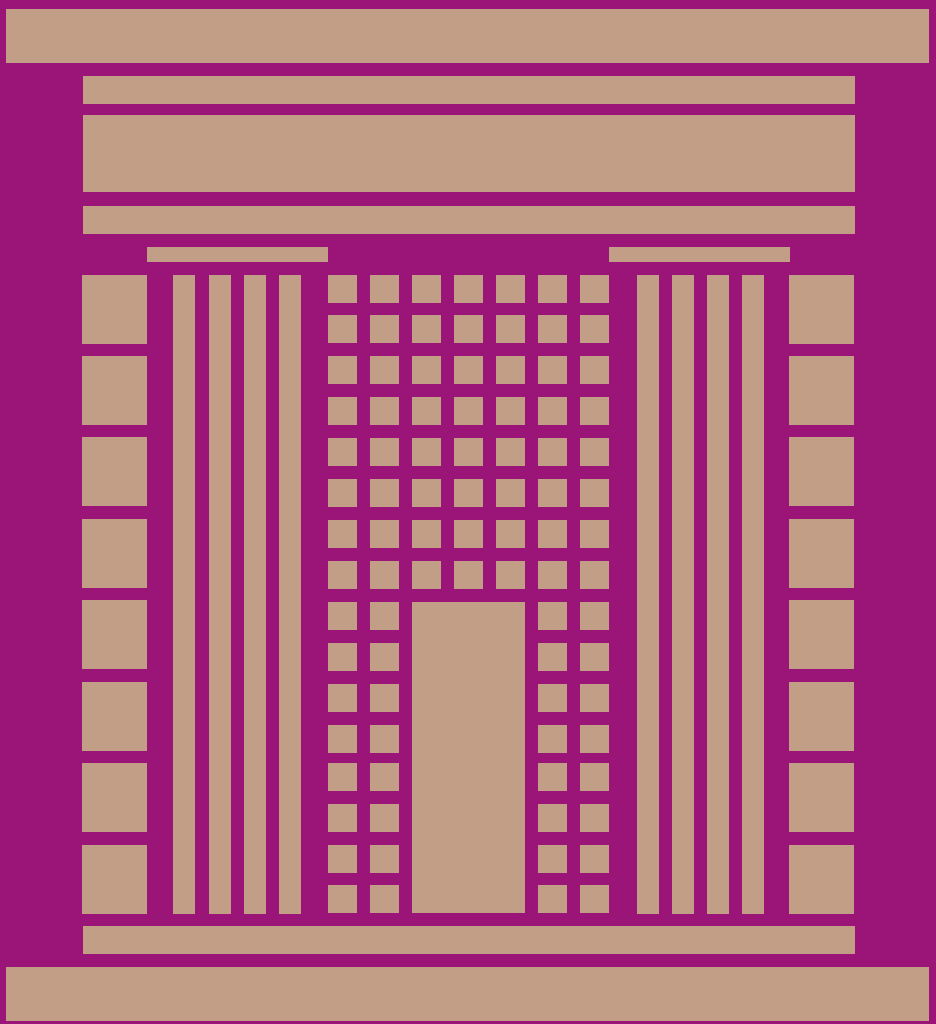
Constitutional Court of Austria

Activity Report 2023



vfgh
Verfassungsgerichtshof
Österreich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Foreword

Christoph Grabenwarter
President of the Constitutional Court

In 2023, the Constitutional Court resumed its pre-pandemic working routines. Restrictions on public hearings were lifted and a few final decisions on COVID-19 measures were taken.

During the course of the year, important and complex new proceedings were instituted and processed. A number of decisions of special significance were taken, including for example decisions on climate protection, the financial and organizational framework of the Austrian Broadcasting Corporation (ORF), the legal and organizational framework of the COVID-19 Federal Finance Agency (COVID-19 Finanzierungsagentur, COFAG), the Federal Agency for Reception and Support Services (Bundesbetreuungsagentur, BBU) and, at year-end, the repeal of the provisions of the Code of Criminal Procedure (Strafprozessordnung, StPO) governing the securing of electronic storage devices and mobile phones.

The number of appeals filed against decisions by the administrative courts remained high. Every second submission related to asylum and immigration law. Despite the high volume of work, proceedings took an average of three months.

In autumn 2023, a great number of applications were submitted to the Constitutional Court by individuals and courts in the context of what is referred to as “aliquoting of pensions” (Pensionsaliquotierung), the first pension increase which was suspended for two years by the legislator. In just a few weeks, the Constitutional Court received over 3,200 near-identical ap-

plications which, thanks to efficient procedures and the dedicated work of a lot of staff members, were all decided before the end of the year. These cases represented a considerable additional workload for the Constitutional Court, which had to ensure that the legal protection of all the persons concerned was safeguarded despite the large number of similar cases that had to be processed simultaneously. The Constitutional Court has therefore proposed publicly and to the legislator to adopt legislation that safeguards the legal protection of individuals while ensuring that the Constitutional Court is able to function in the event of "mass proceedings".

The Constitutional Court's events schedule and international relations also returned to their pre-pandemic level of activity. Members of the Court met with representatives of foreign constitutional courts and the European Courts. The President of the European Court of Human Rights (ECHR), Síofra O'Leary, and the Austrian Judge, Gabriele Kucsko-Stadlmayer, visited the Court on the occasion of Constitution Day and, separately, for a working meeting, in which they discussed both the importance of the case law of the ECHR in Strasbourg and the high quality of the work of the Austrian courts in protecting fundamental rights. President O'Leary gave a well-received keynote speech on Constitution Day, a shortened version of which is included in this Activity Report.

As in previous years, the report also documents in detail the Constitutional Court's judicial and other activities.

Verena Madner
Vice-President of the Constitutional Court

I Factum est

meetings of plenary sessions (per half day)

68

1 year

95 days
average duration of proceedings

2023 in Numbers

The Constitutional Court may in particular be called upon to deal with

- Complaints against rulings by administrative tribunals (Art. 144 B-VG)
- Applications for review of laws, regulations and state treaties (Art. 139, 140, 140a B-VG)
- Lawsuits against territorial authorities on grounds of certain property claims (Art. 137 B-VG)
- Challenges to elections (Art. 141 B-VG)
- Disputes regarding parliamentary committees of inquiry (Art. 138b B-VG)

1
Conflicts of jurisdiction
according to
Art. 138 Abs. 1 B-VG

7
Challenges to elections
according to
Art. 141 B-VG

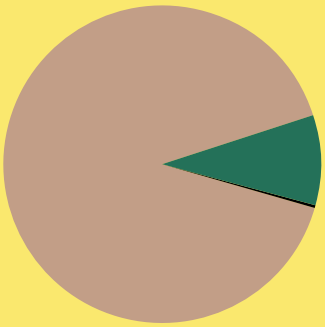
7,993
new cases

24
Lawsuits
according to
Art. 137 B-VG

2
Disputes regarding parliamentary committees of inquiry
according to
Art. 138b B-VG

65.8 %
Asylum cases
(2.686)

4,080
Complaints
according to
Art. 144 B-VG



90.5 %
Applications for review of law
(3,506)

9.4 %
Applications for review of regulations
(365)

0.1 %
Applications for review of state treaties
(4)

3,875
Applications for review of legal norms
according to Art. 139, 140, 140a B-VG
1,116 Applications by courts
23 Ex-officio proceedings
61 Individual applications
2.667 Applications by a party to a lawsuit
8 Others

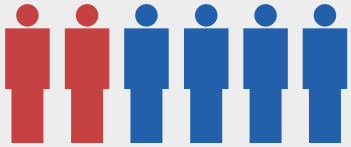
Personnel, Budget, Website

14
Members

28.57%
Women

71.43%
Men

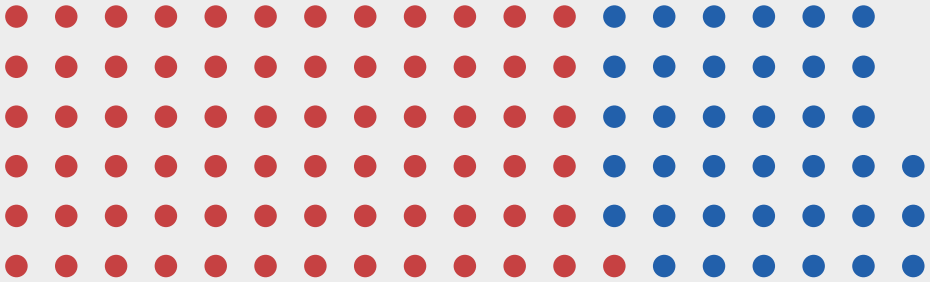
6
Substitute Members



33.3%
Women

66.7%
Men

111
Employees



65.76%
Women (73)

34.24 %
Men (38)

Budget 2023

€ 18.778 million

Website 2023

1.4 million
total visits

5.1 million
page impressions

Citizens' Service 2023

37
written submissions per month

166
telephone enquiries per month

From the Archives

Cartoon on the paralysis of the Constitutional Court, in: Der Morgen. Wiener Montagblatt, 29 May 1933, p. 9. The Constitutional Court was accommodated in the parliament building from 1923.

The Incapacitation of the Constitutional Court in 1933

Ninety years ago, Austria experienced a coup d'état in three acts. The first act unfolded in March 1933, when the Federal Government of Federal Chancellor Engelbert Dollfuss exploited a procedural crisis within the National Council – all three of its presidents had resigned one after the other following a controversial vote – and prevented the National Council from reconvening, using police powers to do so. The Dollfuß government euphemistically referred to this as the "self-elimination" (Selbstausschaltung) of the National Council. After this, Federal Chancellor Dollfuss governed using emergency regulations issued on the basis of the Wartime Economy Enabling Act 1917 (Kriegswirtschaftliches Ermächtigungsgesetz, KWEG 1917), which had been absorbed from the monarchy into the legislation of the Austrian Republic. Historians once called this the "belated curse of the Habsburg Monarchy on republican Austria", because by then, application of the Wartime Economy Enabling Act 1917 was most probably unconstitutional in most cases: Firstly, because the emergency regulations contained provisions which had the effect of amending the Constitution, and secondly, because the extraordinary economic circumstances brought about by the First World War (the end of these economic circumstances was yet to be declared by Federal law) in large part no longer prevailed. The regulations were ripe for repeal by the Constitutional Court.

The Social Democrat Vienna Regional Government (Wiener Landesregierung), which was fiercely opposed to the Federal Government, along with a number of courts, brought proceedings for review of the constitutionality of those regulations before the Constitutional Court. As the end of April 1933 approached, 17 such applications had been received. In seven cases, the Constitutional Court had already asked the Federal Government to submit written observations. It was expected that these cases would be heard in June 1933. The Federal Government searched feverishly for a way to avoid the proceedings. Senior civil servant Robert Hecht – legal advisor to Federal Chancellor Dollfuss and himself a substitute member of the Constitutional Court – came up with an ingenious plan to paralyze the Court. Mr. Hecht – whose idea it had initially been to make use of the Wartime Economy Enabling Act 1917 – suggested that all members and substitute members of the court who had been proposed by the ruling parties or the Government should resign so that the quorums needed for the Constitutional Court to hear cases could no longer be achieved. Under section 7 of the Constitutional Court Act (Verfassungsgerichtshofgesetz, VfGG) one presiding member and at least eight voting members needed to be present to conduct proceedings for the review of the constitutionality of laws and regulations. As the Constitutional Court was composed of 14 members and six substitute members at that time, a full 12 of these judges would have to resign for Hecht's plan to succeed. In any event, he was instructed to conduct the necessary negotiations with willing Constitutional Court judges behind the scenes.

The first resignation came on 18 May 1933. Adolf Wanschura, who had been proposed as a Constitutional Court judge by the National Council, stepped down and explained his decision in

PROPOSED BY		CONSTITUTIONAL COURT JUDGE				
			resigned before the regulation	affected by the regulation of 23 May 1933	resigned after the regulation	remaining
Fed. Gvmt.	President	Durig				Durig
	Vice-President	Froehlich				Froehlich
	Member	Adamovich sen.				Adamovich sen.
	Member	Bernegger			Bernegger	
	Member	Engel				Engel
	Member	Kulisch				Kulisch
	Member	Pockels				Pockels
	Member	Walker				Walker
	Substitute Member	Ganzwohl			Ganzwohl	
	Substitute Member	Hecht			Hecht	
	Substitute Member	Pilz			Pilz	
NC	Member	Eckel		Eckel		
	Member	Freundlich		Freundlich		
	Member	Wanschura	Wanschura			
	Substitute Member	Palla		Palla		
	Substitute Member	Praxmarer	Praxmarer			
FC	Member	Lenhoff		Lenhoff		
	Member	Mathias	Mathias			
	Member	Prey		Prey		
	Substitute Member	Berger		Berger		
		20	3	6	4	7

Effects of the resignations and the "Constitutional Court Formation Regulation" on the composition of the Constitutional Court (according to Zavadil, Ausschaltung, 72)

a wordy article in the Reichspost, a newspaper with links to the Christian Social Party. He condemned the applications for constitutional review as politically motivated and insinuated that in ruling on those applications, the members proposed by the Social Democrats would "virtually act as their own judges". He also called for constitutional reform to remove the "party-political influence" over the composition of the Constitutional Court in the form provided for in the 1929 amendment to the Constitution (Bundes-Verfassungsgesetz, B-VG). Substitute member Ludwig Praxmarer (appointed on the proposal of the National Council) and member Friedrich Mathias (appointed on the proposal of the Federal Council) followed Wanschura's example on 20 and 22 May 1933, respectively. That meant that all of the constitutional judges proposed directly by the Christian Social Party had resigned.

The second act of the coup d'état began on 23 May, when the Federal Government issued a regulation founded on the Wartime Economy Enabling Act 1917 amending the rules for summons of constitutional judges to hearings of the Constitutional Court set out in section 6 of the Constitutional Court Act. This regulation, referred to as "Besetzungsverordnung" (Constitutional Court Formation Regulation) provided that members and substitute members appointed on the proposal of the National Council or Federal Council could participate, and be summonsed to participate, in sessions and hearings of the Constitutional Court only if all other members and substitute members proposed by the National Council or the Federal Council were also members of the Constitutional Court.

As since the 1929 amendment of the Constitution, the legislature had been permitted to propose six members and three substitute members (National Council: three members and two substitute members; Federal Council: three members and one substitute member), while the Federal Government could propose the President, Vice-President, six members and three substitute members, a total of nine judges (six members and three substitute members) were affected by the regulation. As three of those members had already resigned, this meant – applying the Constitutional Court Formation Regulation – that others could no longer be summonsed to participate in cases.

With eleven members remaining, it was in principle still possible for the new Constitutional Court to sit in the required formation, despite the first resignations and the Constitutional Court Formation Regulation. But then came four further resignations: member Matthias Bernegger (23/24 May) and substitute members Ernst Ganzwohl (25 May), Adolf Pilz (27 May) and Robert Hecht (28 May), all of whom had been nominated by the Federal Government. This reduced the number of judges to be summonsed to seven.

On 31 May 1933, in response to this incapacitation of the Constitutional Court, President Ernst Durig and the three judges rapporteur Vice-President Georg Froehlich, Ludwig Adamovich senior and Friedrich Engel, called on Federal President Wilhelm Miklas to inform him of what had occurred and how constitutional justice had been impacted. The Federal President summoned Hecht to a meeting the following day and had a

"lengthy debate" with him. Also in late May and early June, the representative bodies of professors at the faculties of law at the universities of Vienna, Graz and Innsbruck passed a resolution calling on the Federal President to use his "constitutional authority" to counteract the "destruction of the rule of law". Professor Alfred Verdross, Vice-Dean of the Faculty of Law in Vienna, and Professor Theodor Rittler from Innsbruck discussed the situation with the Federal President on 2 June 1933. A communiqué about this resolution originally promised by the Federal President was ultimately not published because the Minister of Education issued an instruction to the contrary to the universities.

The Constitutional Court's June session, with a reduced case list, was rescheduled for 22 June. The Court could now only hear cases relating to pecuniary claims against and between territorial authorities (Kausalgerichtsbarkeit) and to conflicts of jurisdiction of courts and administrative authorities (Kompetenzgerichtsbarkeit) because at that time only a President and four voting members were needed to be present to hear those cases. President Durig summonsed the Vice-President and the five remaining members to the public hearing and session. President Durig's position was that – although the regulation may have been unlawful – the Constitutional Court Formation Regulation was in force and he was required to apply it until it was repealed by the competent authority, that is to say the Constitutional Court. During discussion of the first case (a taxation-related action brought by the Vienna Regional Government against the Federation under Article 137 of the Constitution) President Durig expressed his "concerns regarding the proper composition" of the Constitutional Court and asked whether the Court should review the Constitutional Court Formation Regulation ex officio. The Court, on a motion proposed by judge rapporteur Ludwig Adamovich senior, seconded these concerns. The proceedings against the Federation were suspended and the Court resolved to review the Constitutional Court Formation Regulation. At the same time, in an unprecedented obiter dictum remark towards the end of the statement of grounds, it was pointed out that eight voting members were required for proceedings to review the constitutionality of a regulation and that the Constitutional Court had resolved to "call on the Federal President to endeavour to ensure that the Constitutional Court is enabled to perform its duties under the Constitution in full as soon as possible" (A 1/33/10). Adamovich senior had originally demanded that an enforcement order be issued to the Federal President, before changing his mind and requesting only that an official note be submitted to the Federal President. Reference to that note was also included in the resolution. Engel in particular had strongly supported this, because "If the public hears nothing of this, that would mean that this great moment has found a very small Constitutional Court".

Also on 23 May, horrified at Wanschura's Reichspost article, Federal President Miklas wrote a private note: "I am utterly shaken [...] Is this still a country under the rule of law? First they destroyed Parliament and now comes the destruction of the Constitutional Court, the last anchor of constitutional law!! [...] If the Constitutional Court too is eliminated, there is no longer any limit to the Government's dictatorial rule by emergency regulation other than the acquiescence of the Federal President who has been rendered deliberately powerless in the Federal Constitution by the all-powerful parties. How can any a catholic conscience endure this??" In late May, after receiving the official note from the Constitutional Court, Federal President Miklas wrote to the Federal Government, requesting it to submit proposals for the vacancies "insofar as these [...] are the responsibility of the Federal Government". In the meantime, he had taken the Constitutional Court's position in numerous discussions, but was apparently ultimately intimidated by the government into "acquiescence". It goes without saying that the Federal Government gave no response. It proposed no new members and did not submit observations in preliminary proceedings relating to further challenges to the Constitutional Court Formation Regulation brought before the Constitutional Court.

