesverwaltungsgericht), o Federaliniame finansinių bylų teisme – tik federacijos lygmens mokestiniai ginčai (*vok.* Bundesfinanzgericht) – „9+2 modelis“;
- Pirmosios instancijos administraciniams teismams suteikta kompetencija išspręsti administracinę bylą iš esmės;
- Sudaryta galimybė pirmosios instancijos administracinių teismų sprendimus apskųsti apeliacinės instancijos administraciniam teismui – Austrijos Aukščiausiajam Administraciniam Teismui (*vok.* Österreichischer Verwaltungsgerichtshof);
- Sukurta dviejų instancijų administracinių teismų sistema;
- Apeliacine tvarka peržiūrimos tik tos bylos, kuriose kyla „fundamentalus teisės klausimas“;
- Austrijos Aukščiausiajam Administraciniam Teismui suteiktas teismų praktikos vienodinimo vaidmuo;
- Panaikinta daugelis specialių nepriklausomų komisijų ir įstaigų, kurioms buvo priskirtas konkrečių ginčų viešojo administravimo srityje sprendimas;
- Paminėtų institucijų kompetencija buvo perduota pirmosios instancijos administraciniams teismams;
- Teismo, nagrinėjusio prieglobsčio klausimus (*vok.* Asylgerichtshof), kompetencija buvo perduota Federaliniam administraciniam teismui (*vok.* Bundesverwaltungsgericht). Tai lėmė, jog buvo atkurta apeliacinės instancijos administracinio teismo kompetencija prieglobsčio prašymo bylose veikti kaip paskutinei instancijai.

Pagrindinis reformos aspektas yra pirmosios instancijos administraciniams teismams suteikta kompetencija spręsti dėl bylos esmės. Tai reiškia, kad pirmosios instancijos administraciniams teismams buvo suteikti įgaliojimai ne tik patikrinti administracinio sprendimo teisėtumą ir jį panaikinti neteisėtumo atveju, bet ir atlikti reikiamus veiksmus (pvz., išduoti prašomą leidimą, tam tikrą įpareigojimą ir t.t.). Pažymėtina, jog tokiai kompetencijai spręsti dėl bylos esmės numatyti ir tam tikri apribojimai.

Reforma buvo įvykdyta priimant Konstitucinio įstatymo pakeitimus bei išleidžiant konkrečius organizacinius ir procedūrinius įstatymus dėl naujai įsteigtų pirmosios instancijos administracinių teismų. Be to, taip pat turėjo būti priimtos administracinę teiseną reguliuojančio įstatymo bei Administracinio Teismo (dabar – Austrijos Aukščiausiojo Administracinio Teismo) kodekso pataisos.

Reforma Austrijos Aukščiausiojo Administracinio Teismo vaidmenį pakeitė iš esmės. Nuo šiol Austrijos Aukščiausiasis Administracinis Teismas veikia kaip institucija, kuri yra atsakinga už vienodą įstatymų taikymą ir naujų bei fundamentalių teisės klausimų sprendimą. Pirmosios instancijos administraciniams teismams tenka užduotis užtikrinti teisingumo įvykdymą kiekvienoje byloje.

Atsižvelgiant į piliečių teisinę apsaugą, reforma yra labai sėkminga. Kita vertus, reformoje vis dar kyla daug klausimų, detalai susijusių su reformos pasekmėmis. Tai bus tie klausimai, kuriuos per ateinančius metus turės išspręsti Austrijos Aukščiausiasis Administracinis Teismas.

Pagrindinės sąvokos: administraciniai teismai, administracinių teismų sistema, Austrija, Europos Sąjungos pagrindinių teisių chartija, ES teisė, Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija.

Martin Köhler*, judge of the Austrian Supreme Administrative Court (Österreichischer Verwaltungsgerichtshof), Doctor of Social Sciences (Law).

Martin Köhler*, Austrijos Aukščiausiojo Administracinio Teismo (Österreichischer Verwaltungsgerichtshof) teisėjas, socialinių mokslų daktaras (teisės).