

## ADMINISTRATIVE JUSTICE IN EUROPE

### – Report for Austria–

Questionnaire related the administration control list and typology in the 25 Member States of the European Union

#### **Preliminary.**

1.

Administration jurisdictional control was one typical concern of the liberal streams in the 19<sup>th</sup> century. In Austria, “the Reichsgericht”, a precursor of the Constitutional Court, was created by the December 1867 constitution which also planned creation of a Supreme Administrative Court (hereafter “the Verwaltungsgerichtshof”). However, this project was only fulfilled in 1876. Following this, the Verwaltungsgerichtshof played a decisive role in developing the legal protection system in Austria, establishing fundamental principles for administrative procedural law.

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

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

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

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

With the creation of the Länder independent administrative chambers in 1991, a first approach was made to establish a two-instance-administrative jurisdiction in Austria. Moreover, in 2002 the capacities of these independent administrative chambers were significantly extended.

2.

The rule of law has a central role among fundamental principles of Austrian constitutional law. In Austria, the concept of rule of law highlights the audit competencies lying with the Constitutional Court and the Verwaltungsgerichtshof.

The public administration is defined, due to the principle of the rule of law, by its very close relationship with law: the administration must operate in compliance with law. The administration obligation to respect the law and to act by relying on law is to a great extent on a par with legal positions of the legal standard assignees. The relationship between public administration and law is ensured by control of legality of act and administration action with a view to protect justifiable rights. In Austria, jurisdictional control of administrative acts and action is therefore not just a control of correct administrative operation.

3.

First of all, it is appropriate to distinguish the administration exercising public power prerogatives (“Hoheitsverwaltung”) from the administration called private economic activities (« Privatwirtschaftsverwaltung ») exercised by public administration bodies using the same forms and means of action as all other private individuals (contracts, etc.).

The concept of an administration exercising public power prerogatives in the functional sense also includes public and private corporations that exercise public power prerogatives (i.e. the National Bank which is a joint stock company; in the last twenty years, more and more special companies were created and were conferred control of various markets, i.e. “Austro Control” which is a limited liability company responsible for control of certain provisions related to air traffic, attribution of flight licenses, etc; “the Rundfunk & Telekom Regulierungs GmbH”, a limited liability company responsible for certain tasks in the field of radio casting, television and telecommunication). As concerns separation of these institutions from public administration organisation, the Constitutional Court highlighted in its jurisprudence, as regards to constitution, laws must ensure the administration a certain influence on these separated institutions. Only the administration exercising public power prerogatives is subject to control by the Constitutional Court and the Verwaltungsgerichtshof. Private management administration control is related to the competence of ordinary courts.

In Austria, the most efficient way to define the concept of an administration exercising public power prerogatives is to use a “formal” or “organisational” distinction (article 94 B-VG – federal constitutional laws. Jurisdiction matters are those exercised in relation to competence of common law jurisdiction bodies, while the administration includes all public duties outside the jurisdiction.

*Jurisdiction means law enforcement by bodies entitled to do so and having independence guarantee regarding inquiries, the guarantee of irremovability and may not be unwillingly removed or transferred to another position. By contrast, administration is law enforcement by bodies related to inquiries of hierarchically superior individuals (article 20 paragraph 1 B-VG).*

4.

*The Austrian constitution distinguishes individual normative acts (administrative decision [“Bescheid”], direct exercise of command and constraint power from administrative authorities [“faktische Amtshandlung”] and individual inquiry which is an internal standard [“Weisung”]) of general normative acts (enforcement rules as well as in particular cases expressly provided by the constitution, rules replacing, completing and amending the act).*

### **I - Who controls administrative acts and actions?**

#### **A - Competent bodies.**

5.

Generally, control of administrative decisions in second (or third) authority is carried out within the administration itself.

However, since 1991, Länder independent administrative chambers (“UVS”) decide on second authority in proceedings relating to administrative contraventions, recourses against acts of direct exercise of command and constraint power from administrative authorities, in other

matters entrusted to them by federal laws or by Länder as well as certain matters concerning actions for failure to act without depending on administrative authority inquiries. Their decisions may be contested before the Verwaltungsgerichtshof and/or before the Constitutional Court.

Considering that the control exercised by Länder independent administrative chambers is materially a jurisdictional control, control exercised by administrative proceedings was limited insofar as these independent administrative chambers were called to decide on second authority.

In addition, there are several tribunals of a judicial nature (article 133 point 4 B-VG), a competent independent federal chamber in terms of asylum (“Unabhängiger Bundesasylsenat”) as well as an independent chamber in relation to environmental matters (“Unabhängiger Umweltsenat”) and since 2003, an independent chamber competent for financial matters which has a head-office in Vienna (“Unabhängiger Finanzsenat”).

All these institutions whose members have guarantees of independence and irremovability may be compared to jurisdictions, although they are formally part of the administrative organisation.

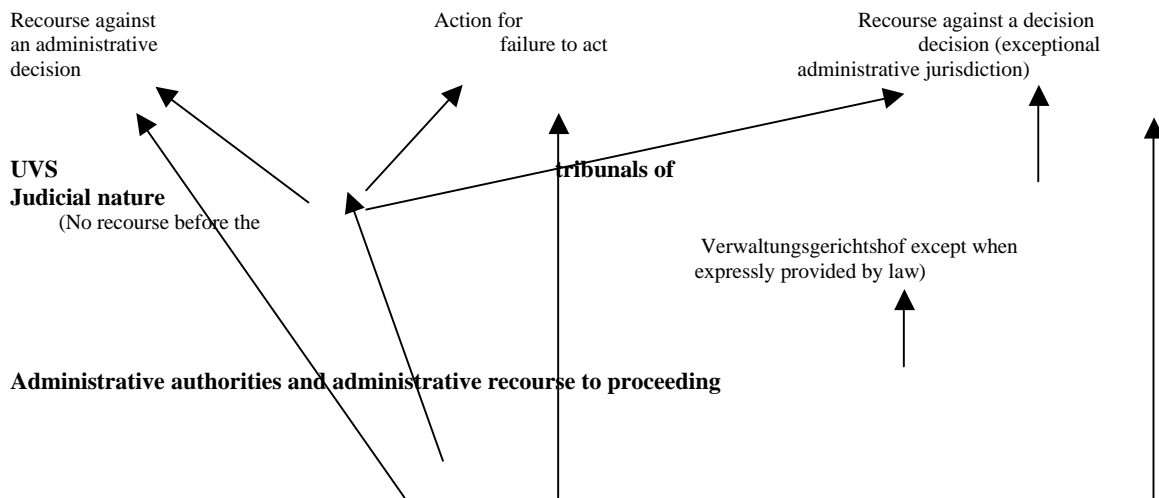
## 6.