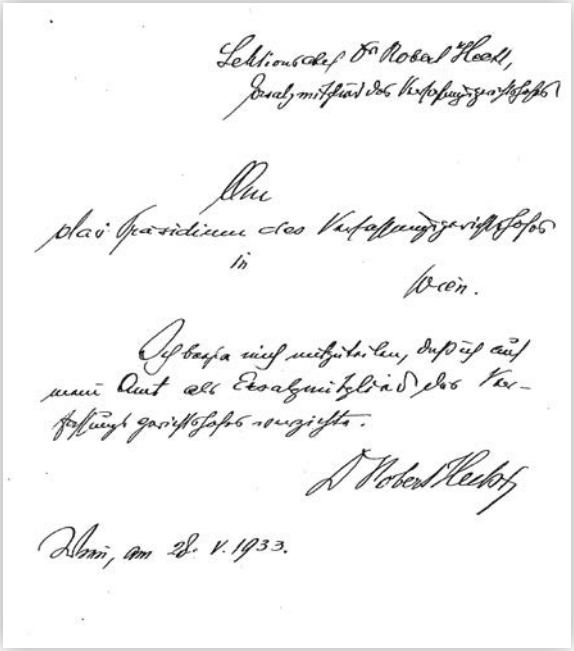
These proceedings ended with the Constitution of 1934 – the third act of the coup d'état – or rather with the transition to the 1934 Constitution (Verfassungsüberleitung). A new Federal Supreme Court (Bundesgerichtshof) was established and a constitutional senate given powers to decide on the lawfulness of regulations (Article 169 of the 1934 Constitution). However, all regulations issued prior to 1 July 1934 on the basis of laws authorizing the executive to issue regulations amending legislation – i.e. the regulations issued under the Wartime Economy Enabling Act 1917 – were excluded from review [section 51 of the Constitutional Transition Act (V-ÜG 1934)]. Cases pending before the Constitutional Court were transferred to the Federal Supreme Court. The proceedings for review of the constitutionality of the Constitutional Court Formation Regulation were finally terminated in October 1934.

The legal debate around the paralyzation of the Constitutional Court and the Court's response to it was multifaceted at the time and remains so to this day. There is a spectrum of opinions ranging from the position that the Constitutional Court Formation Regulation was absolutely null and void to the view that the rump Constitutional Court acted consistently in the only way possible. We will not go into detail regarding those opinions here. A common understanding unites them all, however: It would only have been possible to resolve this situation if the necessary political will had been present. Very little can be done when policymakers act with malicious intent. Ultimately, democracy depends on the acceptance of the constitutional rules by those who participate in it.

Josef Pauser

Further reading:

Neda Bei, Die Zerstückelung des Verfassungsgerichtshofes vor der Junisession 1933, juridikum 2009, 32–36; Klaus Berchtold, Verfassungsgeschichte der Republik Österreich, volume 1: 1918–1933, 1998; Wilhelm Brauneder, Österreichische Verfassungsgeschichte, 11th edition, 2009; Kurt Heller, Der Verfassungsgerichtshof. Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart, 2019; Stephan G. Hinghofer-Szalkay, Richterliche Rechtsnormvernichtung im Notstand. Verfassungsgerichtsbarkeit und Notverordnung, Beiträge zur Rechtsgeschichte Österreichs 2018, 357–370; Peter Huemer, Sektionschef Robert Hecht und die Zerstörung der Demokratie in Österreich. Eine historisch-politische Studie, 1975, 178–192; Christian Neschwara, Verfassungsgerichtsbarkeit im Spannungsfeld von Regierung und Parlament: Österreichs Verfassungsgerichtshof 1918–1934, ZRG GA 2013, 435–453; Thomas Olechowski, Die Ausschaltung des Verfassungsgerichtshofs 1933, in Bernhard Hachleitner et al. (eds), Die Zerstörung der Demokratie, 1933, 156–159; Markus Vašek, Die Gesetzesprüfungskompetenz des VfGH und ihr rechtlicher Schutz, Juristische Blätter 2015, 213–224; Robert Walter, Die Ausschaltung des Verfassungsgerichtshofes im Jahr 1933, in: Verfassungsgerichtshof der Republik Österreich (eds), Verfassungstag 1997, 1998, 17–34; Ewald Wiederin, Münchhausen in der Praxis des Staatsrechts, Gedenkschrift Robert Walter, 2013, 865–888; Ewald Wiederin, Die Verfassungsgerichtsbarkeit in Österreich 1919–1939, Beiträge zur Rechtsgeschichte Österreichs 2022, 276–286; Thomas Zavadil, Die Ausschaltung des Verfassungsgerichtshofs 1933, geisteswissenschaftliche Diplomarbeit Universität Wien 1997.



Sektionschef Dr Robert Hecht,
Beisitzer des Verfassungsgerichtshofes

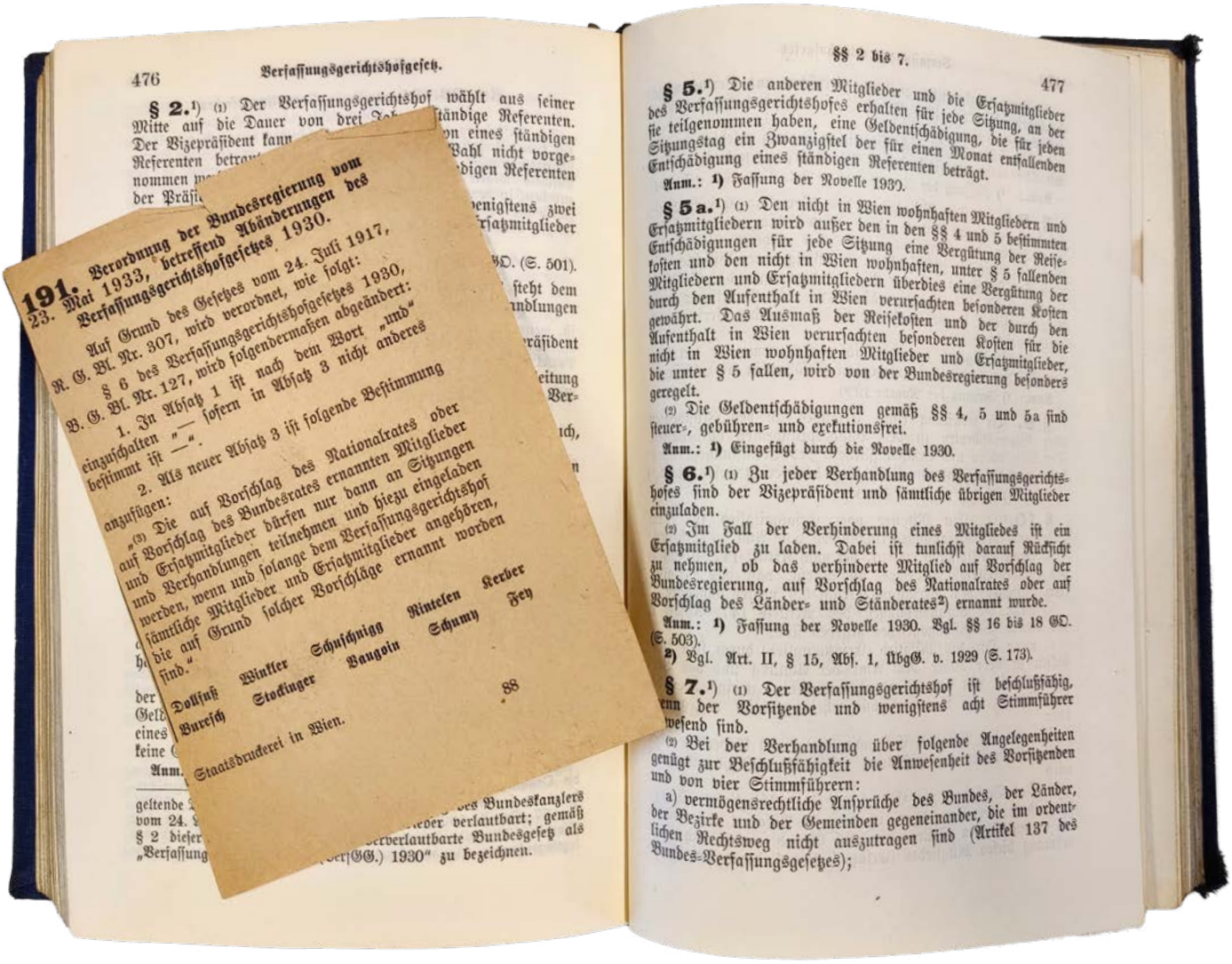
An
den Präsidenten des Verfassungsgerichtshofes
in
Wien.

Ich beehre mich mitzuteilen, dass ich auf mein Amt als Beisitzer des Verfassungsgerichtshofes verzichte.

Dr Robert Hecht

Wien, am 28. V. 1933.

Letter of resignation from Dr Robert Hecht, 28 May 1933
(Records of the Presidium of the Constitutional Court)



476 Verfassungsgerichtshofgesetz.

§ 2.[1] (1) Der Verfassungsgerichtshof wählt aus seiner Mitte auf die Dauer von drei Jahren ständige Referenten. Der Vizepräsident kann von eines ständigen Referenten betraut, wenn die Wahl nicht vorgenommen wurde, der Präsident den ständigen Referenten

191. Verordnung der Bundesregierung vom 23. Mai 1933, betreffend Abänderungen des Verfassungsgerichtshofgesetzes 1930.

Auf Grund des Gesetzes vom 24. Juli 1917, R. G. Bl. Nr. 307, wird verordnet, wie folgt:

§ 6 des Verfassungsgerichtshofgesetzes 1930, B. G. Bl. Nr. 127, wird folgendermaßen abgeändert:

1. In Absatz 1 ist nach dem Wort „und" einzuschalten „— sofern in Absatz 3 nicht anderes bestimmt ist —".

2. Als neuer Absatz 3 ist folgende Bestimmung anzufügen:

„(3) Die auf Vorschlag des Nationalrates oder auf Vorschlag des Bundesrates ernannten Mitglieder und Ersatzmitglieder dürfen nur dann an Sitzungen und Verhandlungen teilnehmen und hiezu eingeladen werden, wenn und solange dem Verfassungsgerichtshof sämtliche Mitglieder und Ersatzmitglieder angehören, die auf Grund solcher Vorschläge ernannt worden sind."

Dollfuß Winkler Schuschnigg Rintelen Kerber
Buresch Stockinger Baugoin Schumy Fey

88

Staatsdruckerei in Wien.

§§ 2 bis 7. 477

§ 5.[1] Die anderen Mitglieder und die Ersatzmitglieder des Verfassungsgerichtshofes erhalten für jede Sitzung, an der sie teilgenommen haben, eine Geldentschädigung, die für jeden Sitzungstag ein Zwanzigstel der für einen Monat entfallenden Entschädigung eines ständigen Referenten beträgt.

Anm.: [1] Fassung der Novelle 1930.

§ 5a.[1] (1) Den nicht in Wien wohnhaften Mitgliedern und Ersatzmitgliedern wird außer den in den §§ 4 und 5 bestimmten Entschädigungen für jede Sitzung eine Vergütung der Reisekosten und den nicht in Wien wohnhaften, unter § 5 fallenden Mitgliedern und Ersatzmitgliedern überdies eine Vergütung der durch den Aufenthalt in Wien verursachten besonderen Kosten gewährt. Das Ausmaß der Reisekosten und der durch den Aufenthalt in Wien verursachten besonderen Kosten für die nicht in Wien wohnhaften Mitglieder und Ersatzmitglieder, die unter § 5 fallen, wird von der Bundesregierung besonders geregelt.

(2) Die Geldentschädigungen gemäß §§ 4, 5 und 5a sind steuer-, gebühren- und exekutionsfrei.

Anm.: [1] Eingefügt durch die Novelle 1930.

§ 6.[1] (1) Zu jeder Verhandlung des Verfassungsgerichtshofes sind der Vizepräsident und sämtliche übrigen Mitglieder einzuladen.

(2) Im Fall der Verhinderung eines Mitgliedes ist ein Ersatzmitglied zu laden. Dabei ist tunlichst darauf Rücksicht zu nehmen, ob das verhinderte Mitglied auf Vorschlag der Bundesregierung, auf Vorschlag des Nationalrates oder auf Vorschlag des Länder- und Ständerates[2] ernannt wurde.

Anm.: [1] Fassung der Novelle 1930. Vgl. §§ 16 bis 18 GO. (S. 503).

[2] Vgl. Art. II, § 15, Abs. 1, ÜbgG. v. 1929 (S. 173).

§ 7.[1] (1) Der Verfassungsgerichtshof ist beschlußfähig, wenn der Vorsitzende und wenigstens acht Stimmführer anwesend sind.

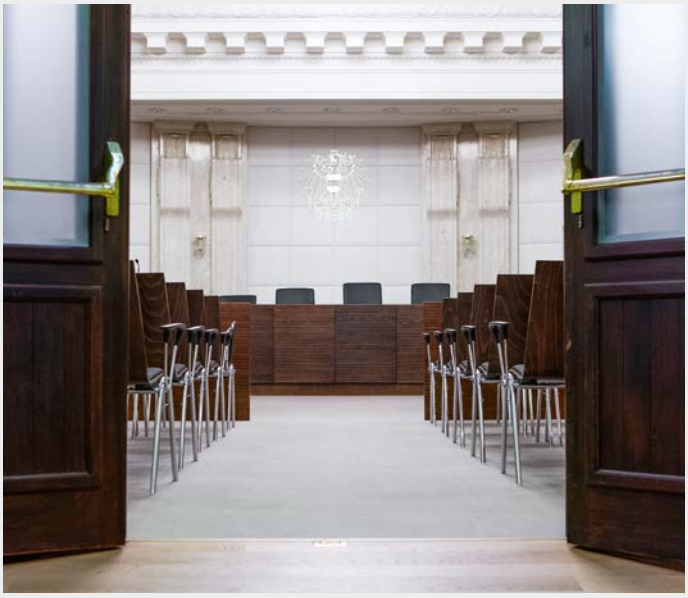
(2) Bei der Verhandlung über folgende Angelegenheiten genügt zur Beschlußfähigkeit die Anwesenheit des Vorsitzenden und von vier Stimmführern:

a) vermögensrechtliche Ansprüche des Bundes, der Länder, der Bezirke und der Gemeinden gegeneinander, die im ordentlichen Rechtsweg nicht auszutragen sind (Artikel 137 des Bundes-Verfassungsgesetzes);

Ludwig Adamovich sen. / Georg Froehlich (ed.), Die österreichischen Verfassungsgesetze des Bundes, 3rd ed., Vienna 1931, 476 f., with the "Constitutional Court Formation Regulation" inserted in the VfGG and cut out of the BGBl. (copy of the old VfGH-library shelfmark A II-65)

II

Personnel




VERFASSUNGSGERICHTSHOF

The Constitutional Court Judges

The Constitutional Court consists of the President, the Vice-President, twelve other Members and six Substitute Members, all of whom are appointed by the Federal President on the basis of proposals submitted by the Federal Government, the National Council or the Federal Council (the two Chambers of the Austrian Parliament). They resign from office in the year in which they reach the age of 70.

Judicial independence is guaranteed to the Members of the Constitutional Court.

Judge Rapporteurs

Judge Rapporteurs are elected by the plenary of the Constitutional Court from among ist members for a period of three years each. Re-election is allowed.

During the reporting year, the Constitutional Court had thirteen Judge Rapporteurs. In 2023, Vice-President Verena Madner, Dr. Christoph Herbst, Dr. Michael Holoubek, Dr. Helmut Hörtenhuber, Dr. Claudia Kahr und Dr. Georg Lienbacher were re-elected Judge Rapporteurs.

Dr. Hörtenhuber resigned from his position as Judge Rapporteur at the end of the reporting year.

The Constitutional Court Judges are supported by staff of 111 employees.

The Members and Substitute Members of the Constitutional Court

Members

Christoph Grabenwarter

Born in Bruck an der Mur in 1966, full professor at the Vienna University of Economics and Business, Member since 2005, Vice-President from 2018 to February 2020, President since February 2020.
Appointed upon proposal of the Federal Government.

Verena Madner

Born in Linz in 1965, full professor at the Vienna University of Economics and Business, Vice-President since 2020.
Appointed upon proposal of the Federal Government.

Claudia Kahr

Born in Graz in 1955, former Head of Department at the Federal Ministry for Science and Transport, Member since 1999. Appointed upon proposal of the Federal Government.

Johannes Schnizer

Born in Graz in 1959, former Senior Civil Servant of the Parliamentary Administration, Member since 2010. Appointed upon proposal of the Federal Government.

Helmut Hörtenhuber

Born in Linz in 1959, former Executive Director of the Regional Parliament, honorary professor, Member since 2008. Appointed upon proposal of the Federal Government.

Markus Achatz

Born in Graz in 1960, full professor at Johannes Kepler University Linz, certified public accountant, Member since 2013. Appointed upon proposal of the National Council.

Christoph Herbst

Born in Vienna in 1960, attorney-at-law, full professor at Johannes Kepler University in Linz, Member since 2011. Appointed upon proposal of the Federal Council.

Georg Lienbacher

Born in Hallein in 1961, full professor at the Vienna University of Economics and Business, Member since 2011. Appointed upon proposal of the Federal Government.

Michael Holoubek

Born in Vienna in 1962, full professor at the Vienna University of Economics and Business, Member since 2011. Appointed upon proposal of the National Council.

Sieglinde Gahleitner

Born in St. Veit im Mühlkreis in 1965, attorney-at-law, honorary professor, Member since 2010. Appointed upon proposal of the Federal Council.

