

An Overview on the Austrian Supreme Court ¹

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1. The Austrian federal legal system and its High Courts of Justice.

1.1. Very helpful to outline the mission of the Austrian supreme Court of Law was the meeting with its President, *Praesidentin des OGH*, Hon. Prof. Dr. Elizabeth Lovrek. She highlighted the role of the *Obertster Gerichtshof (OGH)* as the highest court of law in civil and criminal matters (*Zivil- und Strafrechtssachen*) within the federal Austrian legal system.

1.2. The *OGH* is one of the three high courts of justice in Austria, “*gleichrangigen Hoechstgerichten*” or “equally ranked high courts”, along with the Supreme administrative Court (*Verwaltungsgerichtshof – VwGH*), and the Constitutional Court (*Verfassungsgerichtshof - VfGH*).²

1.3. The comprehensive Austrian judiciary, is the core of a characteristic Romano-Germanic legal system, originated by the former imperial multinational legal framework. Its regulation was modified without solution of continuity throughout the fall of the Austro-Hungarian empire and the foundation in 1919 of the First Austrian Republic, and then the 1934 Austrian civil war, the integration in 1940 within the German legal system after the 1938 *Anschluss*, the 1945 re-establishment of the Austrian Republic on a federal basis, and finally the 1955 end of military occupation by allied forces (Austrian independence treaty or *Österreichischer Staatsvertrag*).³

1.4. As a result of such complex history, the comprehensive Austrian court system is divided in *ordentliche Gerichte* (general courts of law) and *Gerichte öffentlichen Rechts* (public law courts of justice).

¹ Report on the exchange at the Supreme Court of law of Austria, held in Vienna from 18 to 22.12.2023 (*Besuch beim Obersten Gerichtshot 18. bis. 22.12.2023*) in the framework of the “Network of the Presidents of the Supremes Judicial Courts of the European Union” (*Réseau des Présidents des Cours Suprêmes Judiciaires de l’Union Européenne*).

² E. Lovrek, “Vorwort”, in “*Oberster Gerichtshof Tätigkeitsbericht 2022*”, p.3, Vienna, 2023.

³ See section “II. Geschichte des Obersten Gerichtshofs” in the volume “*Obertster Gerichtshof. Ein Überblick über das Gericht letzter Instanz in Zivil- und Strafrechtssachen der Republik Österreich*”, Vienna, 2017, pp. 16-17.

1.5. In my exchange in Vienna, impeccably organized by Herr. Dr. Michael Matzka, head of the *OGH* Foreign relations department, on the behalf of the Network of the Presidents of the Supremes Judicial Courts of the European Union (*Réseau des Présidents des Cours Suprêmes Judiciaires de l'Union Européenne*), I could briefly appreciate both corners (general courts of law and public law courts of justice). I visited indeed their supreme judicial authorities and took part in judicial meetings of two chambers (*Senate*) of the *OGH*, where several judgments were delivered. I could also specifically appreciate the role and functions of the Supreme Court's scientific service (*Evidenzbüro*) and the progress in the digitalization of the judicial system.

2. Public law courts of justice (*Gerichte öffentlichen Rechts*) and general courts (*ordentliche Gerichte*).

2.1. "Public law courts of justice" or *Gerichte öffentlichen Rechts*, have competence in reference to the executive and legislative branches of government and are divided in two limbs.⁴

2.1.1. The first one is the administrative court system, reviewing the legality of administrative acts in principle. The court of last resort within the administrative jurisdiction is the "Administrative high Court" (*Verwaltungsgerichtshof*) acronymized in *VwGH*. In the Austrian legal system, the *VwGH* adjudicates also on asylum- (*Asylfälle*) and tax law (*Steuerrecht*) applications, by means of specific panels (*Senate*) of justices.

2.1.2. The other limb of the courts of public law is the Constitutional Court (*Verfassungsgerichtshof* or, briefly, *VfGH*), which has competence on the constitutionality of federal and provincial laws, and examines the legality of ordinances and other secondary source of regulation. It has also jurisdiction over liability claims against the Republic of Austria, its federated states and territorial articulations. *VfGH* also regulates conflicts between courts of law, and between courts and public officers, and finally settles disputes on political elections. In contrast to the other courts, justices serving at the Constitutional Court are honorary judges and do not sit permanently, but convene for "sessions", usually held four times a year.⁵

2.2. By contrast, the first branch of the judiciary ("general courts" or *ordentliche Gerichte*) exercises professionally the ordinary jurisdiction, where judges deal with all civil and criminal cases.

