

Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,¹ and the adoption of rules to promote responsiveness, such as “silence is consent”.² Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example, scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment and recommendations

Some regulatory agencies have coherent strategies for compliance and enforcement that are well managed. The OECD review heard of examples of good practice; for example, the comprehensive risk-based strategy employed by the Austrian tax office. It was also suggested that fiscal constraints limiting the resources for compliance and enforcement have provided an incentive for the *Länder* to develop risk-based

approaches and apply efforts in the most effective way. In addition it is reported that the *Länder* have already engaged in a discussion of the establishment of national uniform quality standards for maximum waiting times for citizens and as well performance targets for satisfaction with service standards.

Austria could benefit from the development of a framework approach to compliance and enforcement. A focus on improving compliance and enforcement strategies is a relatively new field for the Better Regulation agenda. However, it has considerable potential for reducing the burden on business of regulatory activity and improving the effectiveness of the design of regulation and its implementation, thereby resulting in improved outcomes for citizens and lower costs for the state. A comprehensive and strategic approach to improved compliance and enforcement can help to improve efficiency. This can be achieved in part through sharing good practices among ministries, agencies and jurisdictions with regulatory missions. Furthermore, by focusing on those activities which presents the greatest risk to the achievement of policy objectives, and on those businesses that present the greatest risk of non compliance, the resources required for enforcement by the government and for compliance by business can be allocated more efficiently.

The enforcement of regulation is a principal responsibility of each Land, which allows for wide variance in practices and resultant inefficiencies. This suggests that there is considerable potential for sharing information on new strategies for improving compliance taking account of technical innovations and potential synergies from common practices across the *Länder*. There is no suggestion that the rates of compliance in Austria are low, but Austria does not collect and report statistics on general compliance rates. Accordingly, as a starting point it would be prudent to collect information on compliance problems across the *Länder* to develop a strategic picture of any underlying trends and difficulties, based on the information already collected by regulatory agencies.

The Länder Courts of Audit would benefit from having a principles based framework for assessing the quality of enforcement practices and draft guidance for agencies on the adoption of risk-based approaches (see Chapter 8). This should be supported by a survey of the range of compliance problems across the *Länder* and be grounded in the experiences of regulatory agencies at the level of the *Länder*. Reference to practical examples from within the EU and other countries from within the OECD also merits study as a basis for comparative approaches (in particular, examples from the Netherlands, Denmark, the U.K. and Australia).

Recommendation 6.1. Undertake a survey using the records already compiled by agencies to develop a strategic assessment of the underlying trends and difficulties with compliance and enforcement practices.

Recommendation 6.2. Engage the *Länder* Courts of Audit to jointly develop a principle-based framework for assessing the quality of enforcement practices and the preparation of draft guidance for agencies, with reference to good practices within Austria and examples from other jurisdictions.

The institutional arrangements of the Austrian appeals system are comprehensive and appear to function well, supported by a system of arbitration tribunals and the independent ombudsman's office. In addition Austria has developed an extensive IT network which promotes the efficient administration of the judicial system and electronic access to the records of legal proceedings free of charge on the Internet, as part of the Federal Legal Information System (RIS).

Background

Compliance and enforcement

General context

In Austria, there is an institutional distance between the preparation of legislation and its implementation or execution. Execution of a law may first involve the adoption of secondary regulations, before the law can be applied and enforced. As a rule, the implementation of federal laws is primarily a task of the subnational authorities, notably by the *Länder* governors (*Landeshauptleute*) and the corresponding offices. According to the principle of so-called “indirect administration” (*mittelbare Bundesverwaltung*), the responsible federal minister may issue circulars (*Erlässe*) addressed to the governors on how to interpret the law to ensure its uniform practical application across the *Länder*. The other option is direct federal administration of federal laws. Direct federal administration is only admissible in select exhaustively listed matters and constitutes the exception.³

To a large extent, the enforcement of federal legislation is with the *Länder*. The Federal Constitution allows for “administrative execution” of federal tasks by the *Länder* through the *Landeshauptmann* (indirect federal administration). It also provides for mandatory administration by the *Landeshauptmann* of specific federal economic affairs such as the planning, construction and administration of highways, and official buildings. Enforcement mainly involves administrative activities. Prior to execution, however, in many fields these tasks include the enactment of secondary legislation by the *Länder*.