Andreas Hauer

Born in Ybbs an der Donau in 1965, full professor at Johannes Kepler University in Linz, Member since 2018. Appointed upon proposal of the National Council.

Ingrid Siess-Scherz

Born in Vienna in 1965, former Senior Civil Servant of the Parliamentary Administration, Member since 2012. Appointed upon proposal of the Federal Government.

Michael Rami

Born in in Vienna in 1968, attorney-at-law, Member since 2018. Appointed upon proposal of the Federal Council.

Michael Mayrhofer

Born in Linz in 1975, full professor at Johannes Kepler University Linz, Substitute Member April to September 2021, Member since September 2021. Appointed upon proposal of the Federal Government.

Substitute Members

Robert Schick

Born in Vienna in 1959, Presiding Justice of the Supreme Administrative Court, honorary professor, Substitute Member since 1999.
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Appointed upon proposal of the Federal Council.

Nikolaus Bachler

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Appointed upon proposal of the National Council.

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Appointed upon proposal of the Federal Government.

For detailed CVs of the Members and Substitute Members, please refer to the website of the Constitutional Court:
https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/members.en.html
https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/substitute_members.en.html

III

Judiciary

A Summary of the Most Important Judgments and Decisions of 2023

A. Data Protection Law

14 December 2023, G 352/2021

Securing of data storage devices in criminal investigation proceedings

Repeal as unconstitutional of section 110 paragraph 1 subparagraph 1 and paragraph 4 and section 111 paragraph 2 of the Code of Criminal Procedure (Strafprozeßordnung, StPO) 1975, as amended by Federal Law Gazette I 19/2004

The provisions will be repealed with effect after 31 December 2024.

Under section 110 paragraph 1 Code of Criminal Procedure, items may be secured in circumstances including where it is deemed necessary for evidentiary reasons. Securing (Sicherstellung) means (inter alia) the establishment of temporary power of disposition over an item (retention, Abnahme). The holder of the item must surrender the item. Items that are allowed to be secured are any tangible movable objects and therefore include laptops, PCs, mobile phones (smartphones) and other electronic devices.

As well as allowing access to physical data storage devices, section 110 Code of Criminal Procedure also allows access to the data saved on them without the law enforcement bodies taking (physical) custody of the storage medium.

One of the most significant differences between the securing of data storage devices and the securing of other items lies in the opportunity it provides to evaluate the data saved on the data storage device, and draw conclusions from that data about the person concerned. A secured data storage device potentially contains a very large quantity of data which can, inter alia, be connected with and stored together with other available data (and not only data held by the law enforcement authorities). This data (including when connected with other data) can provide a comprehensive picture of the previous and current life of the party affected by the securing, which is not usually the case when other items are evaluated. In addition, the law enforcement authorities are permitted to access not only data saved locally, but also data stored externally by, for example, accessing this data using that person's computer. This can relate to data saved on a network or in the cloud.

The law does not set out any substantive or procedural rules specifying how the data saved (locally or externally) are to be evaluated; it is therefore entirely up to the investigating authorities themselves to determine how they proceed.

If data saved (locally or externally) on a data storage device is encrypted or

access to that data is protected, the investigating authorities are permitted to decrypt the data or disable the protection.

As a measure undertaken in the course of investigation proceedings, the securing of an item (and evaluation of that secured item) is possible if a reasonable suspicion is present (Anfangsverdacht); a strong suspicion (dringender Verdacht) is not required. A reasonable suspicion exists if, on the basis of specific indications, there is reason to believe that a criminal offence has been committed.

According to the law, the criminal offence is not required to be of a particular seriousness or encompass any aggravating elements for the law enforcement authorities to be permitted to secure and evaluate the items; the only requirement is that there be specific indications giving reason to believe that a criminal offence (of any type) has been committed.

The securing of items does not need to be approved by a judge; it merely needs to be ordered by the prosecution authority and executed by the criminal investigation authority. Under specific circumstances, the criminal investigation authority can secure items of its own motion.

In addition to items held by the accused, items in the possession of (non-suspect) third parties may also be secured, provided that there is a reasonable suspicion against some other person and the item appears to constitute relevant evidence.

The fundamental right to data protection pursuant to section 1 paragraph 1 of the Data Protection Act (Datenschutzgesetz, DSG) guarantees every person the right to secrecy of the personal data concerning that person, especially with regard to the respect for their private and family life, insofar as that person has an interest – which requires particular protection – in such secrecy. This entitlement to secrecy of personal data requiring particular protection is not only intended to prevent the disclosure of data which has been collected, but also prohibits data subjects from being unlawfully obliged to disclose data. This protection also applies if the obligation to disclose is imposed not on the data subject personally, but on a third party with disposal over protected data relating to the data subject.

To that end, section 1 paragraph 2 Data Protection Act contains a substantive reservation which draws the limits for interference with this fundamental right more narrowly than Article 8 paragraph 2 ECHR: Accordingly, besides the use of personal data with the data subject's consent or in the vital interest of the data subject, restrictions to the right to secrecy are permitted only in order to safeguard overriding legitimate interests of another person, namely in the case of interference by a public authority only on the basis of laws which are necessary for the reasons specified in Article 8 paragraph 2 ECHR and which set out sufficiently precisely – i.e. in a manner foreseeable for everybody – the circumstances under which the gathering or use of personal data is permitted for the performance of specific administrative functions.

Laws providing for the use of data which, due to its nature, requires particular special protection may allow such use only in order to safeguard substantial public interests and, at the same time, must provide for adequate safeguards for the protection of the data subjects' secrecy interests.

The provisions of the Code of Criminal Procedure challenged grant law enforcement authorities the power to secure data storage devices, and in a further step, the power to evaluate, store and process data including (sensitive) personal data within the meaning of section 1 Data Protection Act and Article 8 ECHR. This power thus interferes with the right to data protection under section 1 Data Protection Act and the right to respect for private and family life under Article 8 ECHR of both suspects and (non-suspect) third parties.

It is clear to the Constitutional Court that the objective pursued by these provisions, i.e. that of prosecution of criminal offences by way of securing (access and evaluation) of evidence, which includes data storage devices, is a legitimate aim. The powers granted to the law enforcement authorities are appropriate in general to achieve this (legitimate) aim.

A further condition that must be met for an interference with the fundamental right to data protection and the right to respect for private and family life to be deemed proportionate and thus justified is that the severity of the specific interference must not exceed the gravity and importance of the aims pursued by the interference. With regard to data requiring particular protection, section 1 paragraph 2 Data Protection Act imposes a further limitation on interference, stipulating that such data may only be used where necessary to safeguard substantial public interests, and that the individual laws must provide for adequate safeguards for the protection of the data subjects' secrecy interests.

The provisions challenged do not satisfy these requirements:

The Constitutional Court recognizes that the rapid expansion of the use of "new" communication technologies (e.g. mobile telephony, email, exchanging of information via the world wide web, etc.) poses particular challenges for the state in a number

of respects – not least in combatting crime. However, the greater investigative possibilities afforded by state-of-the-art technical tools also mean that the dangers posed thereby to human liberty must be countered in a manner that is appropriate.

For situations where the legislator has granted the law enforcement authorities extensive powers of intervention, section 1 Data Protection Act in conjunction with Article 8 ECHR require effective legal protection to ensure that the conditions for both securing and evaluation of data saved on a secured data storage device are met effectively and the misuse of powers is prevented; this applies all the more in cases where (some of) the data processed is regarded as requiring particular protection (for example health data).

In view of the extent and particular intrusiveness of the powers granted to the law enforcement authorities and the measures consequently required to prevent abuse of those powers, effective protection of fundamental rights can only be guaranteed by way of judicial control.

When approving the securing of a data storage device, the court must determine the categories and content of data allowed to be evaluated, the period to be covered by the data evaluation and the purposes for which the evaluation is to be permitted.

The power of investigation granted to the prosecution authority (and the criminal investigation authority) which was challenged in this case consequently violates section 1 paragraph 2 of the Data Protection Act in conjunction with Article 8 paragraph 2 ECHR because it can be exercised without prior approval by a judge.

Section 1 paragraph 2 of the Data Protection Act in conjunction with Article 8 paragraph 2 ECHR is also violated because persons affected by securing are not afforded adequate legal protection against the extensive powers of investigation granted to the law enforcement authorities. The persons concerned do not know which data is evaluated and how the law enforcement authorities (prosecution authority and criminal investigation authority) actually proceed when evaluating the data.

As the securing of data storage devices constitutes a serious interference with the fundamental rights of data subjects, it is not sufficient that the law enforcement authorities are required under section 5 Code of Criminal Procedure to observe the general principle of proportionality.

However, a rule requiring approval by a judge for the securing of data storage devices would not on its own guarantee adequate protection of fundamental rights.

The legislator must weigh the public interest in the prosecution and investigation of criminal offences on the one hand against the protected fundamental right of persons affected by securing, especially the right to protection of their secrecy interests and the right to protection of their private sphere and family life on the other, and strike a balance between them.

The constitutional requirements for striking this balance vary depending on the intensity of the interference resulting from the specific legislation in place. When conducting this proportionality review, the legislator must take account of the following aspects in particular:

It may make a difference if the law permits data storage devices to be secured in connection with all criminal offences or for certain offences only, e.g. only in case of serious offences or cybercrime.

Whether the securing of data storage devices is constitutionally justified may also depend on whether the legislator has put in place safeguards limiting the evaluation of a secured data storage device to the minimum necessary and ensuring that such evaluation is conducted in a manner which exposes the procedure to scrutiny and verification.

The legislator must ensure that persons affected by the securing of a data storage device and the evaluation of data saved (locally or externally) on it receive (or are able to receive) in a suitable manner the information required to safeguard their rights during the investigation proceedings and the main proceedings.

Finally, account must be taken of whether the legislator provides for effective mechanisms of independent review to verify whether law enforcement authorities acted within the limits of the judicial approval and statutory safeguards and whether the rights of the persons affected by the securing were appropriately safeguarded.

13 December 2023, G 212/2023 and others

Remedies for data breaches by the prosecution authority

Dismissal of applications to repeal as unconstitutional section 31 paragraph 1 first sentence, section 32 paragraph 1 subparagraphs 3 and 4 and section 36 paragraph 2 subparagraph 15 of the Data Protection Act (Datenschutzgesetz, DSG), as amended by Federal Law Gazette I 120/2017

Under the Data Protection Act, the Austrian Data Protection Authority (Datenschutzbehörde, DSB) is also the supervisory authority for the "processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution

of criminal offences or the execution of criminal penalties, and for the purposes of national security, intelligence, and the protection of military facilities by the armed forces“ (section 36 paragraph 1 Data Protection Act in conjunction with section 31 paragraph 1 first sentence Data Protection Act). The prosecution authority, or public prosecutors' offices (Staatsanwaltschaften), are regarded as being among these “competent authorities”.

The responsibilities of the Austrian Data Protection Authority are defined in section 32 paragraph 1 and section 34 paragraph 3 Data Protection Act. These provisions require the Data Protection Authority to “monitor” and “enforce” the application of the fundamental right to data protection. As supervisory authority with responsibility inter alia for the supervision of public prosecutors' offices, it has a duty related thereto to “deal with complaints lodged by a data subject, or by a body, organization or association in accordance with section 28, and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a period of three months, in particular if further investigation or coordination with another supervisory authority is necessary”.

The right to lodge a complaint with the Austrian Data Protection Authority regarding data breaches by a public prosecutor's office applies in addition to the right to resort to the ordinary courts, notably pursuant to section 106 paragraph 1 of the Code of Criminal Procedure (Strafprozessordnung, StPO).

This is not contrary to the principle of the separation of judicial and administrative powers (Article 94 paragraph 1 of the Constitution [Bundes-Verfassungsgesetz, B-VG]). It follows from this principle that the legislator must allocate a matter – in its entirety – to be dealt with either by the courts or the administrative authorities, i. e. one and the same matter cannot be decided by both courts and administrative authorities.

However, this duplication of available remedies in relation to the processing of data for the purposes of the prevention, investigation, detection or prosecution of criminal offences is based on Directive (EU) 2016/680. This Directive provides that every data subject affected by such data processing must be able both to lodge a complaint with a supervisory authority (Article 52), established as an administrative authority, and to seek a judicial remedy (Article 54). Notwithstanding their status as part of the judiciary (Article 90a of the Constitution), public prosecutors' offices are neither courts nor “independent judicial authorities” which can be excluded from the remit of the supervisory authority in accordance with Article 45 of the Directive.

The above provisions of Directive (EU) 2016/680 are mandatory; the legislator has no margin of appreciation when implementing them.

That being the case, repeal of the provisions of the Data Protection Act challenged could be envisaged only if the provisions laid down in the Directive implemented by way of those provisions were to be annulled by the Court of Justice of the European Union (CJEU). However, there is no doubt as to the validity of these provisions (see CJEU judgment of 12 January 2023, C 132/21, Budapesti Elektromos Művek, which concerns corresponding provisions of the General Data Protection Regulation), and the Constitutional Court is therefore not required to refer this question to the Court of Justice of the European Union for a preliminary ruling.

The provisions of Article 44 paragraph 3 of the Constitution regarding the procedure in the event of a fundamental change (Gesamtänderung) to the Federal Constitution (i. e. a referendum) would have effect even if the legislator were bound by European law to implement a particular provision. However, the provisions of the Directive reviewed here do not bring about a fundamental change to the Federal Constitution, neither on their own nor in conjunction with other provisions of Union law.

B. Media Law

15 March 2023, G 297/2022

Reimbursement of costs for wrongfully published replies

Repeal as unconstitutional of section 15 paragraph 3 of the Media Act (Mediengesetz, MedienG) as amended by Federal Law Gazette. I 20/1993.

The repeal shall take effect after 30 June 2024.

Pursuant to section 9 paragraph 1 Media Act, any person who is not merely generally affected by facts presented (Tatsachenmitteilung, presentation of facts) or published in a periodical medium is entitled to publication of a reply in that medium free of charge.

The media owner must comply with requests for publication of a reply.

If the media owner does not publish the reply properly or at all, the affected party may obtain a court order to enforce publication. While the decision of the court is appealable, an appeal does not have a suspensive effect. This means that the reply must be published irrespective of the outcome of the appeal proceedings.

If a reply was published on the basis of a judgment and the appeal against that judgment by the media owner is successful, the media owner is authorized to publish the relevant parts of the judgment of the appellate court. The court must order the applicant to pay the costs of wrongful publication of the reply and of the publication of the judgment of the appellate court (section 17 paragraph 5 Media Act). These costs are based on the rate for advertisements customary at the time of the specific publication.

The purpose of these provisions is to strike a balance between the interests of the affected person, the media owner and the general public.

When defining the law, various fundamental rights had to be taken into consideration. First and foremost, the right of reply curtails the media owner's freedom of the media and communication, which in light of the significance of the freedom of the media in a democratic society must meet the requirements of Article 10 paragraph 2 ECHR. As regards the person affected, the right of reply protects their private and personal sphere as provided in Article 8 ECHR. The right to reply also protects their right, covered by Article 10 paragraph 1 ECHR, to be able to respond publicly to incorrect or misleading media coverage on facts. Finally, it also ensures the provision of correct and complete information to the media audience and a functioning public debate as intended by Article 10 paragraph 1 ECHR.

To take account of these various aspects, the Media Act on the one hand contains provisions intended to support the effectiveness of the right of reply, notably by providing that appeals against a court order requiring publication of a reply do not have a suspensive effect. On the other hand, it is also intended to protect the media owner against inappropriate or unreasonable obligations and to ensure that it is compensated for the costs of the wrongful publication of a reply.

However, this compensation must not reach an amount that deters a person affected a priori from making use of their right of reply.

The amount of the costs of publication is determined inter alia by the standard rates charged by the media owner for advertisements, and thus ultimately the media product's market position. In addition, replies published on a website must remain online for one month; this too can cause the costs of publication to reach a considerable amount.

The affected person cannot control these factors or limit their risk of having to pay the costs of publication in the event that publication – though ordered by the court – is ruled to be wrongful on appeal.

Thus this provision may deter persons affected from exercising their right of reply and consequently, impair the general information purpose of the right of reply. However, the media owner's fundamental right to protection against a disproportionate obligation to publish third-party content could also be ensured by other means.

Section 17 paragraph 5 Media Act thus violates the legislator's obligation to strike an appropriate balance between the interests of the affected person and the media owner.

5 October 2023, G 215/2022

ORF Foundation Council and Audience Council

Repeal as unconstitutional of Section 20 paragraph 1 first sentence subparagraphs 3 and 4 ORF Act (ORF-Gesetz, ORF-G), the words "and 2. have knowledge of the Austrian and international media markets or be held in high regard in the field of economics, science, arts or education by reason of their previous activities" in section 20 paragraph 1 last sentence ORF Act, section 20 paragraph 4 second sentence ORF Act, section 28 paragraphs 4 and 5 ORF Act, section 28 paragraph 6 first sentence ORF Act, section 29 paragraph 6 second, third and fourth sentences ORF Act and section 30 paragraph 1 subparagraph 2 ORF Act.

The repeal shall take effect after 31 March 2025.

The Federal Constitutional Act on Guaranteeing the Independence of Broadcasting (Bundesverfassungsgesetz zur Sicherung der Unabhängigkeit des Rundfunks, BVG Rundfunk) and Article 10 ECHR impose a functional responsibility on the legislator as regards the broadcasting system. The broadcasting system is based on the freedom to broadcast, an individual right guaranteed by Article 10 ECHR, and on the institutional requirements of the Constitutional Broadcasting Act, and is intended to comprehensively guarantee freedom of public discourse via broadcasting. It is responsibility of the federal legislator to stipulate in more detail the legal framework which implements this guarantee. This framework must comprise provisions guaranteeing the objectivity and impartiality of reporting, diversity of opinion, balanced programming and independence of the individuals and governing bodies entrusted with broadcasting (Article I paragraph 2 Constitutional Broadcasting Act).