The right to a trial before a judge of law is enshrined in Austria by Article 83 (2) *B-VG* (Federal Constitution or *Bundes-Verfassungsgesetz*), and the number of lawyers admitted to the bar falls below the number of 7,000, whereas the number of ordinary judges is close to 2,000 and that of public prosecutors nears 400 in total. Court offices are articulated in a rather complex system, distributed on the Federation territory. Shortly, trial decisions may come from district courts (*Bezirksgericht*) or regional courts (*Landesgericht*); against a regional court ruling appeal is in principle granted to a higher regional court (*Oberlandesgericht*). Ordinary judges handle nearly 3,5 million proceedings every year, but fewer than 10,000 of them reach the Supreme Court in Vienna.⁶

⁴ See the publication "*The Austrian Judicial System, The Republic of Austria*" issued by the Federal Ministry of Justice, last edition, p.14.

⁵ The Austrian Constitutional Court is composed of 14 members, President and vice President included. Each member of the Constitutional Court is appointed by the President of the Republic on nomination of either the Government or the Parliament (National- and Federal Council), and none of the justices is currently elected by the Austrian High Courts (*OGH* and *VwGH*).

⁶ "*The Austrian judicial system*", see footnote 4, p.32.

2.2.1. The *Obertster Gerichtshof* grants final review (*Revision*) on decisions from lower ordinary courts, but it can refuse handling of the case if there is no legal question of significant importance.⁷ An application (*Rechtsmittel*) to the Supreme Court may be seeking either ordinary review – *ordentliche Revision* - or extraordinary - *außerordentliche Revision*, depending on the different grounds of the action. *Revisionrekurse* are lodged against violations on points of law (*Rechtsfragen*) in criminal and civil matters and not on matters of fact (*Tatfragen*).⁸

2.2.2. An appeal to the high Court is subject to various restrictions, depending on the matter in question. Among the most notable, there are limitations according to the value of the claim (*Streitwert*), regardless of whether the challenged judgment may raise issues of legal meaning, with few exceptions for sensitive matters.⁹ Namely, an appeal (*Revision*) against second-instance rulings is not permitted in disputes valued at 5,000 euros or less and, if the value in dispute does not exceed 30,000 euros, the appeal to the Supreme Court of law may also require permission from the court of appeal that adopted the challenged judgment. Above 30,000 euros requests for *Revision* are always allowed.

2.2.3. The main function of the Supreme Court (*OGH*) is to preserve the uniform application of the law throughout the Federation. Although lower Courts are not legally bound by *OGH* decisions, as characteristic is of Romano-Germanic legal systems, the case law is guided by the principles of law (*Rechtssätze*) settled by the Supreme Court, available on the electronic database (*Rechtsinformationssystem - RIS-Justiz*), constantly updated by the scientific service of the Court, the *Evidenzbüro*.

3. Inner articulation within the Austrian Supreme Court of law (*Obertster Gerichtshof - OGH*): composition, chambers (*Senate*) and scope of the Procurator General Office.

3.1. Herr. Dr. Michael Matzka, along with Herr. Dr. Goddfried Musger, head of the first civil *Senat des OGH* and Herr. Dr. Erich Schwarzenbacher, member of the fourth *Senat des OGH*, in several meetings offered many elements of knowledge regarding the internal functioning of the Austrian Supreme Court of law.

3.2. The composition of the Court consists of one president, two vice presidents, thirteen presiding justices (*Senatspräsidenten*) and forty-four regular justices (*Hofrat des oberstes Gerichtshofes*). Supreme justices are formally appointed by the President of the Republic, even if the task is often delegated to the Ministry of Justice, and are picked from a short list of candidates. This mechanism is also used to select the President of the *OGH*. Only ordinary judges, and not professors or lawyers, can be appointed supreme justices, although judges may be well members of the academia.