In Austria, (federal and Länder) administrative jurisdictional control is exercised by two supreme jurisdictions, the Constitutional Court and the Verwaltungsgerichtshof, with head-offices in Vienna. There are no administrative courts of first authority (see question No. 5). A final authority administrative decision may be contested before the Verwaltungsgerichtshof on grounds that this decision interferes with a public subjective right of the petitioner and/or before the Constitutional Court on grounds that this decision interferes with a public subjective right of the petitioner; that he/she was conferred by the constitution or because this decision is based on a general standard contrary to the constitution (considered in this context as an exceptional administrative jurisdiction of the Constitutional Court).

According to the constitution, Constitutional Court competence excludes that of the Verwaltungsgerichtshof (article 133 point 1 B-VG – this provision does not apply to actions for failure to act before the Verwaltungsgerichtshof). Nevertheless – except for certain matters such as the associations and meetings system for example, - la Constitutional Court and the Verwaltungsgerichtshof may be referred to in order to control the same administrative decision, but – considering the Constitutional Court controls respect of the constitution while the Verwaltungsgerichtshof is responsible for control of respect of simple laws – both Courts weigh the administrative decision by applying a different type and measure of control. In most cases, competence of one or the other Courts to determine a recourse depends therefore mostly on rights (guaranteed by the constitution or simple laws) that the petitioner vindicated in his/her recourse.

If the case also lies within the competence of the Verwaltungsgerichtshof (meaning the petitioner also has the possibility of forming recourse against the administrative decision before the Verwaltungsgerichtshof by vindicating he/she was prejudiced in his/her public subjective rights) the Constitutional Court may refuse to process certain recourses should there be insufficient chances of succeeding or when the judgment can not be expected to clarify a matter of constitutional law.

In the event the administrative authority is inactive in carrying out its duties, it is possible to form an action on administrative authority failure to act before the Verwaltungsgerichtshof, and– if recourse is accepted – adjudicates in the case itself, insofar as the law confers on the petitioner the right to demand an administrative decision.



## B- Status of competent bodies.

### 7.

The control of administration acts and action exercising prerogatives of public power is not entrusted to the common law jurisdictions. Only private management administration lies with the competence of ordinary courts whose competencies are provided by the constitution and laws.

### 8.

The Constitutional Court and Verwaltungsgerichtshof have a specific status provided by the constitution as well as federal Law on the Constitutional Court (“Verfassungsgerichtshofsgesetz 1953”) and by federal law on the Verwaltungsgerichtshof (“Verwaltungsgerichtshofsgesetz 1985”, hereafter “VwGG”). In addition, there are internal regulations adopted on the basis of these federal laws.

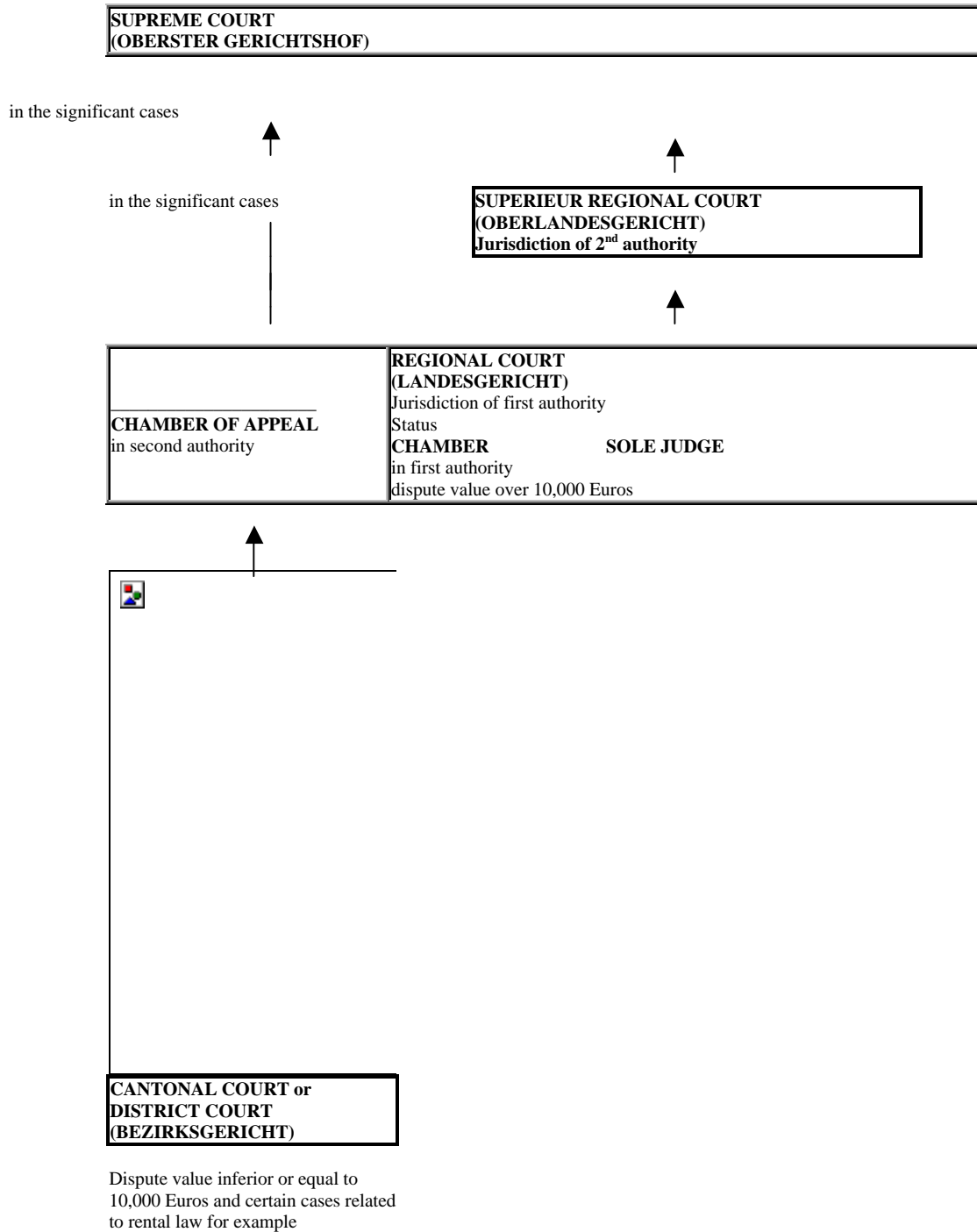
The status of institutions mentioned in No. 5 is governed – as to their main characteristics – by the constitution and/or federal laws by Länder laws respectively.