The Constitutional Broadcasting Act imposes an obligation to establish a public service broadcasting system and to organize it in accordance with the principles set out in Article I paragraph 2 Constitutional Broadcasting Act. Among these principles, the principle of independence provided for in Article I paragraph 2 Constitutional Broadcasting Act is of particular importance for the Foundation Council (Stiftungsrat) and the Audience Council (Publikumsrat) of the ORF. The purpose of this constitutional guarantee of independence is to ensure that no state or private forces are able to influence the activities of the ORF's programming staff for their own purposes by interfering with the governing bodies and officers. In the interests of the general public, which public service broadcasting is intended to serve, the independence of the ORF's governing bodies must be guaranteed specifically with regard to the state bodies and political forces which appoint them.

Therefore, the law must provide for the ability of the members of the ORF governing bodies to perform their duties independently and free of influence. In addition, the provisions governing the appointment and composition of these bodies must guarantee that no state body is able to exert a unilateral influence over their composition which may jeopardize their independence as a whole.

A further requirement arising from the other constitutional principles set out in Article I paragraph 2 Constitutional Broadcasting Act, particularly the principles requiring diversity of opinion and balanced programming, is that the composition of those bodies must be such that they cannot be unilaterally dominated by persons factually or legally associated with a specific group.

The legislator has a margin of appreciation in this regard. It can be ensured in various ways that a variety of interests and perspectives are taken into account in the decision-making of these bodies, for example by defining various professional requirements for members or by involving multiple state bodies in their appointment.

The fact that the governing bodies of the public service broadcaster are (partially) appointed by supreme state bodies is not in itself contrary to the Constitutional Broadcasting Act. The very democratic legitimacy of these state bodies contributes to compliance with the requirements regarding independence and pluralism. The governing bodies of the ORF are the Foundation Council, the Director General and the Audience Council (section 19 paragraph 1 ORF Act).

The **Foundation Council** comprises 35 members appointed in accordance with section 20 paragraph 1 ORF Act as follows:

- The Federal Government appoints six members after soliciting proposals from the political parties represented in the National Council (Nationalrat); each of the parties represented on the Main Committee of the National

Council (Hauptausschuss des Nationalrates) must be represented in the Foundation Council by at least one member.
- The Austrian regions (Länder) appoint nine members; each Land must be represented in the Foundtion Council by one member.
- A further nine members are appointed by the Federal Government, six members by the Audience Council, and five members by the Central Staff Council (Zentralbetriebsrat) of the ORF.

There are no concerns under constitutional law regarding the rule requiring each of the parties represented on the Main Committee of the National Council to be represented in the Foundation Council by at least one member. The appointment of a further member by each Land gives expression to the aspect of federal diversity. The appointment of six further members by the Audience Council, which is itself constituted in accordance with principles of social representation, complies with the aim of ensuring that the Foundation Council is pluralistic in composition.

By contrast, in relation to the nine members of the Foundation Council to be appointed by it, the Federal Government is not subject to obligations intended to ensure diversity in the Foundation Council exceeding those relating to the general personal and professional requirements. These members constitute a relatively large group which significantly outweighs the six members appointed by the Audience Council. This contravenes the constitutional guarantees of independence and pluralism in relation to the appointment and composition of the governing bodies of the ORF.

The ORF Act lays down a number of rules intended to guarantee the personal independence of the members of the Foundation Council in the performance of their duties. In particular, the members of the Foundation Council are not bound by instructions and orders in the exercise of their functions (section 19 paragraph 2 ORF Act). In addition, the members of the Foundation Council are appointed for a period of four years and can be removed prematurely only for specific reasons. However, premature removal from office is also possible if the bodies which appointed the Foundation Council are themselves replaced or if their composition changes. This is inconsistent with the constitutional principle of independence.

The members of the Foundation Council appointed by the Federal Government and the Audience Council must possess a high level of personal and professional aptitude acquired in various fields. However, the ORF Act contains no safeguards to guarantee that those appointing the members of the Foundation Council ensure, or as a minimum seek to ensure, that this requirement for a certain degree of diversity in personal and professional qualifications is achieved. The margin of appreciation granted to the Federal Government and the Audience Council in their decisions regarding which individuals they appoint to the Foundation Council is thus too broad because the important aspect of pluralism afforded by a variety of personal and professional qualifications is not binding in adequate detail and can therefore be devoid of substance. In light of the duties and powers of the Foundation Council, this shortcoming is particularly significant and means that, in this respect too, the provisions governing the appointment of members of the Foundation Council fail to satisfy the requirements of Article I paragraph 2 Constitutional Broadcasting Act.

The **Audience Council** comprises 30 members, 13 of whom are appointed directly by the organizations specified in the ORF Act. For the remaining 17 members, the Federal Chancellor must solicit sets of three proposals from institutions or organizations which are representative of a total of fourteen areas (groups) such as academia, the arts or older people. The 17 members appointed by the Federal Chancellor thus significantly outweigh the other 13 members delegated by representative institutions. This is inconsistent with the principle of independence laid down in the Constitutional Broadcasting Act.

It is also unconstitutional that the Federal Chancellor can freely determine how many institutions or organizations are invited to submit proposals for the areas (or groups) specified in the Act and how many members are appointed for each area (or group). The result of this is that the connection between the members of the Audience Council and the areas and groups that have been defined in both law and society as relevant via representative institutions and organizations is guaranteed only inadequately because the Federal Chancellor is able to undermine this representativeness by appointing multiple members from the same institutions and organizations and by freely choosing whether and which proposals to accept. Therefore, the provisions challenged have been found to be inconsistent with the constitutional principle of pluralism and independence of the Audience Council.

Cartoons

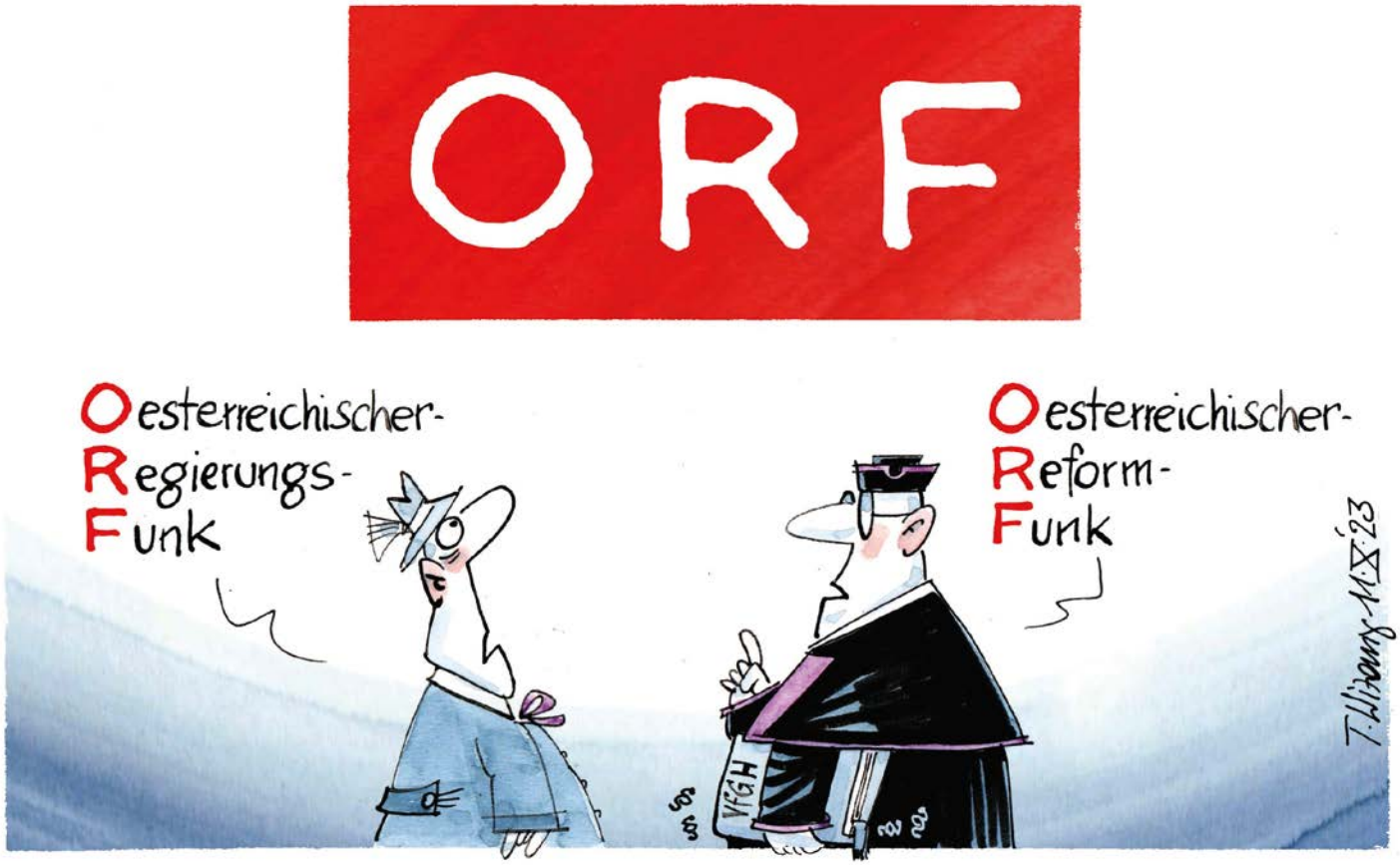
Translation:
No! – This is not a political toy!!

Cartoon: Tiroler Tageszeitung / M. Szyszkowitz

Translation:

Austrian	Austrian
Government	Reform
Broadcasting	Broadcasting

Cartoon: Salzburger Nachrichten / T. Wizany – UmFUNKtionieren



C. Social Law

15 March 2023, G 270–275/2022 and others

Social assistance – in-kind-only provision of supplementary benefits and upper limit for social assistance benefits

Repeal as unconstitutional of the words "instead of benefits in cash in the form of benefits in kind" in section 5 paragraph 5 second sentence and the words "solely in the form of benefits in kind" in section 5 paragraph 5 last sentence of the Federal General Social Assistance Act (Sozialhilfe-Grundsatzgesetz, SH-GG) and of section 8 paragraph 2 subparagraph 2 of the Vienna Minimum Income Act (Wiener Mindestsicherungsgesetz, WMG); finding that the words "in the form of supplementary benefits in kind" in section 6 Federal General Social Assistance Act was unconstitutional.

The repeal of section 8 paragraph 2 subparagraph 2 Vienna Minimum Income Act will take effect after 31 December 2023.

Pursuant to the **Federal General Social Assistance Act**, benefits paid at the reference rates (Richtsätze) can be provided in kind only if this can be expected to achieve the objectives of the benefit more efficiently; benefits covering housing requirements can be granted in kind only if this is not inefficient or inexpedient (section 3 paragraph 5 Federal General Social Assistance Act). The Federal General Social Assistance Act authorizes the regional legislator, i.e. the legislator at Land level, to exceed the maximum benefit rates laid down in the Federal General Social Assistance Act where housing costs are high and in cases of hardship. However, these benefits beyond the maximum rates must, without exception, be provided in kind (section 5 paragraph 5 Federal General Social Assistance Act).

This in-kind requirement is intended to ensure that those benefits are used only for the purpose for which they are granted. Although this provision pursues a legitimate aim, it distinguishes between benefits paid at the reference rates and supplementary benefits in a manner which cannot be objectively justified. In the case of both benefits paid at the reference rates and supplementary benefits, there may be objective reasons to grant them primarily as benefits in kind. However, there is no objective justification for the categorical exclusion of benefits in cash where housing costs are high and in cases of hardship.

Section 5 paragraph 2 subparagraph 2 of the Federal General Social Assistance Act caps monthly subsistence benefits for persons living in a household with others at 70 % of the equalization supplement reference rate (Ausgleichszulagenrichtsatz). By contrast, the Vienna Minimum Income Act provides for a minimum standard of 75 % of this reference rate (section 8 paragraph 2 subparagraph 2 Vienna Minimum Income Act).

However, with regard to matters falling within the scope of the Federal General Social Assistance Act, the regional (Land) legislator has no margin to exceed the maximum rates for general subsistence. The hardship provision set out in section 6 Federal General Social Assistance Act can be applied on a case-by-case basis only and does not provide a basis on which the maximum rates can be exceeded generally. Therefore, the provision stipulating the higher minimum standard in section 8 paragraph 2 subparagraph 2 Vienna Minimum Income Act is inconsistent with the principles defined at federal level and is therefore unconstitutional.

3 October 2023, G 238/2023

Payment of costs for care in residential care facilities

Repeal as unconstitutional of the words "prior to admission to a residential care facility" in section 12 paragraph 2 of the Lower Austria Social Assistance Act (Niederösterreichisches Sozialhilfegesetz, NÖ SHG) 2000 as amended by Regional Law Gazette (Landesgesetzblatt, LGBl.) 1/2022 and of section 12 paragraph 3 of the Lower Austria Social Assistance Act 2000 as amended by Regional Law Gazette 40/2018.

The repeal will take effect after 31 October 2024.

Under section 4 of the Lower Austria Social Assistance Act, individuals in need of assistance are entitled to receive social assistance benefits if they are Austrian citizens or have a status equivalent to that of Austrian citizens and have their place of primary residence (or failing that their place of abode) in Lower Austria. Individuals in need who are entitled to benefits under section 4 Lower Austria Social Assistance Act receive assistance with the costs of residential care if they had their primary residence in Lower Austria prior to admission to the care facility (section 12 paragraph 2 Lower Austria Social Assistance Act). Individuals in need who did not have their primary residence in Lower Austria prior to admission to the care facility receive assistance with the costs of residential care only after they have had their primary residence in Lower Austria for at least six months and if, during that period, they paid the full cost of accommodation in the facility from their own income and from care allowances (section 12 paragraph 3 Lower Austria Social Assistance Act). By contrast, persons who already had their primary residence in Lower Austria at the time of admission to the care facility only need to fulfil the other

requirements and, if they do, receive assistance with the costs of residential care immediately.

The payment of benefits subject to the existence of a place of primary residence (or failing that a place of abode) in Lower Austria is constitutionally unobjectionable. However, section 12 paragraph 2 Lower Austria Social Assistance Act derogates from this general residence requirement by stipulating not only that recipients must have a current primary residence in Lower Austria, but also that they must have had such residence prior to admission to a care facility there. Thus assistance for care in residential care facilities – unlike other social assistance benefits provided for in the Lower Austria Social Assistance Act – is subject not only to a requirement in terms of place, i.e. that recipients live in Lower Austria, but additionally to a requirement in terms of time, i.e. that they have lived there prior to admission to the care facility. This means that more stringent eligibility criteria apply for residential care costs than for other forms of social assistance. Hence the Act distinguishes, firstly, between citizens in need of care according to when they established their primary residence in Lower Austria and, secondly, between persons in need of assistance who have their primary residence in Austria according to whether or not they require residential care.

The principle of equal treatment does not prevent the legislator from differentiating on the basis of objective criteria for the purposes of access to residential care in order to ensure, for example, that individuals requiring residential care can be accommodated locally or near their relatives. However, section 12 paragraphs 2 and 3 Lower Austria Social Assistance Act excludes individuals in need of care from assistance in the form of residential care simply because they establish their primary residence in Lower Austria only when they enter a care facility there. A blanket rule of this kind does not permit account to be taken of individual circumstances (with regard to private and family life, for example), nor does it appear to be appropriate and necessary to ensure that care can be provided locally for the population already living in Lower Austria.

4 December 2023, G 197–202/2023 and many others

Pro-rata reduction of the adjustment factor for the first pension increase

Dismissal of applications to repeal as unconstitutional section 108h paragraph 1a of the General Social Insurance Act (Allgemeines Sozialversicherungsgesetz, ASVG) as amended by Federal Law Gazette I 28/2021 and corresponding provisions contained in the Social Insurance Act for the Self-Employed in Trade and Business (Gewerbliches Sozialversicherungsgesetz), the Social Insurance Act for Farmers (Bauern-Sozialversicherungsgesetz), the Pension Act (Pensionsgesetz) 1965, the Bundestheater Employees Pension Act (Bundestheaterpensionsgesetz) and the Federal Railway Employees Pension Act (Bundesbahn-Pensionsgesetz).

In accordance with section 108h paragraph 1 General Social Insurance Act, all pensions must be multiplied by the adjustment factor on 1 January of each year. Derogating from this principle, the first adjustment is decreased proportionately depending on the day of the month during which the pension is first awarded (the reference date, Stichtag). This means that individuals who retire on 1 January receive the full increase on 1 January of the following year. For those whose pension entitlement commences later in the year, the first increase is reduced by 10 percentage points each month, and those who begin to draw their pension on 1 December or 1 November receive an adjustment only from 1 January of the second following year.

This pension adjustment system raises no constitutional concerns:

It is within the legislator's margin of appreciation to delay the first pension adjustment by decreasing the adjustment factor on a proportional basis. Differences in treatment already arise due to the fact that all pensions – regardless of the reference date – are increased on 1 January of each year. Additionally, the legislator already mitigated the impact of the proportional adjustment for 2023 and suspended it altogether for 2024 and 2025 in order to limit the unwelcome effects of this model.

The pro-rata reduction also does not place women at an unconstitutional disadvantage. The Federal Constitutional Act of 1992 on Different Pension Ages for Male and Female Insured Persons (Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von Männern und Frauen) progressively brings the state pension age of women born between 1 January 1964 and 30 June 1968 into line with that for men with effect from 1 January 2024. Accordingly, these women will all reach pension age in the second half of the year. However, the fact that women born in the years 1964 to 1968 are more affected by the pro-rata reduction is merely the consequence of the Federal Constitutional Act referred to and therefore does not raise constitutional concerns.

D. Environmental Law

27 June 2023, E 1517/2022

Prohibition on sale of fossil fuels and heating oil ("climate lawsuit")

Dismissal of the complaint against a judgment of the Vienna Administrative Court (Verwaltungsgericht Wien) rejecting the request addressed to the then Federal Minister for Digitalization and Economic Affairs to issue a regulation prohibiting the sale of fossil fuels and heating oil.