Judges are distributed among ten civil chambers (*Senate*) of five members each, and in the criminal domain among five chambers. The *OGH* is the head of ordinary jurisdiction (*ordinäre Gerichtsbarkeit*), and the distribution of justices between civil and criminal Chambers reflects a similar proportion of cases pending in front of the Court, near 60% of them regarding civil matters and the rest criminal matters.

⁷ See section regarding “civil remedies” (*Rechtsmittel und Rechtsmittelklagen*) in <https://www.oesterreich.gv.at>, last visited January 5, 2024.

⁸ References in the section “A. Stellung und Aufgaben” in the publication “*Obertster Gerichtshof. Ein Überblick*”, see footnote 3, p. 9.

⁹ Exceptions are provided in certain family and tenancy law disputes (*familien- und mietrechtlichen Streitigkeiten*) as well as in labor and social law matters (*Arbeits- und Sozialrechtssachen*), see <https://www.oesterreich.gv.at>, last visited January 5, 2024.

3.3. In the civil domain *des OGH* public hearings are very rare. Public discussion of the cases do not take place in principle, and judicial chambers meet and decide behind closed doors in presence (or sometimes on-line) regularly once a month. By contrast, criminal panels of justices normally decide after a public hearing and the discussion on the cases by the lawyers.

3.4. There is a Procurator General Office (*Generalprokuratur*) for criminal matters. This is the highest instance of public prosecutors in the Republic of Austria and, along with other competences, it delivers opinions on points of law, useful for *OGH's* judgments. Therefore, the *Generalprokuratur* acts in front of the *OGH* not as a prosecutor, but as a custodian of the law and eventually initiator of the evolution of the case-law (*Judikatur*).¹⁰

3.5. When there is a need to change the case law on a specific matter, the composition of the panel is strengthened by the Presidents of all *Senate*. However, this *verstärkter Senat* judges in rare and important cases.

3.6. The agenda of the monthly chamber meeting (*Sitzung*) for each panel is set at the end of the year for the following by the *Senatspräsident*, in concert with all members of the chamber.

4. Procedures and *Sitzungen des OGH*.

4.1. Before taking part in chamber meetings, I examined the files and discussed part of the cases to be decided with the *Senatspräsident des 1. Senat des OGH* Dr. Gottfried Musger and with the judge rapporteur of the fourth civil chamber, Dr. Michael Matkza.

4.2. Civil cases are usually fully handled behind closed doors with eventual written submissions from the parties, while criminal cases are normally decided after public hearings and the lawyers' discussion of the case, taking into account the remarks delivered by the *Generalprokuratur*.

4.3. Before the *Sitzung*, a draft of the proposed decision on the case is shared by the rapporteur with the *Senatspräsident* and, when the case is calendarized, with the other three members of the panel as well. If needed, a prior research request on the interested legal issue at stake may be addressed to the *Evidenzbüro*.

4.4. The day of the chamber meeting, a short general presentation of the key points of the cases (*Liste*) is distributed to all meeting participants, included trainees and judges from the *Evidenzbüro* that prepared researches on issues to be discussed. Briefly, the paper summarizes for each case the technical matter (*Fachsache*) to be decided, with indication of the parties (*Parteien*), of the remedy requested (*Wegen*, like, for instance, an appeal brought against a decision of a court of appeal - *Revisionsrekurs*), of the issue at stake (*Problem*), of the solution proposed by the rapporteur (*Vorschlag*), of the president's opinion on the rapporteur's proposal (*Bemerkung*).

4.5. The president (*Vorsitzender*) leads the meeting, giving the floor to the speakers. After the case report from the appointed rapporteur (*Vorsteellung*), a discussion follows and finally the decision is taken by the panel of five justices. When the consensual solution to the legal issue is reached, each member of the Chamber suggests to the rapporteur amendments to the text of the draft (*Anmerkungen*), aimed to clarify the line of reasoning or to emend linguistic failures.

4.6. When the content of the decision is defined by the panel, and imperfections of the draft are corrected, the *Vorsitzender* signs the paper print of the judgment as amended, which becomes the original text of the decision. Further sheets on the content of the judgment are also filled by the judge rapporteur providing information addressed to the Registry, useful for the publication of the ruling.