## C - Internal organization and composition of competent bodies.

### 9.

In Austria, any jurisdiction emanates from the Federation (article 82 B-VG). Ordinary courts (criminal and civil, commercial and labor courts) are organised at four levels (“Bezirksgerichte, Landesgerichte, Oberlandesgerichte, Oberster Gerichtshof” - district courts, regional courts, superior regional courts, Supreme Court). There are usually two different orders of jurisdiction that may be subdivided into three categories, regarding procedure in civil law.

In Austria, only ordinary courts (see questions No. 3 and No. 7) ensure control of private management administration.



## 10.

For the table and schema, see question No. 6.

Currently, the Verwaltungsgerichtshof is made up of 63 members: the President, the Vice-president and 61 judges (12 chamber Presidents and 49 judges in charge of legal inquiry). The Verwaltungsgerichtshof sits in 20 chambers chosen by the plenary session. The sessions of chambers and the plenary session are not public. The cases are distributed in advance between the chambers by the plenary session according to various administrative matters (foreigners, taxes, finance, social security law, urban planning, public service law, etc.). Each brief is

allotted to a judge in charge of legal inquiry, a member of the competent chamber, appointed by the Chairman. The chambers are made up of five members (four judges in charge of legal inquiry and 1 Chairman of the chamber) sitting in a restrained formation in relation to administrative contraventions and in cases concerning simple legal questions or only requiring proceeding decisions (three members – two judges in charge of a legal inquiry and 1 Chairman of the chamber). If the decision hinders well-established jurisprudence or if jurisprudence does not provide any unanimous response to legal problems which require solving, the Verwaltungsgerichtshof sits in a chamber with extended composition made up of nine members. A documentation and research office collects the Verwaltungsgerichtshof decisions. The Constitutional Court is made up of a Chairman, a Vice-Chairman, twelve other members and six replacement members. The Constitutional Court reaches decisions in plenary session. The Chairman distributes cases to one of the eight reporters on duty, appointed for three years. The Court meets four times a year for sessions of about three weeks.

#### **D. The judges.**

##### **11.**

All the members of the Verwaltungsgerichtshof are professional full-time judges and are compulsorily retired on the 31<sup>st</sup> of December after reaching 65 years of age (article 134 paragraph 6 B-VG). The law regulating status of the Supreme Court judges (article 7 VwGG) governs their status. According to article 11 paragraph 2 VwGG, at least one member of each Verwaltungsgerichtshof's chamber must be entitled to carry out the duty of judge before the ordinary courts. Moreover, in matters of financial law, a member of the chamber must justify being qualified for service in high administration for finance and in all the other matters; a member of the chamber must be competent for service in general public administration. The Constitutional Court members who are not professional judges are granted the status of judge guaranteed by the constitution. The duties of Constitutional Court members end on the 31<sup>st</sup> December after reaching 70 years of age (article 147 paragraph 6 B-VG). The formation of the Constitutional Court assembly does not vary according to the type of administrative matters in question.

##### **12.**

Constitutional Court members include the Chairman, the Vice-Chairman, six members and three replacement members appointed by the Federal Chairman following recommendation by the Federal Government. The Federal Chairman appoints each of the six other members and three other replacement members following recommendation from the National Council and the Federal Council.

Following recommendation from the Federal Government, the Federal Chairman appoints the Chairman, the Vice-Chairman and other members of the Verwaltungsgerichtshof. The Government establishes its proposal based on a list of three applicants, excluding duties of the Chairman and Vice-Chairman, submitted to the Verwaltungsgerichtshof plenary session.

##### **13.**

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

Verwaltungsgerichtshof members must have completed their law studies and have at least ten years experience in a profession requiring such studies. One third of the Verwaltungsgerichtshof members at least, must be able to prove their capacity for duties as judge; at least one fourth should come from a Land employment, and if possible with the Land administrative services. Other members come from federal administrative services, including financial services.

#### 14.

Payment to Constitutional Court members for carrying out their duties is in accordance with the “1953 Verfassungsgerichtshofsgesetz” which does not provide advances on wages for Constitutional Court members remunerated according to a set scheme based on maximum remuneration for public servants.

Remuneration of the Verwaltungsgerichtshof judges is in accordance with modalities provided by the law governing the status of common law judges (“Richterdienstgesetz”). According to this law, the Verwaltungsgerichtshof members receive the same wages as the Supreme Court judges. Their promotion in the wage scale and, usually, their appointment to the position of Chairman of Chamber takes place according to their seniority.