Section 69 paragraph 1 of the Trade Code (Gewerbeordnung, GewO) 1994 authorizes the competent Federal Minister to enact regulations requiring businesses to undertake certain measures to avoid endangering human life or health or to prevent contamination of the environment. Section 69 paragraph 1 of the Trade Code 1994 does not provide for any individual right for a regulation to be issued.

The legislator is not required to provide for such an individual right in the situation at hand, a corresponding requirement cannot be derived from positive obligations (i.e. the state's obligation to engage in an activity to secure the effective enjoyment of a fundamental right) and there is no constitutional requirement in this regard either.

The case law of the European Court of Human Rights holds that while the ECHR does not contain a right to a healthy environment as such, positive obligations on states to protect against particularly serious harm to the environment can be derived from Article 2 ECHR, Article 8 ECHR and Article 1 of Protocol No. 1 to the ECHR (regarding Article 1 of Protocol No. 1 to the ECHR and Article 2 ECHR see ECtHR, 30 November 2004 [GC], appl. no. 48939/99, Öneryildiz v. Turkey; regarding Article 8 ECHR, see e.g. ECtHR, 24 January 2019, appl. nos. 54414/13 and 54264/15, Cordella and Others v. Italy). An obligation can be regarded as existing only if the hazard exceeds a certain level of seriousness. On the other hand, there does not need to be a direct threat to health (cf. ECtHR, 9 December 1994, appl. no. 16798/90, López Ostra v. Spain; 22 May 2003, appl. no. 41666/98, Kyrtatos v. Greece; 9 June 2005, appl. no. 55723/00, Fadeyeva v. Russia). The state may also have positive obligations in relation to imminent natural disasters (ECtHR, 20 March 2008, appl. no. 15339/02 and others, Budayeva and Others v. Russia and others; 17 November 2015, appl. no. 14350/05 and others, Özel and Others v. Turkey). The positive obligations may require the legislator to define procedural rules (cf. ECtHR, 27 January 2009, appl. no. 67021/01, Tătar v. Romania; 14 February 2012, appl. no. 31965/07, Hardy and Maile v. the UK).

The legislator usually has a wide margin of appreciation in fulfilling its positive obligations (ECtHR, 9 December 1994, appl. no. 16798/90, López Ostra v. Spain; 11 February 2011, appl. no. 30499/03, Dubetska and Others v. Ukraine and others). In principle, entitlement to a particular measure cannot be derived from fundamental rights; rather, it is for the democratically legitimated legislator to fulfil its positive obligations by selecting from among various possible measures. When fulfilling its positive obligations, the legislator must also strike a balance with other affected fundamental rights (cf. e.g. VfSlg. 14.260/1995, 13.725/1994). However, the legislator's margin of appreciation ends where appropriate safeguards are entirely absent or where measures intended to achieve the aim of protection are manifestly inappropriate (regarding the limited constitutional review of positive obligations, see also the decisions of the German Federal Constitutional Court BVerfGE 157, 30).

The Constitutional Court takes the view that an individual right to issue a regulation under section 69 paragraph 1 of the Trade Code 1994 cannot be derived from the obligation of the state to protect fundamental rights.

Hence there can be no objection to the Vienna Administrative Court's decision to dismiss the complaint on the grounds that the complainant did not have such an individual right. Neither the complainant's constitutional right to proceedings before the court, nor any other constitutionally guaranteed right, have been infringed. There are also no concerns regarding the fact that the legislator has not provided for an individual right to issue a regulation in section 69 paragraph 1 Trade Code 1994.

VfGH 13.12.2023, G 193/2023 and others

Prohibition on the keeping of pigs in unstructured, fully slatted pens without a functional area

Repeal as unconstitutional of section 44 paragraphs 29, 30, 31 and 32 of the Animal Welfare Act (Tierschutzgesetz, TSchG) as amended by Federal Law Gazette I 130/2022.

The repeal will take effect after 31 May 2025.

Under section 18 paragraph 2a of the Animal Welfare Act, weaners and rearing pigs must not be kept in unstructured, fully slatted pens without a functional area. This prohibition applies to all facilities newly built or rebuilt with effect from 1 January 2023. For facilities already in existence when the prohibition takes effect, the prohibition will apply from 2040.

In accordance with section 44 paragraph 30 Animal Welfare Act, the Federal Minister for Social Affairs, Health, Care and Consumer Protection and the

Federal Minister for Agriculture, Regions and Tourism (now the Federal Minister for Agriculture, Forestry, Regions and Water Management) are required to carry out an evaluation of pen systems and floor designs by 31 December 2026. The intention is to develop alternatives to the current fully slatted pens which can be used as the basis for new minimum standards. All pig housing facilities will be required to comply with those new minimum standards from 1 January 2040. Exemptions exist for facilities which were in compliance with the current standards on 1 January 2023. The transitional period for those facilities ends 23 years from the date of first use.

The prohibition on the keeping of pigs in unstructured, fully slatted pens without a functional area is founded on a decision adopted by the National Council (Nationalrat) on 15 December 2021 to put in place measures to progressively meet the demands set out in a popular initiative referred to as the "animal welfare popular initiative" (Tierschutzvolksbegehren). In implementing the demands, the related measures will be taken in a way as to ensure predictability of planning for affected farms, positive economic prospects through sufficient market incentives, and financial support.

The animal welfare popular initiative states that the keeping of animals in unstructured, fully slatted pens without a functional area is incompatible with the basic needs of animals.

When interpreting the provisions challenged, significant weight must be accorded to the public interest in animal welfare, but consideration must also be given to predictability of planning for farmers and investment protection. A transitional provision is a suitable way of balancing these interests as constitutionally required.

As the Constitutional Court has found in previous rulings, a shift in values has occurred over recent decades in that animal welfare is today widely recognized as being in the public interest. Section 1 Animal Welfare Act defines the objective of the Act as being the protection of the life and well-being of animals based on the special responsibility of human beings for animals as fellow creatures.

The prohibition set out in section 18 paragraph 2a Animal Welfare Act pursues the objective of public interest of protecting pigs from harm resulting from being kept in unstructured, fully slatted pens without a functional area (cf. section 2 of the Federal Constitutional Act on Sustainability [BVG Nachhaltigkeit]). This prohibition is qualified by section 44 paragraphs 29 to 32 Animal Welfare Act, which grants existing farms a 17-year implementation period to ensure the predictability of planning and protection of investments.

In accordance with the case law of the Constitutional Court, mere reliance, or expectations, that the legal framework will remain unchanged does not as such enjoy particular constitutional protection. Only under certain circumstances does the principle of legitimate expectations impose constitutional limits on the legislator. Section 44 paragraph 29 Animal Welfare Act is intended to provide temporary protection for existing pig farms which keep their animals in unstructured, fully slatted pens without a functional area in expectation on the law remaining unchanged.

The Constitutional Court finds that it is constitutionally acceptable and under certain circumstances necessary for the legislator to provide for transitional rules appropriate to the circumstances. In principle, therefore, there are no concerns regarding the fact that the legislator has laid down transitional provisions for the purpose of protecting the operators of pig farms. However, such transitional provisions must not result in unjustifiable differentiation and their duration must be objectively justified.

The legislator has made value judgment that the keeping of pigs in unstructured, fully slatted pens without a functional area is to be prohibited. Given that the objective of this value judgment was to ensure animal welfare, it is not objectively justifiable for the legislator to focus one-sidedly on protection of investments by providing for a transitional period of 17 years and thereby failing to take adequate account of animal welfare.

The prohibition on unstructured, fully slatted pens without a functional area laid down in section 18 paragraph 2a Animal Welfare Act increases market entry costs for operators of new pig housing facilities. However, protection of investments does not justify such a long transitional period, especially as the transitional provision is a blanket provision which does not differentiate, for example, according to when existing facilities first entered operation. Furthermore, it should be noted that existing farms can apply for subsidies. In differentiating between farms which have constructed a new facility or rebuilt an existing facility since 1 January 2023 or will do so in future on the one hand and those who had a facility in operation before that date on the other, the legislator has created a difference in treatment which is objectively unjustifiable, because it imposes higher market entry costs on new operators and this inequality will remain in place for 17 years.

E. The Rule of Law

7 March 2023, G 282/2022

Performance appraisals of members of the Vienna Administrative Court by the Court's Human Resources Committee

Dismissal of applications to repeal as unconstitutional the words "and the other members of the administrative court" and the citation in parentheses "(section 16 paragraph 2 subparagraph 5)" in section 10 paragraph 1 of the Vienna Administrative Court Public Sector Employment Act (Wiener Verwaltungsgericht-Dienstrechtsgesetz, VGW-DRG) as amended by Regional Law Gazette 42/2021 and of section 16 paragraph 2 subparagraph 5 of the Vienna Administrative Court Act (Gesetz über das Verwaltungsgericht Wien, VGWG) as amended by Regional Law Gazette 45/2020.

Pursuant to Article 135 paragraph 1 of the Constitution, cases before the administrative courts of first instance are decided by judges sitting alone or in panels constituted by the plenary assembly (Vollversammlung) or a court committee. Performance appraisals of members of the administrative court are categorized as judicial decisions. Under section 10 paragraph 1 of the Vienna Administrative Court Public Sector Employment Act, however, this task is entrusted to the Human Resources Committee (Personalausschuss) of the Vienna Administrative Court, comprising the President, the Vice-President and five further members elected by the Plenary Assembly of the Vienna Administrative Court.

There are no concerns under constitutional law regarding these provisions.

Under Article 134 paragraphs 2 and 3 of the Constitution, it is the responsibility of the Plenary Assembly or a committee elected from among its members (comprising the President, the Vice-President and at least five other members of the Vienna Administrative Court) to submit sets of three proposals for the appointment of members to the Vienna Administrative Court. The personnel committees (Personalsenate) of the ordinary courts have a similar right of proposal under Article 86 paragraph 1 of the Constitution in conjunction with section 36 of the Judges and Prosecutors Public Sector Employment Act (Richter- und Staatsanwaltschaftsdienstgesetz, RStDG); these personnel committees are also responsible for appraisal of the performance of judges (section 52 paragraphs 1 and 2 of the Judges and Prosecutors Public Sector Employment Act).

There are no indications that the constitutional legislator wanted to depart from the system in place in the courts of ordinary jurisdiction when specifying Article 135 of the Constitution. Therefore there is nothing to prevent the ordinary legislator from entrusting the plenary assembly or the committee responsible for proposing appointments to the court with further judicial administration matters which are substantively related to functions already allocated to those bodies under the Constitution, even if those matters constitute judicial business under Article 135 paragraph 1 of the Constitution.

The allocation of responsibility for performance appraisals of members of the Vienna Administrative Court to the Human Resources Committee fulfils these conditions. In view of their legal consequences, performance appraisals are to be deemed employment-related matters and therefore substantively related to the Human Resources Committee's task of submitting sets of three proposals for judicial appointments.

28 June 2023, G 299/2022 and others

Decision concerning applications for exclusion of a judge or court panel member and limitation period in criminal proceedings

Dismissal of applications to repeal as unconstitutional section 45 paragraph 1 second, third and fourth sentences of the Code of Criminal Procedure (Strafprozeßordnung, StPO) 1975 as amended by Federal Law Gazette I 19/2004, of the word "not" in section 45 paragraph 3 of the Code of Criminal Procedure as amended by Federal Law Gazette I 19/2004, of section 238 paragraph 2 of the Code of Criminal Procedure as amended by Federal Law Gazette I 93/2007, and the word "not" in section 238 paragraph 3 of the Code of Criminal Procedure as amended by Federal Law Gazette I 93/2007, as well as of section 58 paragraph 3 subparagraph 2 of the Criminal Code (Strafgesetzbuch, StGB) as amended by Federal Law Gazette I 94/2021 and section 58 paragraph 3a of the Criminal Code as amended by Federal Law Gazette I 112/2015.

In accordance with section 45 and section 238 Code of Criminal Procedure, applications for exclusion and refusal of a judge or other member of a court sitting with professional judges and lay judges (Schöffengericht) which are filed during a trial must be decided by the adjudicating court itself. This also applies to applications lodged immediately before the trial. Applications for exclusion or refusal lodged at other times must be decided by the head or president of the court in accordance with section 45 paragraph 1 Code of Criminal Procedure.

This rule, which differentiates according to the time of the application, is consistent with both Article 6 paragraph 1 ECHR and the principle of equal treatment.

Firstly, the court must announce its decision and cite the grounds for that decision. Secondly, the decision on the merits is open to full review by ordinary means of appeal. This ensures that all aspects of a decision to dismiss an application for exclusion of a judge can be reviewed by an impartial court.

In tying the jurisdiction to decide on applications for exclusion to the time an application is lodged, the legislator strikes a balance between the procedural rights of the parties and the interest in ensuring that the duration of proceedings is reasonable. The legislator did not exceed its margin of appreciation in this respect.

In general, liability for criminal offences expires after the applicable limitation period. However, certain periods are not calculated when determining the limitation period, e. g. the period from the first questioning of an individual as an accused, the period from the first threat or exercise of coercion (by the authorities) against a perpetrator because of the offence, from the public prosecution authority's first order or request for performance or approval to execute or authorize certain investigative measures and the taking of evidence (i.e. from the first "prosecutorial act") until the final, i. e. non-appealable, termination of the proceedings (section 58 paragraph 3 subparagraph 2 Criminal Code). This means that the limitation period is suspended while criminal proceedings are pending.

Under Article 6 paragraph 1 ECHR, the courts must rule on criminal charges within a reasonable time. This guarantee requires the state to organize its jurisdiction in such a way that proceedings can be concluded within a reasonable time.

The Code of Criminal Procedure contains several provisions that reflect this obligation. In particular, section 9 paragraph 1 Code of Criminal Procedure stipulates that criminal proceedings must always be conducted expeditiously and without unnecessary delay. A breach of this principle must be taken in mitigation when determining the penalty for an offence (section 34 paragraph 2 Criminal Code); affected criminal proceedings may also be renewed on application (section 363a Code of Criminal Procedure). In addition, section 108a Code of Criminal Procedure provides that the duration of criminal investigation proceedings must be reviewed ex officio at regular intervals.

Yet, the limitation period is not primarily intended to ensure that the duration of proceedings is reasonable; it serves other important purposes such as guaranteeing legal certainty, ensuring protection against obsolete claims which are difficult to defend and preventing unfair outcomes.

Whether the principle laid down in Article 6 paragraph 1 ECHR that a decision must be reached within a reasonable time has been breached is not a question of constitutionality of the law (for example of section 58 paragraph 3 subparagraph 2 Criminal Code) and must be assessed in each individual case.

5 October 2023, G 265/2022

Outsourcing of granting COVID-19 financial support

Repeal as unconstitutional of section 2 paragraph 1 subparagraph 3, section 2 paragraph 2 subparagraph 7, section 2 paragraph 2a, section 3b paragraph 2 and section 6a of the Federal Act Incorporating a Federal Divestment Stock Corporation (Bundesgesetz über die Einrichtung einer Abbaubeteiligungsaktiengesellschaft des Bundes, ABBAG-Gesetz) as amended by Federal Law Gazette I 228/2021.

The repeal will take effect after 31 October 2024.

The Federal Act Incorporating a Federal Divestment Stock Corporation (ABBAG Act) provides for financial measures to support companies in financial difficulties due to the COVID-19 pandemic (section 2 paragraph 1 subparagraph 3, section 2 paragraph 2 subparagraph 7). To that end, the company COVID-19 Finanzierungsagentur des Bundes GmbH (COFAG) was established as a subsidiary of ABBAG (which is not a stock corporation [AG] anymore, but a limited liability company [GmbH] now) and was endowed to be able to provide up to EUR 19 billion of capital and liquidity support and to meet its financial commitments (section 6a paragraph 2).

In carrying out its activities, COFAG is bound by rules issued in the form of regulations by the Federal Minister of Finance by agreement with the Vice-Chancellor (section 3b paragraph 3). Further requirements are set out in an agreement (under civil law) to carry out transactions entered into by COFAG and the Austrian state, represented by the Minister of Finance.

There is no entitlement to financial support (section 3b paragraph 2).

According to case law of the Constitutional Court, non-state legal entities to which sovereign functions have been outsourced are functional parts of the administrative branch. Therefore, if the legislator transfers functions in this way, it must ensure that there is a managerial and administrative framework which satisfies the requirements of Article 20 paragraph 1 (and where appropriate, of Article 20 paragraph 2) of the Constitution.

The performance of public functions in the form of private law (Privatwirtschaftsverwaltung) is generally based on Article 17 and Article 116 paragraph 2 of the Constitution. These provisions were originally intended to enable the state to set up commercial private entities (including the provision of funding and resources), i. e. permit the state to engage in entrepreneurial activity (the treasury as an economic actor) free of the constitutional requirements regarding responsibilities and organizational structure and operate via separate entities.

However, as the nature and purpose of the administrative activity concerned are not relevant when distinguishing between the performance of functions of the state in the form of private law and performance of such functions in the form of public law (see VfSlg. 3262/1957), the performance of functions in the form of private law has in some areas become equivalent to performance of those functions in the form of public law.

Therefore, the Constitutional Court does not endorse the overall view that – when matters relating to performance of duties of the state by private entities are hived off to a separate entity, whether organized under private or public law – the activity concerned (functionally) ceases to be one of state administration. If an independent entity performs public functions using instruments of private law, its activities continue to constitute activities of state administration if, organizationally and functionally, that independent legal entity has a close relationship with the state.

COFAG does have such a close relationship with the Federation. The Federation is indirectly COFAG's sole shareholder; in addition, COFAG's purpose and, in particular, the services it provides are entirely defined by federal law, without providing any entrepreneurial leeway to COFAG. Moreover, the granting of financial support is not a commercial activity that could be undertaken by private market participants.

Functions of state administration may be outsourced to an independent legal entity such as COFAG only under the following conditions: The constitutional principles of efficiency and objectivity must be complied with; the functions transferred must not be core areas of state administration; and there must be statutory safeguards ensuring that the supreme state bodies have managerial authority.