¹⁰ For references, available in English too, see <https://www.generalprokuratur.gv.at/en/>, last visited January 4, 2024.

5. Decisions taken by the Supreme Court.

5.1. On Tuesday, December 19 I took part in the civil 4. *Senat Sitzung*, a subdivision specialized in unfair competition law and commercial law (*Fachsenat für Lauterkeitsrecht und gewerblichen*) under the presidency of Prof. Dr. Georg Kodek. The panel, in a meeting that lasted several hours, decided twenty-one pending cases; among several interesting issues, a controversy regarded the use of a three-star-emblem by a computer and hi-tech company, contested by the German car manufacturer Mercedes as unfair.

5.2. On Wednesday, December 20 I joined the civil 1. *Senat* headed by the *Senatspräsident* Dr. Gottfried Musger, chamber specialized, among *alia*, on public officials- and state liability (*Fachsenat für Amts- und Staatshaftung*). The panel decided eighteen cases and one of the most sensitive judgments regarded a medical liability for lack of prior information about the consequences of a surgical operation gone wrong, an outcome that statistically - according to substantial scientific literature - occurs in a very limited series of cases.

5.3. It's remarkable that each *Senat* of the Court is never fully specialized, and indeed as general rule 50% of all cases pending in front of the Court are distributed, as "generic" *Rechtsklagen*, among all chambers. This organization helps to generate a rather consistent case law (*eine relativ präzise Judikatur entwickeln*), avoiding at the same time the risk of an excessive sectorial approach to the matters of law (*eine Relativierung ist gesucht*) that could have an impact on the professionalism of the justices.

5.4. For instance, during my visit, both *Senate* decided several so-called "*Diesel fälle*". The cases regarded applications generated by alleged wrongdoings of car manufacturers (Porsche, VW, FCA...) who sold cars with diesel motors apparently not compliant with EU law. Such cases, currently pending in large numbers, are usually distributed among all civil *Senate* of the Supreme Court.

5.5. The *OGH* decides on legal issues only and, therefore, the Court while ruling is bound by the facts as established by tribunals of first and second instance. The Supreme Court decides on the accuracy of the judgment issued by the lower courts, highlights eventual invalidities and, to a certain extent, rules on procedural errors occurred in the previous proceedings (*errores in procedendo*).

5.6. A *Senat des OGH* may also decide on the matter itself, confirming or amending the challenged judgment. It can also repeal the interested previous decision and further instruct the regional court or the court of appeal to retry the matter. Finally, it may dismiss the action (*Verneinen*), closing the case.

5.7. Each judge of the Austrian Supreme Court is usually required to write down 70-80 rulings each year, and so 5-7 judgments per *Sitzung* on average. There is substantial staff assistance (*Mitarbeiter*) helping the justices to reach this goal, supported by young lawyers, students from the university and by the *Evidenzbüro*.

6. The *OGH* Scientific Service (*Evidenzbüro - EB*).

6.1. I am grateful to Herr Martin Huettenmayr and Herr Daniel Binder, judges in service at the *Evidenzbüro (EB)*, very effective on Thursday, December 21, in presenting the scope and best practices of the scientific service of the Supreme Court and providing further materials for my report.

6.2. The *Evidenzbüro* is composed of twenty judges detached to the Supreme Court from lower courts, normally for a period of two years, for scientific research purposes. Thirteen of them manage civil cases, and the rest deal with criminal affairs. This disproportion is compensated in criminal

matters by the role of the public prosecutor office (*General Prokuratur*) that, like *Evidenzbüro* for civil matters, delivers opinions useful for the Court's outcome on the specific pending cases.

6.3. The main competences of the *Evidenzbüro des OGH* encompass research activities for the justices, documentation and also drafting decision proposals: among the ten civil *Senate* almost 40% of all judgments delivered have been previously researched by *EB* with the formulation of possible solutions to the legal issue. Research is never aimed at offering a general, systematic picture of some legal issue, but rather specific outcomes in a concrete case. So, for instance, only if the disputed matter is related to relevant ECtHR case law will the paper cover the development of Strasbourg findings.