As a result of this institutional arrangement, the authorities responsible for the preparation of legislation are essentially different from those responsible for its execution. Whenever the application of federal legislation is left to the *Länder*, the federal authorities do not have direct access to information about the application and the practical effects of federal legislation. A number of vertical and horizontal co-ordination mechanisms are in place to make this constellation work.

Both the *Länder* and the federal level are supervisory authorities for the municipal level.

Compliance

The modalities for monitoring compliance vary considerably. In price marking law, for instance, the Ministry of Economy, Family and Youth establishes controlling programmes addressed to the states for implementation. The programmes are issued every year in general, and every two months for special types of enterprises. Issues concerning implementation and results are reported by the states to the Ministry and discussed in meetings on a yearly basis.

The fiscal authorities by contrast do not measure taxation compliance rates directly, but observe several indicators. The Ministry of Finance estimates the percentage of overall compliance for instance by considering the share of citizens whose tax liability does not change after controlling their case. This random test exhibits some weaknesses, as it covers only a fraction of all tax payers and auditing cannot be complete in each case. Nonetheless, it is believed to give a good overview for general trends.

In some sectors, compliance is considered difficult to examine by the relevant ministries. This is the case of the Trade Law (*Gewerberecht*) and the Foreign Trade Act (*Außenhandelsgesetz*), for which there exist no special compliance rate data in the Ministry of Economy, Family and Youth because the acts are either generally executed by the *Länder* (in the first case), or executed by customs and judicial authorities (in the latter case, with regard to sanctions and fines).⁴ The Cartel Court oversees competition law

enforcement by setting fines and forbidding a specific behaviour. The FCA applies the fines and determines also their maximum amount.

Enforcement

Enforcement of federal regulations

District authorities (*Bezirksverwaltungsbehörden*) enforce federal and *Länder* law. There is a right of supervision for federal authorities to guarantee a lawful and equal administration at the level of municipalities. At the *Länder* level, independent Administrative Courts (*unabhängiger Verwaltungssenat*) exist.

Box 6.1. Enforcement regimes in selected sectors

The Ministry of Economy, Family and Youth is the Austrian accreditation body for certification, examination and inspection bodies. All information related to contact persons, form sheets etc. is available on the Internet.⁵

Regular inspections are performed by the Ministry for Labour, Social Affairs and Consumer Protection. In 1993, a law on labour inspection was passed. The Labour Inspection section of the Ministry consists of 19 regional inspectorates and one inspectorate for construction. 500 staff members are employed, of which 300 operate in the field checking 210 000 workplaces.

Further to the Metrology Act, continuous inspections are carried out by the verification offices – e.g. in supermarkets to ensure that measuring instruments display the correct value of quantity and are used properly (*eichpolizeiliche Revision*).

The mining authorities have a lot of duties concerning regulatory enforcement and supervision to ensure safety at the workplace, public health and the protection of the environment. In the case of increased dangers as well as in the case of underground mining they have to inspect the site at least once a year.

Source: Responses of the Austrian Government to the OECD questionnaire.

With regard to risk-based enforcement, forms of risk assessment in monitoring have to be applied because of the very limited resources devoted to enforcement. Trade authorities normally act in reaction to problems and inputs from stakeholders. In competition policy, the Federal Competition Authority determines the fines in cases of infringements. In this process, the risks (understood as the damage to society caused by an anti-competitive behaviour as well as the possible signals sent out by non-punishment) are a regular part of the assessment process. The evaluation of risks plays also a role in the case selection process within the authority.

Enforcement of Land regulations

The discrepancies in enforcement practices from one Austrian federal *Land* to the other are “sometimes enormous”,⁶ and point to the need for nationwide uniform quality standards. In response, the Federal Chancellery and the Federal State of Styria called a conference on the topic in the autumn of 2007. Examples of such standards are a maximum waiting time for clients in the citizens’ offices (*Bürgerbüros*) or a target % of satisfied clients on their first contact with the administrative authority. A brochure on “Quality standards for citizens and business” was published on the occasion of the conference, offering an introduction to “quality standards” and discussing international trends and the Austrian state of the art.⁷