#### 15.

Verwaltungsgerichtshof members and the Constitutional Court members rarely change jurisdictions and only rarely go into active administration although there are no restrictions on this. All members of the Verwaltungsgerichtshof and the Supreme Court are appointed for life and compulsorily retired on the 31<sup>st</sup> December on reaching 65 and 70 years of age respectively.

### **E- Functions of competent bodies.**

#### 16.

Against an administrative decision by the final authority, the petitioner has the possibility to recourse before the Constitutional Court and –apart from some exceptions – before the Verwaltungsgerichtshof. Recourse may be formed before the Verwaltungsgerichtshof (“Säumnisbeschwerde”) against administration shortcomings.

Only the Constitutional Court and the Verwaltungsgerichtshof can approve or quash an administrative decision. In cases related to actions for failure to act, only the Verwaltungsgerichtshof adjudicates in the case itself (see also question No. 6).

Disputes related to contracts concluded between the administration and private individuals generally lies within the competence of ordinary courts. Some decisions attributed by competent authorities may be contested before the Constitutional Court and before the Verwaltungsgerichtshof; this being in terms of entering into public contracting only.

Concerning granting of damages to a petitioner prejudiced by administrative detrimental action, he/she may request recourse before the ordinary courts. Should a decision by the competent court depend on the legality of an administrative decision and if the court considers the administrative decision in question is contrary to law; it must defer a judgement and request that the Verwaltungsgerichtshof determine legality of the administrative decision.

The Constitutional Court and the Verwaltungsgerichtshof have no power of injunction.

**17.**

There is no formal mechanism comparable to prejudicial questions provided in article 234 CE, apart from the Verwaltungsgerichtshof capability to determine legality of the administrative decision in terms of claims against detriment by the administration or by one of these bodies (see above) and the Constitutional Court capability to recognize questions of reference related to validity of certain normative acts (i.e. laws, rules, treaties) submitted to the Verwaltungsgerichtshof by certain ordinary courts, Länder independent administrative chambers or the “Bundesvergabeamt” (federal authority competent in terms of public contracting). According to article 38 AVG (federal law on proceedings before administrative authorities) an administrative authority may defer a judgement and wait for the decision of another administrative authority or a competent court to decide on a question prejudicial to the relevant case if the prejudicial question is already subject to proceedings engaged before the competent authority or if such proceedings are engaged simultaneously. In addition, concerning similar questions of law that may also arise in another legal procedure, with a crucial significance for the decision by the financial administration of second authority, article 281 BAO (federal law on proceedings before financial authorities) stipulates this authority may defer judgement if paramount interests of parties are not opposed thereto. Nevertheless, these provisions do not provide authorities with the possibility of introducing amendment proceedings aiming to determine the nature, validity and scope of an act toward certain types of bodies.

**18.**

Verwaltungsgerichtshof members do not carry out the function of counsel of executive power and/or legislative power. During the process of passing a law, the Constitutional Court and the Verwaltungsgerichtshof, just like several other institutions, may however be invited to express their opinion about a project for Law and to give their opinion which serves as counsel and information for the legislator. As for questions relating to the politico-legal field, the Verwaltungsgerichtshof expresses with great reserve when pronouncing. By contrast, if the Verwaltungsgerichtshof is directly or indirectly involved (i.e. if a project might influence overburdening at Court), the Verwaltungsgerichtshof takes clear stands. Furthermore, although this instrument is not very efficient, the annual report on Court activities (“Tätigkeitsbericht”) which the Verwaltungsgerichtshof must communicate to the Federal Chancellor (article 20 VwGG) offers the possibility to call to attention questions the Court considers worth raising in relation to the field of legislation or administration.

The Verwaltungsgerichtshof opinion being in any case an external opinion, its expression does not lead to Court identification with a law passed following situations that might question Verwaltungsgerichtshof impartiality, and besides which, it is not requested to control. As such, laws are difficult to imagine. The members of the Verwaltungsgerichtshof and Constitutional Court must respect standards on conflict of interest and impartiality adjudicated by the constitution, as well as laws and duties falling to them through their status.

**19.**

The Constitutional Court and the Verwaltungsgerichtshof do not have counselling functions. See question No. 18.

## **F - Function and relationship distribution between competent bodies**

### **20.**

The Constitutional Court and the Verwaltungsgerichtshof do not have a specific procedure or instrument to enable ensuring harmonisation and uniformity of law enforcement and interpretation within administrative body authorities. The compulsory effect of decisions by the Constitutional Court and the Verwaltungsgerichtshof is limited to the context of the relevant case. However, administrative authorities usually attempt to follow higher jurisdiction jurisprudence.

As several legal provisions show (ex. see article 281 BAO - question No. 17; the finance authority will base its decision on decisions reached by an administrative authority or by another court on a similar legal matter) the Austrian legal order requires uniformity of law enforcement and interpretation. When several actions for recourse are pending before the Verwaltungsgerichtshof, relating to one or several similar legal questions, then article 38a VwGG provides the Verwaltungsgerichtshof with the possibility to issue a special order obliging administrative authorities with final authority to make decisions but only where the Verwaltungsgerichtshof decision will have no influence.

To ensure well-established jurisprudence, the VwGG provides for extension of the chamber composition from five to nine members if the decision was running counter to well-established jurisprudence at Court or when jurisprudence does not provide any unanimous response to legal problems requiring solutions. In any case, a decision diverging from a decision made in a chamber with extended composition must in turn be made in a chamber with extended composition. The head of the Verwaltungsgerichtshof documentation and research office must refer legal questions subject to divergence from jurisprudence to the Court Chairman.

## **II- How do courts control administration acts and action?**

### **A. Access to the judge.**

#### **21.**

The petitioner must exhaust the administration internal rights of review before submitting a complaint before the Constitutional Court and/or the Verwaltungsgerichtshof. Exhausting all possibilities for administrative rights of review constitutes a condition to for recourse admissibility before the Constitutional Court and before the Verwaltungsgerichtshof in any type of dispute.

#### **22.**

Any physical or person or entity alleging he/she is prejudiced in his/her rights by an administrative decision may submit a complaint before the Constitutional Court and/or the Verwaltungsgerichtshof (called “recourse for parties”).