In the case of COFAG, the supreme administration functions continue to have control as required under the constitution. Although, as a subsidiary of ABBAG, COFAG is not directly subject to the managerial authority of the Minister of Finance. However, the Minister can exert influence over the management board of COFAG (which is established as a limited liability company) via ABBAG, which is a limited liability company wholly owned by the Federation. This is consistent with Article 20 paragraph 1 of the Constitution.

Yet the hiving-off of sovereign administrative activities to COFAG as provided for in the ABBAG Act does contravene the constitutional principle of objectivity:

COFAG itself does not have the necessary resources and equipment, specifically the necessary technical equipment, to perform its tasks in a manner equivalent to performance of those tasks by state bodies. In addition, COFAG has no essential functions which it must perform independently. Notably, the general verification of compliance with the eligibility criteria of the COVID-19 Financial Support Review Act (COVID-19-Förderungsprüfungsgesetz) is performed by the tax authorities.

The fact that there is no legal entitlement to receipt of COVID-19 compensation payments (section 3b paragraph 2 ABBAG Act) is also deemed not objectively justified and therefore unconstitutional. This financial support must be regarded as compensation for harm caused to businesses as a result of measures introduced under the law on epidemics (such as lockdowns and prohibitions on entry to certain places and facilities). In such cases, there must be an unconditional legal entitlement to compensation payments. While the case law of the ordinary courts recognizes the right to invoke the principle of equal treatment with other persons who have already received compensation payments in cases where public funding is granted under "self-binding" laws (Selbstbindungsgesetze, i. e. laws that create obligations for administrative bodies without establishing entitlements for individuals), this is not sufficient under the circumstances given here.

14 December 2023, G 328–335/2022

Provision of legal advice and representation to aliens by the Federal Agency for Reception and Support Services (Bundesbetreuungsagentur, BBU)

Repeal as unconstitutional of section 2 paragraph 1 subparagraph 2, the words "2 or" in section 3 paragraph 3 subparagraph 2, the words "subparagraph 2 point b and" in section 7 paragraph 1, the words "subparagraph 2 point a and" in section 7 paragraph 2, the words "legal advisors" and "the procedure in the event of breaches of duty by legal advisors, the provision of regular professional training for legal advisors which must be ensured in accordance with section 13 paragraph 4 subparagraph 2" and "subparagraph 2 point b and" in section 8, section 9 paragraph 1 third and fourth sentences, the words "subparagraph 2 points a and b and" in section 10 paragraph 2, section 12 paragraph 2 third sentence, section 12 paragraph 4 second sentence, the words "subparagraph 2 points a and b and" in section 12 paragraph 5, section 13, the words ", notwithstanding section 13 paragraph 1," in section 24 paragraph 1, and section 28 paragraph 2 of the Act Establishing the Federal Agency for Reception and Support Services – BBU Act (BBU-Errichtungsgesetz, BBU-G), and of section 52 of the Act on Proceedings Before the Federal Office for Immigration and Asylum (BFA-Verfahrensgesetz, BFA-VG) as amended by Federal Law Gazette I 53/2019.

The repeal will take effect after 30 June 2025.

In accordance with section 49 paragraph 1 of the Act on Proceedings Before the Federal Office for Immigration and Asylum, aliens can be granted free legal advice during proceedings pending before the Federal Office for Immigration and Asylum (Bundesamt für Fremdenwesen und Asyl, BFA), especially in relation to applications for international protection. Under certain conditions (e.g. applications by minors) applicants have a legal right to legal advice.

Aliens are in any case entitled to legal advice in proceedings before the Federal Administrative Court (Bundesverwaltungsgericht, BVwG) (section 52 Act on Proceedings Before the Federal Office for Immigration and Asylum). When it issues a decision, the BFA must notify aliens in writing that they will be automatically provided with a legal advisor free of charge. Legal advisors are required to provide support and advice to aliens bringing a complaint and during the complaint proceedings, and – upon request of the alien – represent them before the Federal Administrative Court.

Before the Federal Agency for Reception and Support Services (BBU GmbH) was established and entrusted with providing legal advice to aliens (by the amendment in Federal Law Gazette I 53/2019), this task had been stipulated in sections 48 to 52a of the Act on Proceedings Before the Federal Office for Immigration and Asylum. Under those previous provisions, the Federal Ministry of the Interior was responsible for selecting legal advisors for proceedings before the BFA and the Federal Chancellor was responsible for selecting legal advisors for proceedings before the Federal Administrative Court. The duration of a legal advisor's appointment was determined by the contract entered into with the Federal Minister of the Interior or the Federal Chancellor; reappointment was permitted. Legal entities could also be entrusted with the provision of legal advice. The appointment of individual legal entities could be revoked with immediate effect if they ceased to meet the necessary conditions or in the event of repeated and persistent breaches of duty by a legal advisor commissioned by the legal entity to provide legal advice.

In accordance with section 2 paragraph 1 subparagraph 2 BBU Act, provision of legal advice is now the responsibility of BBU GmbH, a non-profit limited liability company (GmbH) wholly owned by the Federation. Shareholder rights are exercised on behalf of the Federation by the Federal Minister of the Interior. The BFA – which decides on applications by aliens, notably for international protection, and which is the defendant in any appeal proceedings brought before the Federal Administrative Court by an alien – is directly subordinate to the Minister.

BBU GmbH has one or more manging directors appointed by the Federal Minister of the Interior. In accordance with section 9 paragraph 1 BBU Act, the head of the BBU legal advice department must be appointed by the Federal Minister of Justice and be granted power of attorney (Handlungsvollmacht) by the BBU management board. Further details are set out in the framework agreement which must be entered into by the Federal Minister of the Interior and BBU pursuant to section 8 BBU Act.

BBU GmbH's tasks include the provision of legal advice in proceedings before the BFA and the provision of legal advice and representation before the Federal Administrative Court.

According to section 13 paragraph 1 BBU Act, legal advisors must be independent and are not bound by instruction when performing the duties stipulated in section 2 paragraph 1 subparagraph 2 BBU Act. They must carry out their advisory activities objectively and to the best of their knowledge, and are subject to a duty of confidentiality.

Additional stipulations on the legal advice to be provided are set out in the framework agreement under

section 8 BBU Act. This framework agreement must contain provisions covering the terms of engagement, the services to be provided, reimbursement of costs, invoicing arrangements and selection of legal advisors (and interpreters and human rights observers), as well as the procedure in the event of breaches of duty by legal advisors. The "detailed agreement on legal advice" (as part of the framework agreement) contains specific provisions relating to disciplinary and functional supervision of the legal advice department and provisions on termination of employment and the provision of information. In accordance with the above agreement, instructions must not be issued to legal advisors in any case. Moreover, legal advisors enjoy special protection against dismissal and termination of employment.

For the alien to receive effective judicial protection, it is essential that the advice is provided by appropriately qualified advisors who are independent and not bound by instructions. While the requirement that legal advisors for BBU GmbH be independent is provided for in law (section 13 paragraph 1 BBU-G), further details regarding the position of those legal advisors, both within BBU GmbH and with regard to the Federal Minister of the Interior, who is the shareholder representative of BBU GmbH, are set out in an agreement.

On their own, the provisions of this agreement do not sufficiently meet the requirements arising from Article 47 paragraph 2 of the Charter of Fundamental Rights of the European Union (CFR) to ensure effective judicial legal protection. This is because, when entering into this framework agreement, the management board of BBU GmbH is – from the company law perspective – bound by the instructions of the general meeting of the company's shareholders, i. e. by the instructions of the Federal Minister of the Interior. This potential for influence arising from the requirements of company law means that the contractual agreement between the Federation and BBU GmbH cannot on its own be regarded as constituting an effective legal safeguard of the statutory independence of the BBU legal advisors. An effective safeguard would also require to explicitly enshrine in the law the independence and freedom from instruction of the legal advisors, particularly as regards their position within BBU GmbH (disciplinary and functional supervision), their tasks and responsibilities (allocation and acceptance of cases) and their employment relationship (protection against dismissal and termination).

However, the provision of legal advice and representation to aliens by BBU GmbH cannot be regarded as a function of the administration of the state – in contrast to the activities performed by COFAG. The legislator has entrusted the provision of legal advice and representation to a state-controlled private entity. However, provision of legal advice and representation by the individual legal advisors working for BBU GmbH is a service provided to aliens in the interests of the assertion of their rights which can also be – and is – provided by private entities (especially non-profit organizations). From a legal point of view, therefore, this activity is not structured in such a way that BBU GmbH or the individual legal advisors can be regarded as forming part of the state administration. As a result, the provisions governing legal advice and representation by BBU GmbH cannot be measured against the constitutional principles applicable to the state administration (Article 20 paragraphs 1 and 2 of the Constitution).

7 December 2023, G 105–106/2023
7 December 2023, G 590–591/2023

Legal protection against barring and no-contact orders

Rejection of applications to repeal as unconstitutional (inter alia) section 25 paragraph 4 and section 38a of the Security Police Act (Sicherheitspolizeigesetz, SPG) as amended by Federal Law Gazette I 147/2022, the words "who has not yet participated in violence prevention counselling in accordance with section 38a paragraph 8 Security Police Act," in section 382f paragraph 4 of the Enforcement Act (Exekutionsordnung, EO) and of section 13 paragraph 1 second sentence of the Weapons Act (Waffengesetz, WaffG) 1996.

Pursuant to section 38a paragraph 1 Security Police Act, law enforcement bodies are authorized to prohibit a person who on the basis of certain facts must be regarded as likely to commit an assault on life, health or freedom (potential perpetrator, Gefährder) from entering a dwelling in which an endangered person lives or from coming within 100 metres of that dwelling (barring order, Betretungsverbot). The barring order is combined with an order prohibiting the potential perpetrator from making contact with or approaching the endangered person (no-contact order, Annäherungsverbot).

The security authority must be notified without delay when a barring and no-contact order is issued and it must review that order within three days. If the security authority establishes that the conditions for issue of the order were not met, it must inform the endangered person of its intention to lift the order and lift it (section 38a paragraph 7 Security Police Act).

Within five days of issue of a barring and no-contact order, unless the order is lifted by the security authority, the potential perpetrator must contact a

violence prevention counselling service and actively participate in violence prevention counselling; if the potential perpetrator fails to make contact or participate in counselling, they must be summoned to appear before the security authority (section 38a paragraph 8 Security Police Act).

The concerns challenging the constitutionality of these provisions are unfounded.

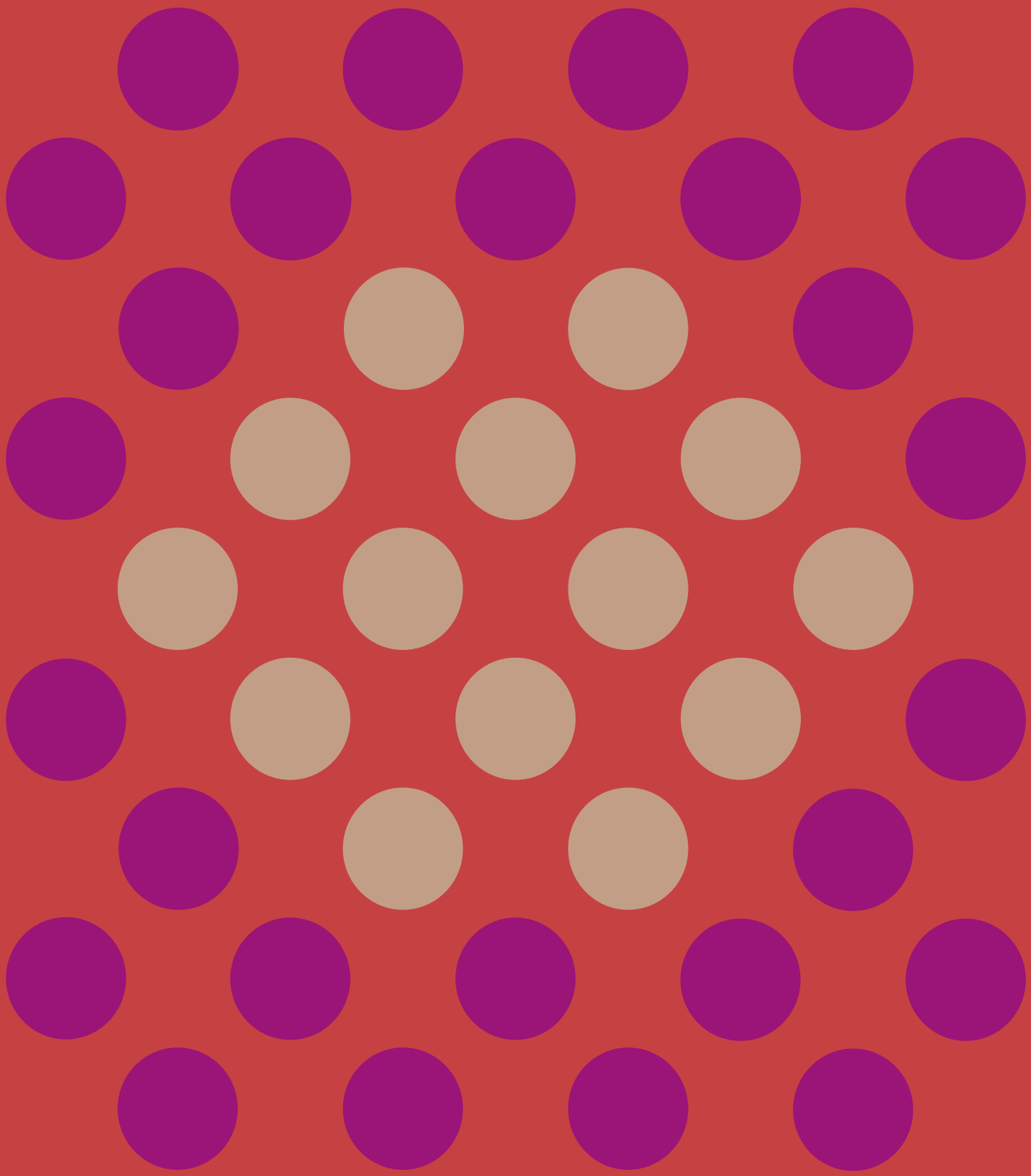
A barring and no-contact order pursuant to 38a of the Security Police Act is not a criminal charge as provided in Article 6 paragraph 1 ECHR, but an administrative policing measure intended to protect public order. Additionally, a barring and no-contact order does not affect any civil rights pursuant to Article 6 paragraph 1 ECHR. The guarantees provided for in Article 6 ECHR are therefore not applicable to the issue of a barring and no-contact order.

A barring and no-contact order can be challenged by means of a complaint against the exercise of direct orders and coercive measures by administrative authorities (Maßnahmenbeschwerde) according to Article 130 paragraph 1 subparagraph 2 of the Constitution. In the complaint proceedings, the administrative court of first instance must determine whether it was reasonable on the basis of the documented facts for the intervening bodies to regard the situation as dangerous. To do so, the administrative court must undertake an objective ex-ante assessment from the perspective of the intervening bodies at the time of their intervention. However, this restriction does not curtail the power of the administrative court to establish the relevant facts, but is relevant to the standard of review to be applied. In any case, the administrative court must review whether the decision to issue the order was consistent with the purpose of the law (i. e. the prevention of violence) and whether the procedure (including documentation of the relevant circumstances) was observed.

The lawful imposition of a barring and no-contact order and in particular the obligation to participate in violence prevention counselling is also not contrary to the right of free movement. On the contrary, justified interference with the right to free movement on the basis of these provisions pursues the legitimate aim of protection against dangerous assault, is proportionate, and also necessary to combat domestic violence and prevent that criminal offences are committed.

A barring and no-contact order has legal consequences (requirement to participate in violence prevention counselling, temporary prohibition on possession of weapons) which cannot be challenged separately and cannot be reversed if the order is subsequently lifted or found to be unlawful. However, this is neither disproportionate nor unjustified, nor does it violate the right to an effective remedy.

IV



Events and International Relations

History of Events in 2023

20 January 2023

Seminar on parliamentary law

Students visit the Constitutional Court as part of a seminar on parliamentary law led by Ingrid Siess-Scherz, Member of the Constitutional Court, Ewald Wiederin, professor of the University of Vienna and Christoph Konrath, Austrian Parliament Administration.

27 January 2023

Solemn hearing of the ECtHR in Strasbourg

Vice-President Madner takes part in the ceremonial opening of the judicial year and the annual seminar at the ECtHR.

21 February 2023

Visit to the Constitutional Court by the Austrian Academic Scholarship Foundation (Studienstiftung)

After a guided tour of the Constitutional Court building, President Grabenwarter leads a discussion with scholarship holders from the Austrian Academy of Sciences (*OeAW*).

7 March 2023

Visit by the Deputy Prime Minister of North Macedonia

President Grabenwarter meets with Slavica Grkovska, the Deputy Prime Minister of North Macedonia in charge of Good Governance Policies, to discuss a range of topics including the appointment of independent (constitutional) judiciary, as well as anti-corruption issues.

13 March 2023

Book presentation "Texte zur österreichischen Verfassungsgeschichte" (Texts on Austrian constitutional history) at the Constitutional Court

Former Federal President Heinz Fischer, Constitutional Court President Grabenwarter and Constitutional Court Librarian Josef Pauser, together with former Federal Chancellor Brigitte Bierlein, present their facsimile edition of the Austrian constitutions since 1848.

17 March 2023

First annual conference of the European Commission's Legal Service in Brussels

Vice-President Madner accepts an invitation to give a presentation on the subject of "Intergenerational Justice and Climate Litigation" at the annual conference of the European Commission's Legal Service.

24 March 2023

Ceremony to mark the appointment of new judges at the German Federal Constitutional Court in Karlsruh

President Grabenwarter and Member Georg Lienbacher attend the ceremony to bid farewell to the outgoing Judges Monika Hermanns and Peter M. Huber and officially welcome the new Members of the German Federal Constitutional Court, Rhona Fetzer and Thomas Offenloch.

26 to 28 March 2023

Ceremonial event in Bucharest organized by the Constitutional Court of Romania to commemorate the 100th anniversary of the Constitution of Greater Romania

Ralf Böckle attends the event in Bucharest.