Appeals

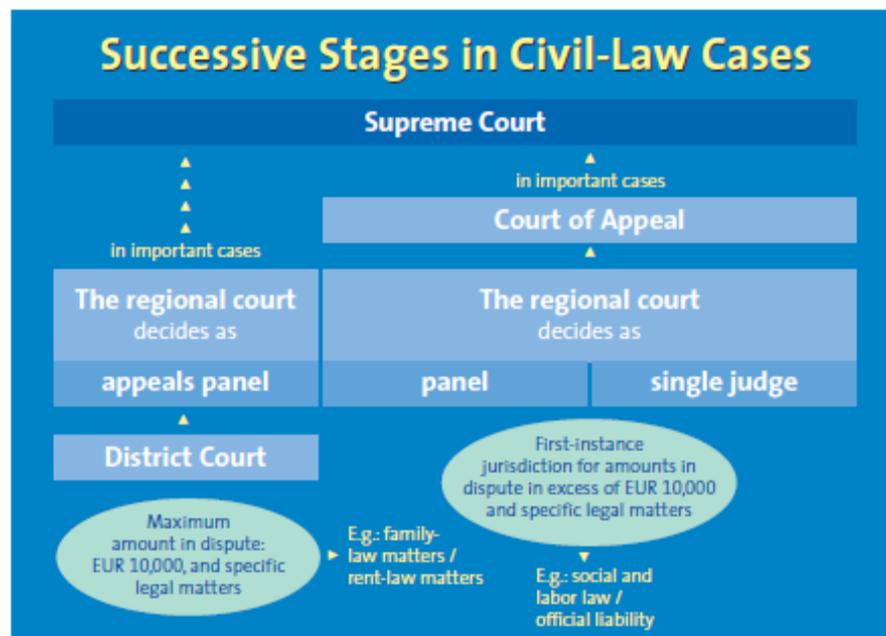
General context

The Austrian Federal Constitution Law grants the individual citizen the right to a trial before a legal judge. It also stipulates that judicial and administrative powers shall be separate at all levels of proceedings. This seeks to ensure the independence of the respective jurisdictions.⁸

The ordinary jurisdiction (*ordentliche Gerichtsbarkeit*) covers civil law and criminal law matters. The court system consists of 140 district courts (*Bezirksgerichte*), 20 state courts (*Landesgerichte*), four state courts of appeal (*Oberlandesgerichte*)⁹ and one Supreme Court (*Oberster Gerichtshof*). Various types of legal remedies exist, including ordinary appeals, recourse or nullity appeals and complaints.

- The district courts are often the first-instance courts.
- Appeals against their decision can be lodged with the higher level state court (*Landesgericht*), where an appeal panel rules in second-instance. Whenever state courts act as first-instance courts, appeals against their rulings are handled by the court of appeal as a second instance.
- The courts of appeal are second-instance courts for all civil and penal-law cases. In addition, these courts play a special role in the administration of the judicial system. The president of a court of appeal is the director responsible for the administration of all courts in his/her court district. In this function, his/her only and immediate superior is the Federal Minister of Justice.
- In cases requiring a decision on legal issues of fundamental importance, a further appeal is also possible to the Supreme Court (*Oberster Gerichtshof*) in Vienna. There are therefore three successive stages in civil-law cases (Figure 6.1). No further (domestic) remedy is possible against its decisions.

Figure 6.1. Successive stages in the Austrian civil-law cases



Source: Federal Ministry of Justice, The Austrian Judicial System. Institutions – Agencies – Services, January 2009, p.12.

With regard to constitutional issues, the federal and the subnational governments can challenge legislation of the other level. A constitutional review of norms requires a “one-third motion” of the members of the National Council, the Federal Council or *Länder* council. Other institutions which can apply to the Constitutional Court are inter alia the Administrative Court, the Supreme Court, the appellate courts or the Independent Administrative Panel and the Independent Federal Asylum Panel. In addition, the Constitutional Court itself may initiate a constitutional review proceeding. This occurs very often during the review of a decree. Individuals can file an application to have a piece of legislation or a regulation reviewed if they are directly affected and if it is unreasonable for them to choose another path to protect against the claimed violation of law.

Appeals to agencies’ decisions and regulations

On a general basis, administrative decisions and regulations can be challenged in court. The procedures and institutions involved vary according to the status of the agency (whether it has regulatory character or not), and the type of administrative act the appeal is filed against. Regulations issued by regulatory agencies may be challenged ultimately before the Constitutional Court (*Verfassungsgerichtshof*).