In certain cases, the federal and Land bodies may claim objective prejudice of rights and file recourse against an administrative decision before the Verwaltungsgerichtshof (called “ex officio recourse”). The Law often provides such a possibility when cases lying within the competence of the independent administrative chambers of the Länder or the independent federal chamber competent in relation to asylum are in question.

In cases relating to implementation of the supervisory power on the parish exercised by the federal and Land authorities, the parish functions as a party. It may take recourse against

decisions by the supervisory authority before the Constitutional Court and before the Verwaltungsgerichtshof to defend its administrative autonomy right.

23.

In the case of “recourse for parties”, the petitioner must show an interest in decision annulment as well as a legal interest in decision annulment. The petitioner is not obliged to prove prejudice of his/her rights, but, that he/she was prejudiced by the contested decision by Law indicated in recourse must be possible.

This obligation to vindicate a subjective legal interest does not exist in the case of a parish recourse and in the case of “ex officio recourse” where, through the same nature of recourse, the petitioner may not have any subjective interest in decision annulment or, in the case of parish recourse, administrative autonomy right is prejudiced by any illegality in exercise of guardianship.

24.

Recourse against an administrative decision must be filed before the Constitutional Court and before the Verwaltungsgerichtshof within six weeks after the petitioner was notified of the decision. In certain cases, the petitioner may file for recourse before the Verwaltungsgerichtshof before being notified of the administrative decision on legal proceedings already indicated to another party. Recourse must simply be sent by post by the last day of the deadline. The postmark date is taken into account. Judges are not empowered to extend contentious deadlines.

Action for failure to act may be filed before the Verwaltungsgerichtshof only once the deadline to be respected by the administrative authority elapsed, in order to issue an administrative decision (generally 6 months). Other than this, there is no deadline to be respected concerning action for failure to act.

25.

In principle, all administrative decisions (“Bescheide”) aside from their significance –either limited or on the contrary significant due to decision relationship with the political sphere - may be contested before the Constitutional Court and before the Verwaltungsgerichtshof. However, all decisions of a judicial nature made by tribunals and cases before the Constitutional Court (see question No. 6) or invention patents are beyond Verwaltungsgerichtshof capacity.

However, it is important to mention that in Austria the legal protection system before the Verwaltungsgerichtshof is related to the administrative decision known as “Bescheid”. The Constitutional Court is also responsible for control of administrative regulation legality outside its competence for recourse against administrative decisions. Yet there are – outside the administrative decisions and the administrative regulations – administrative political decisions that may not be contested (e.g. decisions by government cabinet on government law projects, decisions on appointment proposals, decisions by government in the field of private management administration, etc.).

**26.**

The Constitutional Court may refuse to process recourse if it has insufficient possibility of succeeding or if judgment is not likely to define a constitutional problem, providing it is not a case outside of Verwaltungsgerichtshof competence.

The Verwaltungsgerichtshof may refuse to process recourse against a decision of a Land independent administrative chamber, of the independent federal chamber competent in relation to asylum or against a decision of the federal authority competent in relation to public contracting (“Bundesvergabeamt”), if the Verwaltungsgerichtshof decision does not depend on a legal question of public significance which is presumed if the decision varies from Verwaltungsgerichtshof jurisprudence, if such jurisprudence does not exist or if the relevant legal question was not solved by Verwaltungsgerichtshof jurisprudence. In matters of administrative contraventions, the Verwaltungsgerichtshof may only refuse to process recourse if the fine imposed on the petitioner does not exceed 750 €(article 33a VwGG). This decision is made by a Verwaltungsgerichtshof chamber, usually without a public hearing and is motivated. Considering article 33a VwGG only applies to decisions issued from a Land independent administrative chamber, from the independent federal chamber competent in matters relating to asylum or from the federal authority competent in relation to public contracting, decisions therefore reached by administrative authorities with the function of courts in the sense of article 6 CEDH, article 33a VwGG is not likely to raise any problems with regard to article 6 CEDH.

**27.**

There are no specific forms for recourse and requests for which form is free. Recourse before the Verwaltungsgerichtshof must include the following elements: indication of the contested administrative decision and the administrative authority where this decision issues from, the facts, the concrete indication of the right in which the petitioner alleges he/she is prejudiced (for “ex officio recourse” indication of the contestation scope), recourse motives, a concrete request and indications required to check respect of the contentious deadline. The contested decision or a copy of it must be attached to recourse request. The petitioner must attach the required number of recourse copies as one copy is required for the Verwaltungsgerichtshof file and one copy must be sent to each of the parties in the proceedings as well as to the competent Federal Minister or the competent Land Government if the contested decision does not issue from these same authorities.

Recourse before the Constitutional Court must include the following elements: information on the contested administrative decision and the administrative authority from where this decision issues, the facts, information on the petitioner’s wrongdoing for which the constitution provides Constitutional Court competence, the request to quash the administrative decision and the information required to verify respect of the contentious deadline. The contested decision or a copy of it must be attached to the request for recourse. The petitioner must attach the required number of recourse request copies as a copy must be sent to each party whose presence is necessary at the hearing.

**28.**

Filing requests before the Constitutional Court and before the Verwaltungsgerichtshof via the Internet is not possible. As for proceedings before the administrative authorities; there are several projects related to teleprocedure and e-procedure (e-registry) and some have already been carried out in the context of the “e-government” project.

**29.**

The petitioner must settle payment of 180 € by bank transfer as “court office fees” to authorities for the competent financial administration when filing for recourse before the Constitutional Court and before the Verwaltungsgerichtshof. However, payment of this amount is not a pre-set condition for recourse admissibility and has no influence on the legal procedural course and on the Court decision. Procedures related to “court office fees” to be paid lies with the competence of the finance authorities.