3 and 4 April 2023

Conference of the Italian-Austrian Forum for Comparative Law in Rome on the occasion of the 50th anniversary of the death of Hans Kelsen

The Vice-President of the Italian Constitutional Court, Daria De Pretis, and Member of the Austrian Constitutional Court, Johannes Schnizer, pay tribute to Hans Kelsen in their keynote speeches at this conference which was co-organized by the Austrian Cultural Forum on the occasion of the presentation of the "Biography of a Legal Scholar" by Thomas Olechowski.

10 to 12 April 2023

International conference organized by the Constitutional Court of Thailand on the occasion of its 25th anniversary

Ralf Böckle travels to Bangkok and gives a talk at the international symposium "The Constitutional Court on the Protection of Rights and Liberties".

23 to 25 April 2023

Bilateral meeting in Vienna with the German Federal Constitutional Court

President Stephan Harbarth, Vice-President Doris König and twelve Judges – including all five newly appointed Members of the German Federal Constitutional Court – travel to Vienna to continue their regular discussions. Christine Langenfeld and Ines Härtel, Members of the German Federal Constitutional Court, and Helmut Hörtenhuber and Michael Holoubek, Members of the Austrian Constitutional Court, give introductory presentations on the previously agreed discussion topics "Principles of electoral law (Berlin election)" and "Freedom of the public media (in connection with media privilege and data protection)".

28 and 29 April 2023

Discussion group – European Association of Constitutional Courts in Heidelberg

Representing the Constitutional Court at the discussion group, President Grabenwarter, Vice-President Madner and Member Georg Lienbacher give a presentation on the reform of the preliminary ruling procedure.

2 May 2023

Short visit by Ukrainian Constitutional Judges during an OSCE conference in Vienna

President Grabenwarter speaks to the delegation about the challenging situation in Ukraine and discusses issues relating to constitutional jurisdiction and possible future cooperation.

4 and 5 May 2023

Congress in Berlin hosted by the German Federal Constitutional Court for the Presidents of the European Constitutional Courts

Vice-President Madner speaks on "Constitutional responsibility: causality, duties of protection, freedoms" at the congress organized by the German Federal Constitutional Court on "Climate Change as a Challenge for Constitutional Law and Constitutional Courts" and her presentation is published along with all the other congress presentations.

18 and 19 May 2023

Visit to the Italian Constitutional Court in Rome

President Grabenwarter, Vice-President Madner and Members of the Constitutional Court Johannes Schnizer, Christoph Herbst and Ingrid Siess-Scherz take part in the meeting in Rome. The topics discussed with their Italian colleagues are "End of life: two rulings compared" (with presentations by Giovanni Amoroso and Christoph Herbst) and "Constitutional Courts and their relations with the legislature" (with presentations by Ingrid Siess-Scherz and Maria Rosaria San Giorgio).

25 and 26 May 2023

International conference on "Models of constitutional complaints in Central Asian countries"

The Venice Commission organized a conference in Uzbekistan titled "Models of constitutional complaints in Central Asian countries". Mr. Böckle, the Venice Commission liaison officer, attended on behalf of the Constitutional Court.

26 May 2023

Ceremony to mark the appointment of new Judges at the German Federal Constitutional Court in Karlsruhe

Vice-President Madner and Constitutional Court Member Michael Holoubek attend the ceremony to bid farewell to outgoing Judges Susanne Baer and Gabriele Britz and to inaugurate the new Members of the German Federal Constitutional Court, Martin Eifert and Miriam Meßling.

2 June 2023

Visit to Vienna of the Acting President of the Ukrainian Constitutional Court

Acting President Serhiy Holovaty meets with President Grabenwarter to discuss constitutional jurisdiction, the rule of law, and possible cooperation with the Austrian Constitutional Court.

5 June 2023

Trilateral meeting in Châtau Bela, Slovak Republic

President Grabenwarter and his counterparts, the President of the Slovak Constitutional Court Ivan Fiačan and the President of the Czech Constitutional Court Pavel Rychetsky, convene for discussions.

6 June 2023

Meeting with UN High Commissioner for Human Rights Volker Türk

President Grabenwarter, Vice-President Madner and Members Claudia Kahr and Ingrid Siess-Scherz meet with Volker Türk to discuss the universality of human rights, the current global human rights situation and the challenges of today's crisis and war zones, as well as issues relating to climate change and new technologies.

20 June 2023

Study visit to Vienna by a high-ranking delegation from Serbia

Secretary General Stefan Frank receives a high-ranking delegation from Serbia, which includes the President and Judges of the Supreme Court, who are visiting Vienna together with representatives of the Council of Europe as part of an EU and Council of Europe project to strengthen the rule of law. The main topic of discussion is the importance of judicial independence.

23 June 2023

Study visit by a delegation from the Indonesian Constitutional Court

Member of the Constitutional Court Georg Lienbacher receives the delegation led by Enny Nurbaningsih, Judge at Constitutional Court of the Republic of Indonesia and participates in discussions on topics including constitutional complaints, the handling of mass proceedings and the organization and structure of the Constitutional Court.

24 July 2023

Meeting with the French Secretary of State for Europe

During a working lunch held during the visit of Laurence Boone, the French Secretary of State for Europe, President Grabenwarter engages in discussions about the role of constitutional courts in Europe and about matters concerning migration and asylum law.

30 August to 1 September 2023

EUnited in diversity II: The rule of law and constitutional diversity, The Hague

President Grabenwarter and Vice-President Madner take part in the international conference organized by the CJEU, the Constitutional Courts of Belgium and Luxembourg and the Supreme Court of the Netherlands. President Grabenwarter also chairs a panel.

7 September 2023

Visit to the Constitutional Court by the Governor of Carinthia

President Grabenwarter receives Peter Kaiser, Governor of Carinthia and Chairman of the Governors' Conference for talks. Topics under discussion include the reorganization of the financial equalization system, the settlement of the bilingual road (that are also place name) signs dispute a decade ago, and childrens' rights.

10 and 11 September 2023

Visit to the Constitutional Court of the Republic of Moldova and the Moldova State University in Chișinău

After talks with the Members of the Constitutional Court of the Republic of Moldova, which is currently chairing the Conference of the European Constitutional Courts, President Grabenwarter gives a guest lecture on "The Rule of Law" at the Moldova State University to official representatives of the University as well as to numerous employees of the Constitutional Court and students.

21 September 2023

Symposium at the University of Innsbruck

President Grabenwarter delivers a keynote speech at a symposium at the University of Innsbruck on the topic of "The constitutional court's reasoning".

2 October 2023

Constitution Day

Federal President Alexander Van der Bellen and Federal Minister Karoline Edtstadler each deliver a welcoming address. In her keynote speech, ECtHR President Síofra O'Leary discusses the question "What Future for the European Court of Human Rights?". A German-language version of the speech given in English is distributed to guests at the ceremony (a shortened version of which can be found here → p. 50).

13 October 2023

Study visit to Vienna by a delegation from Kazakhstan

Member of the Constitutional Court Georg Lienbacher receives a delegation of nine Judges from the recently established Constitutional Court of Kazakhstan.

20 October 2023

Meeting of Constitutional Court clerks in Vienna

At an event held at the Vienna City Hall, over 150 current and former clerks of the Constitutional Court meet to discuss the topic of "The Constitution and working methods of the administration".

23 and 24 October 2023

International conference organized by the Constitutional Court of the Republic of Kosovo to mark the opening of the Court's 14th judicial year in Pristina

Member of the Constitutional Court Georg Lienbacher attends the international conference on "The contribution of constitutional courts in protecting and strengthening fundamental values of democracy, human rights" and delivers a presentation.

26 October 2023

Open day

President Grabenwarter and the staff of the Constitutional Court host the Constitutional Court's open day, welcoming around 850 visitors and providing them with an insight into the Court's work at information points throughout the building. All the guests are invited to test their knowledge of the Constitution at a quiz organized by age group.

9 November 2023

Bilateral meeting in Vienna with the ECtHR – President of the ECtHR Síofra O'Leary and ECtHR Section President Gabriele Kucsko-Stadlmayer

The discussion with President Grabenwarter and Member of the Constitutional Court Michael Holoubek are focused on legal matters such as mandatory vaccination (against COVID-19) and the legitimacy of nobiliary particles. They also discuss issues related to cooperation within the Superior Court's Network and Protocol No. 16 to the ECHR (not ratified by Austria).

10 November 2023

Conference of the Presidents of Constitutional Jurisdictions of EU Member States in Brussels

Member of the Constitutional Court Helmut Hörtenhuber, representing the President, participates in the dialogue initiated by EU Commissioner Didier Reynders between the EU Commission and the Presidents of all the European Constitutional Courts.

10 November 2023

Lecture at the Kärntner Verwaltungsakademie in Klagenfurt

As part of the "*Alles was Recht ist"* law lecture series, President Grabenwarter gives a talk on the topic "New challenges for the democratic state". Numerous guests from the judiciary and in Carinthia Administrative Court take part in the ensuing discussion.

15 and 16 November 2023

Bilateral meeting in Vienna with the Constitutional Court of the Slovak Republic

President Grabenwarter, Members of the Constitutional Court Ingrid Siess-Scherz and Substitute Member Robert Schick receive a delegation of Judges from the Slovak Constitutional Court led by President Ivan Fiačan. They participate in bilateral discussions on "Constitutional courts and legislation" (with a presentation by Martin Vernarský, Slovak Constitutional Court judge, entitled "Constitutional review in the legislative process" and by Ingrid Siess-Scherz entitled "Inactivity of the legislator").

15 to 17 November 2023

Ceremony and international conference in Belgrade organized by the Constitutional Court of the Republic of Serbia on the occasion of its 60th anniversary

To mark the anniversary, Vice-President Madner travels to Belgrade to give a talk on "The role of the constitutional courts in applying the European Convention on Human Rights and the case law of the European Court of Human Rights at the national level".

27 November 2023

International conference organized by the Constitutional Court of the Republic of Albania to mark the 25th anniversary of the Constitution

President Grabenwarter takes part in the anniversary event and gives a talk on "Constitutional Courts and the Protection of Human Rights in Europe" during the ceremony in the parliament of the Republic of Albania.

Constitution Day 2023: Speech

Síofra O'Leary

President of the European Court of Human Rights

What Future for the European Court of Human Rights?*

* A shortened version of the speech for the activity report.

The Present

In the mid-1990s one of my predecessors, President Ryssdal (1985–1998), noted that the Convention had become: "[...] the single most important legal and political common denominator of the States of the continent of Europe in the widest geographical sense [...] a constitutional law for all Europe in the field of human rights protection".

But the reality is that the Court of today forms part of a complex multi-level system for the protection of human rights, alongside national constitutional and supreme courts of 46 Council of Europe States and the Court of Justice of the European Union. The role of the latter in relation to the core values underpinning the Convention has changed as EU law itself and the context in which the EU operates have changed.

The influence of the CJEU thus extends beyond the 27 EU Member States and is deepening within the EU-27 as Article 2 TEU, and the common European values which equally underpin the EU, become a driving force in the Luxembourg court's legal discourse. Our multi-level system is thus now more complex than when my predecessor spoke in the 1990s. In addition, the rules-based, multilateral international order of which the Court and Convention are both products is less welcome and more disparaged in some quarters than at any time since the end of the Second World War. Yet, let it not be forgotten, as war is waged to the East, that despite the expulsion of the Russian Federation from the Council of Europe, the Court remains competent to deal with over 14,000 Russian cases pending before it, as well as five interstate cases introduced by Ukraine.

The jurisprudential relationship with national superior courts of the 46 member States of the Council of Europe operates under the umbrella of the principles of subsidiarity and the margin of appreciation, both well-established in the Court's case-law and now featuring in the Preamble to the Convention. According to these principles the Convention should primarily be applied at domestic level by the national authorities, where necessary by the courts, in accordance with their margin of appreciation. The latter goes hand in hand with the Strasbourg Court's European supervision, embracing both the legislation and the decisions applying it, even those handed down by independent national courts.

Central to this relationship with national courts is our jurisprudential dialogue, where we speak through our judgments, and sometimes also separate opinions or the odd obiter dictum. This relationship may be marked with agreements or reasoned disagreements. However, as long as the latter reflect what one of my predecessor's described as "critical loyalty", they may contribute effectively to the protection and development of human rights in Europe.

In the context of the enlargement of the Council of Europe which I just mentioned, the Convention system has played and continues to play a vital role in ensuring democratic change in transitional democracies in Central and Eastern European States. In relation to States which have joined the EU since 2004, it has played a crucial role in preparing them on the road to accession and sanctioning thereafter failures to respect common European values. The same can be expected to happen in relation to the Council of Europe States, such as North Macedonia, Montenegro, Moldova and Ukraine, which have been granted candidate status in recent years.

Moreover, the interpretation and application of the Convention as a living instrument by the Court for over sixty years has created a vast body of law covering a broad variety of topics of relevance for international law and our contemporary European legal landscape. Think of the minimum guarantees which must be enshrined in criminal proceedings in order to ensure fair trials, the vindication of the rights of women,

children, the disabled or sexual and gender minorities, the development of a batch of environmental rights, the protection of privacy and data in our turbo-charged digital world, certain aspects of the relationship between employers and employees or the defense of democracy's lifeblood via rights of expression and assembly and limits thereto, to name but a few.

The development of Convention standards has also filled important gaps at crucial points in time in the protection of fundamental rights under the EU Treaties and infiltrated the formulation and spirit of different provisions of the Treaty on European Union (not least Articles 2 and 6 § 3) and the Charter of Fundamental Rights of the EU.

* * *

The current position of the Court and the overall Convention system cannot be separated from the challenges facing the Council of Europe more broadly as it seeks to protect human rights, democracy and the rule of law in its 8th decade.

Some of the challenges facing the Council of Europe were recently addressed at the 4th Summit of Heads of State and Government in Reykjavík which President Van der Bellen attended. Prior to the Summit, the Court contributed a Memorandum identifying three critical issues, namely the need for States to abide by their international legal obligations under the Convention and execute Court judgments, the need for sufficient and sustainable resources to allow the Court to exercise its judicial mission and the need to hold States accountable in inter-State and conflicts-related cases, even if they have been expelled from the organisation.

One of the key political messages from that Summit – the States explicit reaffirmation of their "deep and abiding commitment" to the Convention system and the Court as "the cornerstone of the Council of Europe's protection of human rights" – is one which now needs to be implemented in practice.

* * *

But the problem of long-lasting origin, the one with which I earlier closed my overview of the past – namely, the high number of cases on the Court's docket and their nature – endures.

Leaving aside the fact that close to 75 % of the docket is composed of applications concerning questions in relation to which the Court has well-established case-law or repetitive cases, almost 20,000 applications are pending at Chamber level. These are cases which are either priority or impact cases – meaning they raise issues which must be dealt with expeditiously, which warrant the attention of a 7 Judge Chamber, and which may touch on legal, political and societal questions of fundamental concern for a given State, States or the Convention system as a whole.

Yet, according to a calculation published in recent years, the ratio between cases pending and communicated to the respective respondent Governments and judgments rendered increased from 2,521 in 2013 to 4,421 in 2016.

How realistic then is it to expect a Court with 46 Judges, limited legal and material resources, which performs the four quite different judicial functions as I will now explain, to process these cases in a timely manner while at the same time elucidating and further developing the democratic, rule of law and human rights standards required for our age?

I'm struck by a recent Belgian judgment in which the Court identified a systemic problem of delay in the length of civil proceedings. Referring to the principles of subsidiarity and shared responsibility on which the Convention system is based, the Court emphasised that the latter cannot function correctly in the absence of justice being rendered by national courts within a reasonable

time at national level. *Ipso facto*, delay at the level of the Strasbourg court itself is untenable. Let's not forget that it took over 4 years to render this judgment which identifies and condemns a systemic problem affecting many thousands of litigants. It is painful for a Court President to turn the spotlight on their own Court's difficulties; but it is also necessary.

If we break down the Court's docket in 2023 we see that the crux of the problem is how to reconcile four quite different roles which the Strasbourg Court is now called upon to perform:

- filtering a huge volume of inadmissible applications (more than 35,400 applications were declared inadmissible or struck out of the list of cases by a single judge, a Committee, a Chamber or a Grand Chamber in 2022);
- processing large numbers of more or less repetitive or identical well-founded cases (796 judgments in respect of 3,554 applications were adopted by three-judge Committee formations last year);
- ensuring careful and timely scrutiny and adjudication of cases raising complex and often novel human rights questions; and
- managing the record number of inter-State and conflicts related cases of which the Court is now seised.

One wonders whether Dworkin's idealised Judge Hercules, endowed with extraordinary skills, time and resources, might be a better choice to tackle the task which faces us today.

The Future

Turning therefore to the future, the question boils down to whether and if so in what way we need to rethink the Court's role in the Convention system to meet adequately not just the challenges of tomorrow, but also some of those arising already today.

Some commentators have remarked, quite legitimately in my view, that successive high-level reform conferences on the Convention system have been dominated by practicalities, failing to focus on the more fundamental question of *purpose*. How best should we deploy the Strasbourg Court's scarce resources to ensure that the Convention is given maximum effect depends on what one identifies as the core functions and purpose of the Court itself.

Today, at this solemn ceremony to mark your Constitution Day, I would like to revisit the debate I touched on in my introduction regarding the Court's "constitutional" function and offer it as a path for further reflection regarding the Court's future.

Let me make very clear, when I use the word "constitutional" before national Constitutional Court judges, that there is no intention or desire to trespass on the terrain of Constitutional Courts which, in Austria, ranges from reviewing the constitutionality of laws to overseeing the lawfulness of elections and deciding on conflicts of jurisdiction.

I am not advocating that the ECtHR should resemble national constitutional courts in all significant particulars. The Court's role is and would remain subsidiary to that of national courts; its jurisdiction is and would remain limited to finding whether Convention obligations have been breached. The choice of means to ensure timely and effective execution of Strasbourg Court judgments is and would remain with the respondent State and the Committee of Ministers. The Court cannot and would not have powers to quash national legislation.