6.4. Another task of the *EB* is to read all judgments of the Court to check if mistakes are made, categorize all decisions for the official judicial database (*RIS-Justiz*),¹¹ and extract from the most notable cases the relevant principles of law (*Rechtssätze*). Indeed, after the judgment is signed on paper by the *Vorsitzender*, the Registry works on the corrections of the text and on putting the decision into the database, while the *EB* works on its categorization and drafting, if the legal issue is relevant, the new *Rechtssatz*.¹²

6.5. Finding out the principles of law from the text is a meaningful legal activity. Regarding the writing style of the Supreme Court rulings, most justices often consider neither necessary nor elegant to quote within their judgments the relevant part of another Court decision. Indeed, within the typical line of judicial reasoning, there is a tendency to make simple reference to the number of an already existing principle of law (*Rechtssatznummer*) available in the *RIS-Justiz*, without its full exposition. The judgment is therefore mostly written to be technically understood by the lawyers rather than the parties and general citizens.

6.6. All decisions in the database, both in civil and criminal matters, are manually anonymized. Usually the anonymization covers the names of the parties, but sometimes it also includes more sensitive data within the text. When the judge rapporteur drafts the judgment, she/he highlights the parts of the text to be anonymized using a grey color, and after the judgment is delivered, the *Evidenzbüro* controls the text before the decision is published by the Registry. The use of artificial intelligence (AI) for this purpose is neither yet implemented nor desired at this stage of the technical evolution of available algorithms. Due to the overload of information, there are risks of missing critical information, and, as a result of the failures in the automatic anonymization process, the rule of the Supreme Court could be undermined.

7. IT devices and official database: the *Rechtsinformationssystem (RIS-Justiz)*.

7.1. The use of information technology (IT) in the Austrian Supreme Court is extensive, especially in the civil domain, where usually each document is digitalized (*Digitalerakt*), but it does not cover every aspect of the procedures.¹³ In principle, all new civil files are dematerialized, and digital signature devices are in use. However, a copy on paper of the dossier is still available for most civil cases, and the decision is normally formalized in the presence of the justices by means of a printed text of the judgment amended and hand-signed by the *Vorsitzender* in front of the *Senat*.

¹¹ See the *Rechtsinformationssystem* at <https://ris.bka.gv.at>, last visited January 5, 2024. The ministerial office of justice and digitalization is charged of the technical maintenance of the database.

¹² There is little record of the case law before 1945. In the past, when the database was not yet available, short summaries of the rulings of the Court were written on cards and kept in the Court's documentation centre. After 1945 the jurisdiction of the Austrian Supreme Court was restored, but all documentation was already burned in Lipsia, where in the early 40s of the XX century the full *OGH* documentation was transferred, following the 1938 *Anschluss*.

¹³ For further references, "*The Austrian judicial system*", see footnote 4, p.39.

7.2. Although the goal is to allow all judges to work directly on IT devices to work on acts originally digitalized and submitted by lawyers, it seems there is no urgency for videoconferencing in Court proceedings and for extensive use of the digitalized signatures of judgments and their automatic electronic publication. Almost all Supreme Court justices reside in Vienna, have an office within the *OGH Justizpalast*.¹⁴ and meet and decide in their presence.

7.3. Further, files of the criminal proceedings are only partially dematerialized, and there is no criminal digital trial.

7.4. Most Constitutional Court (*VfGH*) judgments are collected in the *RIS-Justiz* from 1980, Supreme Administrative Courts' (*VwGH*) from 1990, and Supreme Courts' (*OGH*) from 1991; along with the full text of the *OGH* rulings, more than 136,500 *Rechtssätze* are available.¹⁵ Gradually, the *RIS-Justiz* became a huge database, and now includes in small proportions even rulings from lower courts when the case law is of general relevance, like decisions from the Court of Korneburg, competent for the international airport of Vienna. To date, the system does not use AI algorithms in the database. There is a searching mask for the query of the interested judgment, and the results display the relevant bulk of information (*Norm*, legal provision, judicial authority, text, principle of law or *Rechtssatz*,...) and, if available, the related meaningful case law.