**30.**

Recourse before the Constitutional Court must be presented by a mandated lawyer (Ministry of Absolute lawyers). This obligation is not in force for recourse presented by a body of the federal administration, a Land, local governments and certain other institutions. In certain cases, the Federal Ministry or the public Ministry for general State public prosecution (“Finanzprokurator”) may represent the Federation, the Länder and other institutions. With regard to proceedings, the parties may act themselves or they may be represented by a lawyer (relative Ministry for lawyers).

Recourse before the Verwaltungsgerichtshof must be signed by a lawyer or a public accountant. With regard to proceedings, parties may, themselves, act or be represented by a lawyer or, in cases related to finance law, by a public accountant. Recourse presented by a body of the federal administration, a Land, local governments and certain other institutions are exempted from this signature obligation. In addition, recourse before the Verwaltungsgerichtshof presented by a civil servant with legal training need not be signed by a lawyer or public accountant.

There is no difference between practice and texts.

The Ministry for lawyers is not intended for proceedings before administrative authorities.

**31.**

The petitioner may request legal aid for all or part of the legal proceedings before the Constitutional Court and the Verwaltungsgerichtshof according to provisions in the Code of Civil Procedure. Access to legal aid is subject to the petitioner’s income and recourse chances for a successful outcome. Legal aid may notably include exemption from legal proceeding costs, including the “court office fees”, as well as assistance of a lawyer appointed by the chamber of lawyers. A member of the Verwaltungsgerichtshof grants legal aid. Refusal of legal aid cannot be subject to recourse.

**32.**

The Constitutional Court may ratify abusive and unjustified recourse with a fine of up to 2,900 € (article 220 of the Code of Civil Procedure that also applies to proceedings before the Constitutional Court).

Abusive and unjustified recourse before the Verwaltungsgerichtshof may be ratified with a fine of up to 726 € (article 35 AVG).

## **B. The legal proceedings.**

### **33.**

Proceedings before the Constitutional Court and before the Verwaltungsgerichtshof, as for proceedings before the independent administrative chambers created in order to meet conditions of article 6 CEDH, have a contradictory nature and respect the principle of defence rights and equal footing between the parties implicated in legal proceedings. These principles originate in national law (constitutional law and national laws e.g. in provisions of article 41 paragraph 1 and article 45 paragraph 1 VwGG that guarantee the parties the right to be heard) and in European law (notably in the European Convention on Human Rights). Decisions by the Courts are motivated (usually in great detail). Documents have a paramount role in proceedings. As the Courts are entitled in many cases to decide without a hearing, most of the decisions by the Constitutional Court and the Verwaltungsgerichtshof are not publicly given.

### **34.**

The Constitutional Court and the Verwaltungsgerichtshof are courts in which independence and impartiality are guaranteed by the constitution and laws.

Constitutional Court members are excluded from carrying out of their duties if they took part in the administrative legal proceedings that preceded legal proceedings before the Court and in cases relative to their own interests or in the interest of their relatives and in cases where they are or were the legal guardian of a party in legal proceedings. Parties in legal proceedings cannot impeach Constitutional Court members. The Constitutional Court decides in camera on exclusion of a member from legal proceedings in question.

Verwaltungsgerichtshof members as well as assistant jurists who draw up a report must compulsorily abstain from carrying out their duty in cases relating to their own interests or in the interest of their relatives, in cases where they are or were the legal guardian of a party in legal proceedings, if they took part in administrative legal proceedings or if there are any other significant reasons that might question their impartiality. On these grounds, parties in legal proceedings may impeach Verwaltungsgerichtshof members and assistant jurists. The competent chamber for relevant legal proceedings decides on the impeachment request in the absence of the impeached person and, on request, the Court Chairman orders replacement of the impeached member with a member provided by Court internal regulations.

### **35.**

Yes, the petitioner may claim new legal means after recourse has been filed. In this very case, the other parties in legal proceedings are notified of the petitioner's explanatory memorandum and have the possibility of pronouncing on the new means claimed by the petitioner.

### **36.**

The petitioner, the administrative authority from whence the contested decision is issued– and if it is recourse against the decision of an independent administrative chamber, the competent final administrative authority on the subject – as well as the persons whose interests are affected by success of recourse (“mitbeteiligte Parteien”) are the parties in legal proceedings before the Verwaltungsgerichtshof.

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

**37.**

No such public department exists.

**38.**

No such institution exists.

**39.**

The Verwaltungsgerichtshof suspends legal proceedings if the petitioner's request was met (e.g. if the administrative authority from whence the contested decision was issued or an authorised administrative authority quashed the contested decision, if the petitioner withdrew his/her recourse before the Verwaltungsgerichtshof, if the Constitutional Court quashed the administrative decision or if the administrative decision no longer has prejudicial effects for the petitioner). With regard to actions for failure to act, the Verwaltungsgerichtshof suspends legal proceedings if the administrative authority subsequently issues the requested administrative decision or if another administrative decision whose effects meet the legal interests of the petitioner was issued or if the petitioner withdrew his/her request before the administrative authorities.

The Verwaltungsgerichtshof may refuse to process recourse under conditions stipulated in article 33a VwGG (see question No. 26).

The Verwaltungsgerichtshof may reject recourse as inadmissible because the contentious deadline was not respected, because the Verwaltungsgerichtshof already judged the case, because the petitioner did not exhaust administrative rights of review, because it is excluded that the petitioner might be prejudiced by the contested administrative decision through indicated law in recourse, because the petitioner did not contest an administrative decision (but another act), etc.

**40.**

At the Verwaltungsgerichtshof, the judge in charge of the legal inquiry orders communication on recourse to parties. The communication of requests and memorandums during legal proceedings is made through the registry service.

**41.**

The Verwaltungsgerichtshof is bound by facts and circumstances established by the administrative authority from whence the contested decision was issued. It may only control these elements insofar as the administrative authority did not duly respect provisions governing administrative procedures. The parties can no longer claim new material facts. If the Verwaltungsgerichtshof considers the administrative decision lacks essential material elements, it quashes the administrative decision for procedural fault. The administrative authority is then obliged to establish required facts and to find a solution to decision loopholes. This explains why the inquiry procedure before the Verwaltungsgerichtshof whose control is essentially related to questions of law and not facts is relatively limited in importance. However, insofar as the facts required for legal proceedings before the Court are to be established (e.g. respect of for contentious deadlines, the petitioner's failure to maintain an action in court, circumstances related to Court competence, etc.) the Verwaltungsgerichtshof must establish these elements *ex officio*.