However, it is difficult to ignore the fact that the Strasbourg Court was endowed with certain "constitutional" features from the get-go. The circumstances in which the Convention was established, its rationale to provide a "defence of the character and integrity of national, political, constitutional and legal systems", the Convention's character as a "constitutional instrument of European public order" and the very nature of human rights litigation all point to those features. So too – and this is my central focus – does the standard-setting function of the Strasbourg Court, whose reach goes well beyond an individual application or applicant.

Referring to its role in relation to individual applications lodged pursuant to Article 34 of the Convention, the Court has repeatedly explained that it has: "[...] a double role in respect of applications lodged under Article 34 of the Convention: (i) to render justice in individual cases by way of recognising violations of an injured party's rights and freedoms under the Convention and Protocols thereto and, if necessary, by way of affording just satisfaction and (ii) to elucidate, safeguard and develop the rules instituted in the Convention, thereby contributing in those ways to the observance by the States of the engagements undertaken by them as Contracting Parties ..."

This citation comes from a case called *Nagmetov v. Russia*, decided in 2017, on the issue of a just satisfaction award following the finding of a serious violation of Article 2 on the right to life. The Court stressed in that case that the awarding of sums of money to applicants by way of just satisfaction was a duty "incidental to its task under Article 19 of the Convention of ensuring the observance by States of their obligations under the Convention". In *Karner v. Austria*, decided many years previously in 2003, the Court had recognised the provision of individual relief as important under the Convention system but also stressed that the mission of the latter is also "to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States".

We can thus differentiate between the Court's "constitutional" role whereby it seeks to clarify the interpretation of the provisions of the Convention, safeguarding the achieved level of Convention guarantees and, where needed, further developing Convention standards, and its "adjudicative" role which focuses on individual justice.

It is not possible to discern from the case-law a strict set of legal criteria determining whether, in a given case, the Court exercises its adjudicative or constitutional role. Much depends on the circumstances of a particular case and the issues raised therein. It is also difficult, if not impossible, to talk about the exclusive constitutional or adjudicative functionality of the Court's case-law. It is rather the question of preponderance of one or the other function in a given case.

The guiding consideration is whether the examination of the case goes beyond the particular situation of the applicant and raises issues of general importance for the Convention community of States or for the respondent State's legal system. Where the general importance is strong, the elements of constitutional function are stronger, and vice versa.

The hallmarks of a predominantly constitutional role can most obviously be found in the pilot and quasi-pilot procedures. These are procedures developed as a means to identify the structural problems underlying repetitive cases against one or more States and imposing an obligation on States to address those problems. This procedure allows the Court to select one or more cases for priority treatment and to adjourn or "freeze" related cases pending the resolution of the leading case. The emphasis is therefore not on the adjudication of one particular case, but on finding the solution to address the general problem and to provide guidance on the applicable Convention standards.

In the past two years the Court has also been pursuing a case-processing strategy which focuses on what we call "impact" cases. This too bears the features of a constitutional standard setting function, as it aims at rapid identification and more expeditious processing of cases which are particularly important for a given State or for the development of the Convention system and which raise new issues regarding the interpretation and application of the Convention. These impact cases may concern a variety of questions ranging from democratic good governance, the rule of law, protection of the environment, new technologies, equality and domestic violence or climate change, to name but a few.

The Court's constitutional role can also be observed in cases outside the structure of these two formal case-processing strategies, such as in the grouping of cases, the prioritisation of certain categories of cases or use of the "no

significant disadvantage" admissibility criterion, according to which cases which do not reach a certain threshold of seriousness need not be examined.

Individual cases are also illustrative of the constitutional features of our adjudication. Thus, for instance, in *Paposhvili v. Belgium* – which addressed the question of principle whether persons suffering from serious illness could be deported to their country of origin in the face of doubts as to the availability of appropriate medical treatment there, in relation to which earlier case-law and standards had not been clear – the Court did not consider that the applicant's death should lead to the discontinuation of examination of the case. Citing the *Karner* extract which I just mentioned, the Court held that: "[T]he impact of this case goes beyond the particular situation of the applicant, unlike most of the similar cases on expulsion decided by a Chamber ...".

The same approach can be seen in the recent high-profile case of Ecodefence concerning the application of the Foreign Agents Act to non-governmental organisations in Russia. The Court considered that the issue of succession of the applicant organisations which had since ceased to exist could not affect the continuation of examination of the case which "transcend[ed] the person and the interests of an individual applicant." It then examined in detail the operation of the domestic system and found it incompatible with the Convention. I should add, as I did at the opening of the judicial year in Strasbourg in January, that the Court took too long to decide the *Ecodefence* case; a fact which underlines the need to rethink what purpose the Strasbourg Court can best serve and how best it can do so, consolidating the impact strategy, the expeditious handling of key cases and the provision of resources required to allow us to do both.

In an unprecedented case decided in 2017 – *Burmych and Others v. Ukraine* – the Grand Chamber of the Court was confronted by a dilemma which placed the question of the Court's role and purpose front and centre. The case concerned a repetitive legal question par excellence (albeit one with serious consequences for the individuals involved and for the rule of law generally), namely non-enforcement of domestic court judgments in Ukraine. The Court had already adopted a pilot judgment in relation to Ukraine, and had instructed that State in detail on the measures needed to remedy the structural problems at issue. It had also decided 14,000 applications and was seised of over 12,000 more.

The Grand Chamber considered that it had discharged its judicial function by identifying the systemic shortcoming, finding a violation of the Convention due to this shortcoming, and providing guidance as to the general measures which had to be taken for the satisfactory execution of the pilot judgment so as to ensure relief and redress for all victims, past, present and future, of the systemic violation found. The Court therefore struck these cases out of its list of cases and sent them to the Committee of Ministers to be dealt with under the relevant execution process. It is interesting to note, for the purposes of our present discussion, that the Court's approach in *Burmych and Others* was criticised in some quarters as having betrayed the right of individual application and introduced "certiorari through the backdoor", despite the fact that supervision of *Burmych* and the accompanying 12,000 plus applications remains before the Committee of Ministers.

* * *

A holistic approach to the future of the Convention system requires us to think about the Court from the perspective of the complexities, forms and features of its different roles and functions. This means, *in concreto*, that we need to examine both the constitutional and adjudicative functions of the Court and to agree upon the steering principles of balance between these two functions. As I said previously, my call for genuine and profound reflection should not be read as a betrayal of the individual right of application. It is, in essence, a call for us to protect the Convention system and the Court's role within by striking a better balance between the two functions it has thus far been exercising.

While former judges, presidents and officials of the Court have extra-judicially evoked the need to reflect on and develop the Court's constitutional role, the official discourse of reforms of the Convention system have centred on solutions which would require the Court to adjudicate each and every case reaching it. Preservation of the Court's adjudicative role, combined with a focus on procedural and structural adjust-

ments during the reform process, have thus taken precedence over consideration of what the Court's constitutional role might better achieve in this, its 8th decade.

But to what effect? The Interlaken reforms and innovations certainly succeeded in bringing the system back from the brink. But is it not illusory to think that the Court can systematically render justice in each and every case reaching it when the profound political, economic, rule of law and security crises of our continent are constantly creating, and threaten to create in future, many more individual human rights complaints.

Last week, I delivered a leading Grand Chamber judgment in *Yüksel Yalçinkaya v. Türkiye*. The case concerns questions relating to protection from arbitrary prosecution and respect for the right to a fair trial of a Turkish teacher convicted of membership of an armed terrorist organisation in the aftermath of the attempted coup d'état in Türkiye. I mention this case in the context of my address because the Court is seized of 8,000 identical or similar applications lodged by teachers, civil servant and judges.

I am aware of the pitfalls of emphasis on the Court's constitutional role, which, if not properly managed, could be accused of arbitrary and even politicised selection. My reflections should not be understood as advocating a pure *certiorari* system – at least not in the form of a complete discretion for the Court to select cases for adjudication.

The point I wish to make is that the conception of the right of individual application and the reference to the Convention system in this context should be understood in a broader sense where the Court is only one, albeit highly important and indispensable, element in the overall structure of human rights protection on our continent. In this structure the Court acts not as a court resolving individual complaints but as a court with constitutional characteristics that elucidates, safeguards and further develops the relevant human rights standards in conjunction with national superior and, to a certain extent given the expansion of EU competence into new fields and the interpretation and application of the EU Charter, the EU courts.

So what can be done to enhance the Court's constitutional role and ensure the future stability of the Court and the Convention system? As I stressed earlier, I seek merely to offer some points for further consideration and reflection. Let me start with two doable measures.

Firstly, the Court, for its part, could delve more seriously into use of the "no significant disadvantage" admissibility criterion whose record thus far has been described as "dismal", communicating better with the different constituents which the Court serves (applicants, respondent States, third party interveners, nationals bars etc) to explain how and when this provision should be used. Until recently, the Court could not reject an application on this de minimis basis unless the complaint had been heard by a national court. This led, for example, to a seven Judge Chamber having to deliver a judgment on a parking fine of approximately 25 euros accompanied, when the applicant complained, with 5 points on his licences. The Court found a violation of Article 6 of the Convention due to the lack of availability of judicial review of such a sanction under Bulgarian law, but awarded no just satisfaction. One can only estimate the cost, many times more than the original fine and the applicant's 300-euro costs and expenses, of this 9-year European judicial saga. This is not what the Strasbourg Court is for, or what it is needed to do in these turbulent times.

Secondly, in our case-law we have often emphasised the important role of lawyers, providing Convention protection under Articles 6 and 10 in particular. In *Morice v. France*, for example, the Court held: "The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that

the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence [...] That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties".

Given that the Court rejects, on average, approximately 37,000 applications each year, with approximately 31,000 applications rejected by single judges for various reasons of procedural inadmissibility, national bar associations could play a greater role in ensuring that lawyers, as independent professionals in the administration of justice, also understand their duties when it comes to their clients lodging applications.

Moving on to a more substantial change, at the level of the member States – as the principal institutional actors controlling the future of the Court and the Convention system – reflection could be carried out to devise an institutional mechanism for the Court allowing it to further filter cases which have "constitutional" relevance for adjudication.

Such filtering, however, would not be a purely discretionary exercise – and thus not a *certiorari* procedure – but would depend on clear criteria for identifying cases of general importance for the Convention community of States or for the respondent State's legal system and separating them from other cases which require little or no further judicial intervention by the Court. Similar criteria have already been devised in the context of the Court's "impact" case-processing strategy that I mentioned earlier.

The filtering in question would also differ from a *certiorari* procedure in that prima facie meritorious cases not falling within the constitutional or impact categories would not be rejected but could be referred to the Committee of Ministers for the finding of a solution to the applicant's complaint in cooperation with the authorities of the respondent State, and in accordance with the well-established case-law of the Court. Individual relief could thereby be ensured, presumably in a more efficient manner than if the case went first through the lengthy procedure before the Court, and only then to the Committee of Ministers.

Substantial reforms of this nature might also look to an enhanced role for non-judicial rapporteurs provided by Article 24 of the Convention, who operate under the authority of the President and form part of the Registry. Additionally or alternatively, a preliminary, non-judicial layer for the examination of cases, performing a similar role to that of the former Commission, could be considered. However, unlike the former Commission, the body in question could be attached to the Court (in order not to break the idea of a single Convention supervisory mechanism) and could be competent only to dispose of the repetitive cases and cases subject to the well-established case-law of the Court, referring them directly for further consideration by the Committee of Ministers. Relevant cases could be referred back to the Court for its judicial examination where respect for human rights, as defined in the Convention and the Protocols thereto, requires judicial examination of the application.

For its part, and even within the current institutional framework, it seems essential that the Court makes more use of pilot and quasi-pilot judgment procedures designed for cases which seek to identify and resolve structural or systemic problems, and which allow the Court to perform its constitutional role and deal with follow on cases in a highly efficient and abridged way. In this context, I'm promoting internal reflections as regards revived and enhanced use of such procedures, combined with greater using of summary format judgments and decisions at Committee level to allow 7 Judge Chambers to concentrate judicial efforts on cases of systemic and constitutional relevance.

A fundamental prerequisite for a functioning Convention system based on "constitutional pluralism" is for national superior courts to act as faithful guardians of the values underpinning the system. They have the task of ensuring that the Convention is duly implemented and "embedded" in domestic legal orders. The Convention is based on shared responsibility, but the primary responsibility lies with national authorities – executives, legislatures and, in the last resort, courts such as yours. Given that we have over 75,000 cases pending, the system of shared responsibility is clearly not operating as it should. However, on a more positive note, as I approach my conclusions, 70 % of those pending cases hail from just 4 States (namely Türkiye, Russia, Ukraine and Romania). Austrian applications represent, in contrast, only 0,12 % of our current docket and Ireland is in a similar position. This points to the fact that for many of the 46 States, embeddedness has been achieved, ensuring that the Strasbourg Court only intervenes exceptionally; albeit when it does – in cases such as *Kurt, X and Others, Maslov, or Schalk and Kopf* – the impact of its judgments may be far-reaching, even when it finds no violation in the circumstances of the individual case.

These and other Austrian cases have contributed significantly to the development of the Court's case-law. In addition, Austria's record executing Court judgments signals commitment to the system, its authority and value, as well as simple respect for the rule of law.

Conclusion

Distinguished guests, when asked to deliver an address to mark this important day in your legal and political calendar, I deliberately chose a topic which would make both the speaker, in advance, and the audience, on the day, work.

Given that I have made your minds work hard this Monday morning, allow me to conclude quite shortly, by referring to the terms of the Plenary Court's Memorandum on the occasion of the 4th Summit.

In this memorandum, the Court's 46 Judges recalled the decisive role played by the Council of Europe and the Court for over 7 decades, seeking to maintain high standards of democracy, human rights and the rule of law in the member States. Speaking as a collegiate body of 46 Judges, we concluded then in a manner which I could not better in my conclusion for you today:

"As war rages on European soil, Council of Europe member States should not lose sight of what the Convention system is intended to do, namely to monitor compliance with the minimum standards necessary for a democratic society operating within the rule of law. It serves as an early warning system which seeks to prevent the erosion of democracies. We cannot either lose sight, at this critical point in Europe's history, of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms and of our profound responsibility to pass on this unique international protection mechanism to future generations."

In this solemn spirit of responsibility, tinged with hope, I conclude today's address and thank you for your attention.

International Relations

As the event history shows, the Constitutional Court was able to resume its programme of knowledge exchange and institutional relations both at home and abroad in 2023.

Here is a brief overview of the international conferences in which Members of the Constitutional Court participated.

It was a pleasure to see that all five new Members of the German Federal Constitutional Court in Karlsruhe managed to attend the bilateral meeting with the Constitutional Court in Vienna in April 2023. In addition to the President of the Federal Constitutional Court Stephan Harbarth and Vice-President Doris König, twelve Federal Constitutional Court Judges participated in the discussions. Presentations by Federal Constitutional Court Judge Christine Langenfeld and Member of the Constitutional Court Helmut Hörtenhuber opened a debate on the topic "Principles of electoral law", with particular reference to the partial rerun of the Bundestag elections taking place on 10 November 2022 in several constituencies in Berlin. There was also a second discussion on the topic "Freedom of public media", in which Federal Constitutional Court Judge Ines Härtel and Member of the Constitutional Court Michael Holoubek expressed their views on media privilege and data protection.

Two visits and working meetings with the Constitutional Court of Ukraine took place in the first half of the year. In May, during a brief visit to Vienna for an OSCE conference, three Members of Ukraine's Constitutional Court met with President Grabenwarter. The Ukrainian delegation discussed their efforts to continue their work despite the challenges of the war. The dialogue with the Ukrainian Constitutional Court continued when Acting President Serhiy Holovaty met with President Grabenwarter on 2 June in Vienna. They discussed issues relating to the rule of law and a possible cooperation with the Constitutional Court.

At the invitation of Silvana Sciarra, former President of the Italian Constitutional Court, President Grabenwarter, Vice President Madner and Members of the Constitutional Court Johannes Schnizer, Christoph Herbst and Ingrid Siess-Scherz travelled to Rome for discussions with their Italian colleagues. The first topic of the working meeting concerned the decisions on euthanasia, which were elucidated by Judges Giovanni Amoroso and Christoph Herbst. The second topic of discussion was the relationship between constitutional courts and the legislature, with presentations given by Judges Maria Rosaria San Giorgio and Ingrid Siess-Scherz.

During the recent pandemic years, discussions continued to be held between the Slovakian Constitutional Court and the Constitutional Court Presidents of neighbouring countries. The most recent meeting took place on 5 June at Château Bela in Slovakia at the invitation of President Ivan Fiačan of the Slovakian Constitutional Court. A delegation from the Slovakian Constitutional Court visited the Austrian

Constitutional Court in November at the invitation of President Grabenwarter. At the bilateral meeting held to discuss the topic of "Constitutional courts and legislation" Member of the Slovakian Constitutional Court Martin Vernarský gave a presentation on "Constitutional review in the legislative process", while Member of the Constitutional Court Ingrid Siess-Scherz spoke about the "Inactivity of the legislator".

President Grabenwarter visited the Republic of Moldova and the Republic of Albania, two countries that have both achieved candidate country status for accession to the European Union. President Grabenwarter travelled to Chișinău in September at the invitation of Domnica Manole, the President of the Constitutional Court of the Republic of Moldova. During a meeting with Members of the Constitutional Court, they focused on discussing issues related to the 19th Congress of the Conference of European Constitutional Courts. The Constitutional Court of the Republic of Moldova currently holds the presidency and is organizing the next congress in May 2024. President Grabenwarter also gave a talk on "The Rule of Law" to a large audience of students and lecturers at the Moldova State University. Moldova's Constitutional Court has meanwhile launched its school project with backing from Austria. In 2022, President Manole had visited Vienna to learn about Austria's successful "*Verfassung macht Schule*" programme that had inspired Moldova's initiative.

To mark the 25th anniversary of the Constitution of the Republic of Albania in November, President Grabenwarter travelled to Tirana and gave a speech in parliament on "Constitutional Courts and the Protection of Human Rights in Europe".

In April, the Constitutional Court was represented at an international symposium held to mark the 25th anniversary of the founding of the Constitutional Court of the Kingdom of Thailand. The theme of the presentation was "The Constitutional Court on the Protection of Rights and Liberties".

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