If the agency concerned is only competent for regulatory enforcement, its decisions can be challenged ultimately before the Administrative Court (*Verwaltungsgerichtshof*) and the Constitutional Court. This is for instance the case, for the transport and public procurement sectors, where decisions can be challenged before the Federal Administrative Court and the Constitutional Court. Recourse to one of these courts depends on the matter, as they have different competences. The main task of the Administrative Court is to review the legality of administrative acts.¹⁰ The Constitutional Court examines administrative acts for compliance with fundamental rights and reviews the constitutionality of laws and the legality of ordinances.¹¹

In certain cases, the second instance entity is the parent ministry or other sectoral institutions. For instance a challenge to the decisions by Austro Control can be made to the Minister of Transport. In the energy sector, the body of appeal against decisions of Energy-Control Ltd is the Energy-Control Commission. In the telecommunications field, appeals against the Austrian Communications Authority (*KommAustria*)’s decisions can be submitted to the Federal Communications Senate (BKS) in the second instance. Third instance (*i.e.* appeals against the latter decisions) is the ultimately again the Austrian Administrative Court.

The use of ICT in the judicial system

Austria has developed an extensive IT network supporting its judicial system. Electronic legal correspondence has increased work efficiency, facilitating the communication of almost all types of submissions to the courts and the electronic service of documents by the courts. A data base on decrees was designed and can be accessed free of charge. It lists insolvency proceedings, court auctions, decrees derived from penal and civil cases, publications, custodianships and the service of documents.¹²

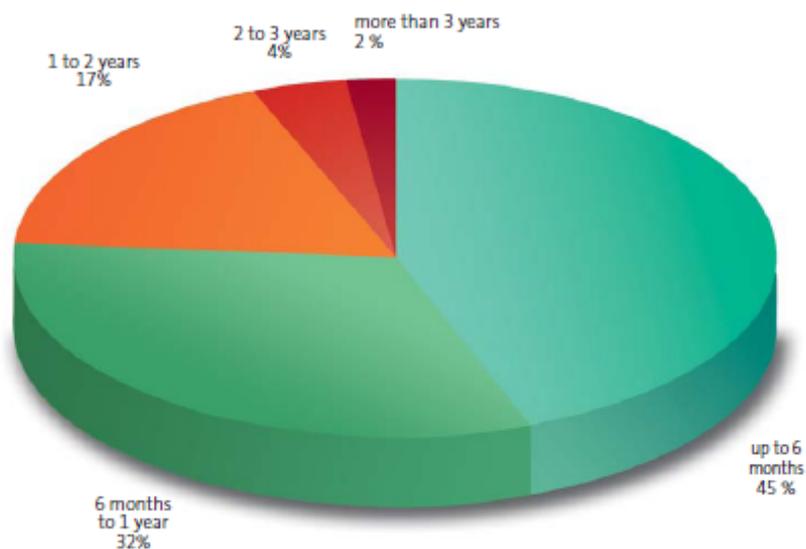
The documentation of the judicial case law is also available free of charge on the Internet, as part of the Federal Legal Information System (RIS).¹³ A web site allows easy access to court-certified expert witnesses, interpreters and translators.¹⁴ A central data base archiving documents has been set up. The Austrian government reports that it will be possible to use the data base for all kinds of applications and proceedings, especially for the *land* and the trade registers.¹⁵

Performance of the system

The quality of court decisions is reported to have improved in recent years. The Federal Ministry of Justice reports that surveys indicate general satisfaction and trust in the work of the judges by the public opinion. This is also reflected in the acceptance of court rulings. With reference to first-instance decisions, not only is just one decision every fifth is challenged by resorting to a legal remedy, but the majority of challenged decisions are then confirmed by the appellate court.¹⁶

The courts system works expeditiously. Almost half of the cases are finished after only a few months (see Figure 6.2).¹⁷

Figure 6.2. Average length of proceeding in Austria (%)



Source: Federal Ministry of Justice, *The Austrian Judicial System. Institutions – Agencies – Services*, January 2009, p.34.

Alternative dispute settlement mechanisms

Arbitration tribunals

Arbitration is frequently used in Austria. It plays a major role for instance in commercial exchanges. Arbitral tribunals differ from ordinary courts, as they are private judicial institutions. The parties involved accept the ruling of an arbitral tribunal in a specific litigation in accordance with the so-called “arbitration agreements”, upon which these tribunals are based. The decisions of arbitral tribunals are binding upon the parties involved. However, in case of grave procedural mistakes, applications to repeal an award may be lodged with the ordinary courts.

The private arbitral adjudication offers a series of advantages. The parties may nominate persons of their confidence to reach a decision; the decisions (“awards”) can be taken by special experts who may take equity-based decisions without being bound by strict regulations; and such proceedings are (possibly) conducted with expediency. Problems may arise in connection with the arbitrators preserving their objectivity and the often high costs of arbitral proceedings. The jurisdiction of arbitral tribunals is limited to the extent that they have no power of punishment or enforcement. They cannot impose any punishments

and cannot enforce their rulings by applying coercive measures. This is reserved exclusively to the state, *i.e.* the ordinary courts.