The Constitutional Court mission as final jurisdiction concerns questions on law and not questions on facts. In addition, control exercised on administrative decisions is generally of a global nature. Thus, it is rarely carries out inquiry procedures.

**42.**

The hearings (except for the in-camera sitting and the voting) are public. The parties and their representatives may intervene orally during the hearings.

The hearing on a decision by the Verwaltungsgerichtshof chamber takes place in camera. Such a decision is made for public order reasons. In this case, parties may request authorisation for three persons they trust to participate in the hearing. The chamber Chairman conducts the hearing. The judge in charge of legal inquiry refers the case. All other members of the chamber may intervene and ask questions.

The hearing before the Constitutional Court starts with the judge in charge of the legal inquiry addressing the jury, and may take place in camera on grounds of public order if there is a reason to assume the public hearing might be used to hinder legal proceedings or on request by the parties if private or family related questions are discussed during the hearing.

**43.**

Deliberation takes place at a time considered appropriate by the Court, in camera. Members of the competent chamber and an assistant jurist who draws up the report take part in the in-camera sitting.

**B. The judgment.**

**44.**

Judgments are motivated in detail or more succinctly according to case complexity and questions to be solved. Motivation of judgments should enable petitioners to understand the meaning and scope of the decision. The question of consideration is taken in account.

**45.**

The Court mentions standards (both national and international) applying to the case which necessarily motivate the decision. Standards applied are often mentioned verbatim. In any case the legal situation is exposed in detail.

**46.**

The Verwaltungsgerichtshof exercises detailed control on questions of law raised in the case and an overall appreciation of facts, meaning control of respect for procedural standards to be applied by the administrative authority. Particular control is reserved to acts interpreting exercise of administrative full powers to act. The Verwaltungsgerichtshof can only verify the administration used its full powers to act on the basis of laws.

In principle, the Constitutional Court exercises a total control with regard to prejudice of constitutional rights and the petitioner's prejudice by applying unconstitutional standards. In case the petitioner alleges he/she is prejudiced in his/her constitutional rights by severely erroneous law enforcement, the Constitutional Court only verifies in a global manner whether the administrative decision can be based on applicable standards.

**47.**

The administrative authority legal subject from whence the quashed decision was issued must pay the petitioner a lump sum of 1,171.20 € including compensation for costs incurred in filing for recourse and “court office fees” paid by the petitioner if the Verwaltungsgerichtshof quashes all or part of the contested decision.

Should the Verwaltungsgerichtshof reject recourse as being inadmissible or unfounded, the petitioner must pay a lump sum of 381.90 € for memorandums and costs incurred to submit administrative procedure acts, to the administrative authority from whence the contested decision was issued, and possibly a lump sum of 991.20 € to the party whose legal interests are affected by successful recourse.

The Verwaltungsgerichtshof chamber which judged a case also decides (in the judgment) on granting of compensation for fees and costs, the amount being a lump sum fixed by Federal Chancellor regulation. Legal procedure costs may only be granted on specific request from the party. Parties cannot be dispensed from legal procedural costs not included in legal aid.

The party which loses legal proceedings before the Constitutional Court can be condemned with a request to pay legal procedural costs to the opposite party. Contrary to legal proceedings before the Verwaltungsgerichtshof, there is no regulation for legal procedure before the Constitutional Court to provide lump sums as compensation for the winning party. If the petitioner wins legal proceedings, the Constitutional Court currently grants 1,800 € plus 20 % VAT as well as reimbursement of “court office fees”.

**48.**

Decisions by the Constitutional Court and the Verwaltungsgerichtshof are handed down by a collegiate group.

As concerns the Verwaltungsgerichtshof, the judge in charge of the legal inquiry decides on granting of legal aid, and on suspensive effects to a request and can make decisions on pre-trial and prior procedure of legal proceedings. The Verwaltungsgerichtshof internal regulation stipulates the judge in charge of legal inquiry must communicate those decisions before they are sent to the Chairman of the chamber.

**49.**

No, separate opinions are not authorised – neither before the Constitutional Court, nor before the Verwaltungsgerichtshof. In the judgment, the result of voting and opinion of chamber members who voted against the decision is not mentioned. The result of voting and opinion of chamber members are reported in a non-public report.

**50.**

In theory, judgment may be pronounced orally at the end of a hearing. In practice, Verwaltungsgerichtshof judgments are pronounced in writing.

**D. The effects and execution of judgement.****51.**

Judgment res judicata is only imposed on parties in legal proceedings and does not relate to the case being decided upon. It does not depend on the nature of contested acts. The judgment has

no formal precedent authority (see, however question No. 20, notably article 38a VwGG, extension of Verwaltungsgerichtshof chambers and article 281 BAO).

**52.**

No, the judge may not temporally limit effects of a judgment he/she hands down.

**53.**

The right to execution of decisions of judgement is formally ensured in Austria by law. If an administrative decision is quashed by the Constitutional Court or by the Verwaltungsgerichtshof, administrative authorities must use all means available to establish a judicial situation corresponding to the Court legal opinion. In a case where the Verwaltungsgerichtshof itself decides on the case (administrative action for failure to act), the Court must determine the court or administrative authority that will be in charge of execution of judgment according to provisions governing proceedings before these institutions (article 63 VwGG).

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

In the case where judgments by the Verwaltungsgerichtshof and the Constitutional Court are unexecuted due to fault, the administrative authority responsibility as well as (indirectly) the individual responsibility of public agents in charge of execution can be accepted. There is special administrative recourse and action for administrative failure to act before the Verwaltungsgerichtshof in case of excessive duration of administrative proceedings and the default of administrative authorities who must generally decide within six months.