7.5. The database is available to the public, and it's free: every lawyer and citizen can have access to the *RIS-Justiz*, and the database provides access not only to the official version of the high courts' judgments, but also to the official text of legal provisions like the statutory federal law.

8. Role of the Supreme Administrative Court of Austria (*Verwaltungsgerichtshof – VwGH*) vis-à-vis the *OGH*.

8.1. Herr Dr. Markus Thoma, *Senatspräsident des VwGH* received me in the beautiful building of the former High Chancellery of Bohemia in *Judenplatz*. Until 2012, the Constitutional Court was also located in this palace.¹⁶ The peculiarity is that the palace was built and rebuilt specifically for the purpose of being at the hearth of the public administration and exercise of administrative jurisdiction, a function that has been accomplished for five centuries.

8.2. Regarding composition, the Supreme Administrative Court of Austria consists of 70 judges articulated in panels and chambers of three to five justices. Each judge is appointed by the President of the Republic on the nomination of the executive Cabinet¹⁷ from a short list. The President and vice President are directly appointed by the executive Cabinet, and the key post of President of the Supreme Administrative Court of Austria is vacant at the moment of the finalization of this report.

8.3. The current competence and composition of the *VwGH* reflects the content of the major administrative reform entered into force on January 1, 2014 (*Verwaltungsgerichtsbarkeit-Novelle 2012*) which included, among *alia*, a total rewriting of the chapter on administrative justice in the 1930 Federal Constitution (*Bundes-Verfassungsgesetz*). As a result, layers of administrative review were eliminated and eleven new administrative courts were created, one for each Land of Austria, providing judicial review of the decisions from administrative agencies of the state and in tax matters as well.

¹⁴ See "*Der Wiener Justizpalast*" issued by Republik Österreich, 2023.

¹⁵ *Evidenzbüro* is competent only for decisions from the Supreme Court of law (*OGH*).

¹⁶ The current reconstruction of the palace dates to the beginning of the XVIII century and it is considered a masterpiece of the baroque architect Johann Bernhard Fischer von Erlach.

¹⁷ It is the Government of Austria, composed by the Chancellor, the Vice Chancellor and all Ministries.

In this new legal framework, the *VwGH* is now the administrative court of last resort, reviewing decisions of lower administrative courts on important questions of law.¹⁸ The creation of a capillary administrative jurisdiction articulated on different levels had the goal of meeting the European Convention on Human Rights requirements as interpreted by the ECtHR case law.

8.4. In front of the *VwGH* public hearings (*mündliche Verhandlung*) are exceptional, and most cases are settled behind closed doors (*Sitzungen*) by panels of justices (*Senate*). The rights of the defence are exercised by means of written submissions from the parties.

8.5. Cases regarding fiscal law and asylum law fall within the competence of the Supreme Administrative Court. Eventual conflicts of competence between different jurisdictions, such as ordinary jurisdiction *vis-à-vis* administrative jurisdiction, are examined and settled by the Constitutional Court (*Verfassungsgerichtshof - VfGH*).

8.6. The Administrative Supreme Court has a scientific service similar to *OGH Evidenzbüro*, aimed at developing the uniformity of the case law through *Rechtssätze*, principles of law. The service also relates the single judgment to the previous established *Judikatur* and highlights if the new ruling departs from it. This legal activity is very important to understand if the case law on the specific issue is consistent or not.

9. Concluding remarks.

The valuable experience gained during the exchange and the professional and warm relationships established with the Austrian colleagues are elements contributing to strengthening the mutual trust among the Supreme Courts of the European Union. Both the head of the *OGH* Foreign Relations Department and the *Senatspräsident* of the Supreme Administrative Court (*VwGH*) expressed interest and desire to further develop in the close future relations and training projects on common ground issues, such as, for instance, the judicial use of AI and its challenges, with the Italian Court of Cassation Secretariat (*Segretariato Generale della Corte di Cassazione*).

Rome, January 5, 2024

¹⁸ See the publication “*Österreichischer Verwaltungsgeschichtshof – Unabhängigkeit, Rechtskompetenz, Verlässlichkeit*”, Vienna, 2022, p.5.