The Ombudsman's office

Independent ombudspersons were introduced in Austria in 1977, based on the Scandinavian model. The National Council is responsible for appointing ombudspersons for a six-year term of office, and they may be re-elected once. The Ombudsman's Office is a panel with collective responsibility and comprises three ombudspersons, who chair the board in rotation. Their task is to examine alleged or suspected maladministration. Anyone, irrespective of age, nationality or place of residence, who has a complaint about the Austrian administration, and who is personally affected by a grievance can contact the service. The Ombudspersons can also act *ex officio*, *i.e.* without a complaint being lodged, if it suspects maladministration.

On 1 November 2007, the Austrian judiciary introduced ombudsoffices¹⁸ to offer Austrian citizens an improved information and complaint service. Anyone involved in court proceedings may turn to the ombudsoffice if they have questions or complaints concerning the work of the courts. They are located at the higher regional courts and are headed by experienced judges. Ombudsoffices, however, must not interfere with pending proceedings nor do they constitute another type of appellate court.¹⁹

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. See: Art. 102 Para 2 Federal Constitutional Law. Tax administration is an example.
4. The Federal Ministry for Economy, Family and Youth (BMWFJ) has the responsibility to issue licenses for export, transit and brokering of goods and certain services as well as technology with a security context. Upon export the customs authorities merely check the existence and the legitimacy of those licenses. This is done in by a supervised electronic system (so called E-Customs) with almost no more direct checks at the border. Valid licenses issued by BMWFJ are indispensable preconditions for customs clearance. Legal authorities are involved only in cases where fundamental penal regulations of the Federal Trade Act (AußHG 2005) are disregarded or contravened. Those are usually cases that could not be noticed by the BMWFJ, because no application for a license was made, either out of negligence or by ignorance, many times also because of non awareness of interdictions based on directly applicable international law, *e.g.* sanctions. The legal authorities act only, if these acts are reported to them (*e.g.* by

the customs authorities or in some cases by the BMWFJ, if it gets informed about them) and if these acts are criminal and/or liable to prosecution.

5. See: www.bmwfj.gv.at/BMWA/Schwerpunkte/Unternehmen/Akkreditierung/AkkreditStelle/default.htm (last accessed 9 December 2009).
6. Quoted from: Federal Chancellery (2009), *Turning the administration upside down!*, Vienna, p.12.
7. See: Federal Chancellery (2007), *Qualitätsstandards für BürgerInnen und für die Wirtschaft*, Beiträge zur Österreichischen Bezirkshauptleutekonferenz von 20.–21. November 2007 in Graz, Vienna.
8. See: Art.s 83 (2) and 94, respectively.
9. They are located in Vienna (covering Vienna, Lower Austria and Burgenland), Graz (covering Styria and Carinthia), Linz (covering Upper Austria and Salzburg), as well as Innsbruck (covering Tyrol and Vorarlberg).
10. See: Art.s 130ff of the Federal Constitutional Law.
11. See: Art.s 137ff of the Federal Constitutional Law.
12. See :www.edikte.justiz.gv.at (last accessed 1 December 2009).
13. See: www.ris.bka.gv.at (last accessed 18 November 2009).
14. See: www.sdgliste.justiz.gv (last accessed 1 December 2009).
15. This refers to the paper-less foreign trade administration via PAWA database, see: questionnaire completed by Austria p.11.
16. See: Federal Ministry of Justice, *The Austrian Judicial System. Institutions – Agencies – Services*, January 2009, p.33.
17. The OECD review team heard that the high volume of appeals in the context of applications to determine refugee status was putting considerable strain on the resources of the Constitutional Court. It was suggested that would require more resources to prevent the emergence of long delays and impediments to other work by the Court. However, this type of matter is not strictly within a consideration of the role of the appeals system in promoting Better Regulation objectives.
18. This institution is only related to affairs independent of the judiciary, to which the *Volksanwaltschaft* is not allowed to interfere (the *Volksanwaltschaft* being strictly limited to the administration of justice).
19. See: www.bmj.gv.at/internet/file/8ab4ac8322985dd501229ce2e2d80091.en.0/die_justiz_eng_05.09.pdf, p.42 (last accessed 31 March 2010).