**54.**

The Verwaltungsgerichtshof chronic overload is a serious problem to which the Court has sought to bring public and mainly political attention for several years. Legislative reforms (as yet insufficient) were initiated (e.g. creation of independent administrative chambers, possibility to refuse processing of certain recourses) and other measures were considered to take the burden off the Court.

Apart from legal protection instruments already in existence (action for administrative failure to act, general provisions on responsibility of administrative authorities), these reforms do not provide new means to ensure the petitioner compensation for prejudice resulting from excessive delays in decision making and/or ending unreasonable duration of legal proceedings.

## **E - Right of review.**

**55.**

In Austria, there are no lesser administrative jurisdictions (however, for independent administrative chambers, see question No. 5).

**56.**

In Austria, only two supreme jurisdictions recognise administrative disputes.

## **F. Urgent proceedings and summary judgments.**

**57.**

No, such an institution does not exist for administrative disputes. The judge in charge of the legal inquiry may only grant suspensive effect of recourse action so as to avoid creating a prejudice difficult for the petitioner to rectify.

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

**58.**

See question No. 57.

**59.**

See question No. 57.

## **III – Can administrative disputes be settled by non adjudicative proceedings?**

**60.**

Generally, laws provide hierarchical recourse for administrative authorities to settle administrative disputes. In most cases, the petitioner has the possibility to prepare recourse against an administrative decision by first authority in the administrative authority determined by law (see question No. 5). The petitioner may lay a matter before the Constitutional Court and/or Verwaltungsgerichtshof only after administrative rights of review are exhausted.

**61.**

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

“Volksanwaltschaft” competence was extended to cases related to administration through Länder constitutional laws for seven out of nine Austrian Länder. The Vorarlberg and Tyrol Länder created institutions with similar competences.

**62.**

In the field of administration exercising public power prerogatives, such alternatives to settle disputes are generally not provided. There are several special matters (e.g. public trading) where laws provide reconciliation proceedings. As for matters of private management administration related to competence of ordinary courts, arbitration conventions may be stipulated in conditions provided by article 577 ss. in the Civil Procedure Code.

## **IV –Administration of Justice and statistical data.**

**A. Means available to justice in administration control.****63.**

The average budget accorded to justice is about 270 million Euros (including about 8 million Euros for the Constitutional Court and about 12 million Euros for the Verwaltungsgerichtshof) corresponding to about 0.24 percent of the federal budget (about 114,000 million Euros).

**64.**

There are about 2,000 magistrates (judges of ordinary courts as well as of the Constitutional Court and the Verwaltungsgerichtshof) in Austria.

**65.**

About 4 percent of the Austrian judges are assigned to administration control.

**66.**

There are 22 and 24 young jurists at the Constitutional Court and the Verwaltungsgerichtshof respectively establishing reports during Court sessions. Assistant jurists work for documentation offices, assist judges in their research and in elaboration of their decisions. About 22 jurists assist the 63 Verwaltungsgerichtshof members, while each of the eight Constitutional Court judges in charge of legal inquiries are assisted by two to three jurists. The assistants must have completed their law studies. Apart from this, their training can vary.

**67.**

The Verwaltungsgerichtshof and Constitutional Court with a head office in the same building, have a library in common, with a wide range of national and international legal works, texts and documents as well as comprehensive documentation on legal sources.

**68.**

Almost all workstations at the Constitutional Court and the Verwaltungsgerichtshof are equipped with computers and Internet access. Computer means are used for file management, data base, research, decision reports, etc.

**69.**

The Constitutional Court and Verwaltungsgerichtshof have an Internet site to announce and inform about news relating to both Courts. However, the sites are not used as a means for communication between Courts and those due to be tried.

**B. Others statistics and indications in figures.**

**70.**

In 2003 and 2004, respectively 8,238 and 8,073 new requests were registered with the Verwaltungsgerichtshof registry.

**71.**

In 2003 and 2004, respectively 9,388 and 8,588 files were processed by the Verwaltungsgerichtshof.

**72.**

In 2005 stock piles of unprocessed briefs from the previous years at the Verwaltungsgerichtshof amounted to 7,659 files.

**73.**

As concerns recourse against administrative decisions, the delay for judgement was 22 months in 2003 and 2004. With regard to actions for administration failure to act where the Verwaltungsgerichtshof was to adjudicate in the case itself, the average delay was 22 months in 2003 and 33 months in 2004.

**74.**

In Austria, lesser jurisdictions do not exist (see question No. 5). As concerns administrative decisions contested before the Verwaltungsgerichtshof, the rescission rate was 50.80 percent in 2003. In 2004, 38.89 percent of administrative decisions contested before the Verwaltungsgerichtshof were quashed.

**75.**

In 2003, the Verwaltungsgerichtshof processed 2,602 briefs relating to rights of foreigners, 1,369 briefs relating to taxes, 284 briefs relating to urban planning, 259 briefs relating to social security, 237 briefs relating to motor vehicle law, 239 briefs relating to road police, 274 briefs in relation to public service law, 184 briefs in relation to special matters linked to competence of administrative authorities (e.g. employment of handicapped persons and of foreigners, occupational health and safety), 180 briefs in relation to industrial and commercial occupations, 164 briefs in relation to social aid, 72 briefs in relation to waterways and water supply legislation and 45 briefs in relation to environmental and wildlife protection. The remaining processed briefs were in relation to various other matters.

In 2004, the Verwaltungsgerichtshof processed 1,963 briefs in relation to law for foreigners, 942 briefs in relation to taxes, 333 briefs in relation to social security, 328 briefs in relation to urban planning law, 312 briefs in relation to public service law, 294 briefs in relation to road police, 258 briefs in relation to special matters linked to competence of administrative authorities, 254 briefs in relation to the industrial and commercial professions, 221 briefs in relation to social aid and 54 briefs in relation to environmental and wildlife protection. The remaining processed briefs were related to various other matters.

**C. Economics of administrative justice.****76.**

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