

EWALD WIEDERIN

Full professor presso l'Università di Vienna  
ewald.wiederin@univie.ac.at

**PROTEZIONE AMBIENTALE O AMPLIAMENTO  
AEROPORTUALE?  
IL PRINCIPIO DI FULL JURISDICTION  
NELL'ORDINAMENTO AUSTRIACO**

**CLIMATE PROTECTION OR AIRPORT EXPANSION?  
FULL JURISDICTION IN AUSTRIA**

SINTESI

L'Austria è un paese piuttosto piccolo, privo di particolare importanza globale. Cionondimeno, l'esperienza austriaca in materia di *full jurisdiction* delle corti amministrative può risultare interessante per due ordini di ragioni. In primo luogo, l'Austria ha recentemente (cinque anni orsono) cambiato radicalmente il proprio sistema processuale amministrativo. In secondo luogo, una recente pronuncia giudiziale ha destato l'attenzione non solo dei giuristi ma anche dell'opinione pubblica provocando un acceso dibattito: nel Febbraio del 2017, la Corte Amministrativa Federale ha disposto l'annullamento del provvedimento di ampliamento dell'aeroporto di Vienna, provocando l'indignazione non solo del management aeroportuale, ma anche del ceto imprenditoriale e di una parte del mondo politico. Questo caso dimostra molto bene che le corti amministrative che operano in *full jurisdiction* possono ricevere maggiore pubblicità delle Corti di Cassazione<sup>1</sup>. Già nel Giugno 2017, solo quattro mesi dopo, la Corte Costituzionale ha ribaltato la decisione del giudice amministrativo, riformando la decisione di bloccare i lavori di ampliamento dell'aeroporto, stabilendo che la Corte Federale Amministrativa avesse gravemente violato la legge agendo arbitrariamente. Il contributo, prende spunto dalla citata vicenda, per evidenziare quanto delicata sia la comprensione del ruolo e dei limiti del principio di *full jurisdiction* a fronte di decisioni amministrative connotate da un elevato tasso di politicità.

ABSTRACT

Austria is a rather small country without much global importance. Nevertheless, the experience of this country about the *full jurisdiction* of administrative

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<sup>1</sup> M. VAŠEK, *Die Kognitionsbefugnis der Verwaltungsgerichte bei behördlichen Ermessensentscheidungen*, in *Juristische Ausbildung und Praxisvorbereitung*, 2017/18, pp. 19 ff.

courts may turn out to be interesting for two reasons. First, Austria radically changed its administrative jurisdiction system five years ago. Secondly, a recent judgement attracted not only public attention but also the attention of jurists, by raising a lively debate: in February 2017, the Federal Administrative Court blocked the measure providing for expansion of Vienna airport, by arousing the indignation not only of the airport management but also of entrepreneurs and some politician. This case well demonstrates that the administrative courts having *full jurisdiction* may have more publicity than the Courts of Cassation<sup>2</sup>. Even in June 2017, i.e. only four months later, the Constitutional Court decided in favour of the airport and annulled the challenged decision. The Constitutional Court deemed that the federal administrative court had seriously infringed the law by acting arbitrarily. The essay, inspired by this event, points out how difficult is to understand the role and limits of *full jurisdiction* in case of administrative decisions affected by politics.

PAROLE CHIAVE: Austria – processo amministrativo – casistica giurisprudenziale - full jurisdiction – ruolo – limiti

KEYWORDS: Austria – administrative jurisdiction – case law- full jurisdiction – role – limits

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## **1. The establishment of a Supreme Administrative Court in 1867/1876 and the limitations of its jurisdiction.**

Austria is a small country, whose glory lies in the past. So does the glory of its system of administrative jurisdiction: The monarchy was one of the first states to subject its executive to judicial scrutiny<sup>3</sup>. In 1867, a decision was made against adopting the English model, according to which the ordinary courts are the ones responsible for the judicial control of the administrative action. Instead, a special court was established, with territorial jurisdiction over the whole monarchy<sup>4</sup>. This Supreme Administrative Court resembled the French Conseil d'Etat in many ways, but, unlike the latter, it was not part of the execu-

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<sup>2</sup> M. VAŠEK, *Die Kognitionsbefugnis der Verwaltungsgerichte bei behördlichen Ermessensentscheidungen*, in *Juristische Ausbildung und Praxisvorbereitung*, 2017/18, pp. 19 ff.

<sup>3</sup> Cf. T. OLECHOSWKI, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich*, Wien, Manz, 1999, pp. 38 ff.

<sup>4</sup> See Staatsgrundgesetz über die richterliche Gewalt, *Reichsgesetzblatt* Nr. 144/1867, Art. 15 para. 2.

tive, but rather a genuine court<sup>5</sup>. A complaint to the Supreme Administrative Court could only be brought after the internal administrative remedies had been exhausted<sup>6</sup>. Especially this included the internal appeal, which could generally be made all the way to the top, to the highest administrative authority, the Ministry itself<sup>7</sup>. Nonetheless, after the internal administrative remedies had been exhausted any administrative act could, in principle<sup>8</sup>, be challenged before the Supreme Administrative Court. During the inter-war period the scope of legal protection was gradually expanded: the neglect of duty to come to a timely administrative decision also became challengeable, followed by the right to oppose acts of direct administrative power and compulsion<sup>9</sup>.

However, the jurisdiction of the Supreme Administrative Court was limited in many ways, so it was nowhere near the full jurisdiction<sup>10</sup>.

First, the Court was bound by the facts of the case, which were determined and established by the administrative body<sup>11</sup>. It was not entitled to hear witnesses, nor to appoint experts or to conduct inspections on its own. It could only review whether the administrative authority had acted lawfully in the course of determining the facts.

Second, the Court was only entitled to verify whether citizens' subjective legal rights were infringed by the contested administrative decision<sup>12</sup>. Objective unlawfulness could only be addressed by the Court if, as an exception, an administrative organ was authorised to appeal to the Court in order to protect

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<sup>5</sup> A. MERKL, *Allgemeines Verwaltungsrecht*, Wien-Berlin, Springer, 1927, pp. 373 ff.; E. WIEDERIN, Grundfragen der Neuorganisation der Verwaltungsgerichtsbarkeit, *Reflexionen über Demokratie und Recht. in Festakt aus Anlass des 60. Geburtstages von Clemens Jabloner*, edited by R. Walter and K. Zeleny, Wien, Manz, 2009, pp. 33 ff. (36 ff.).

<sup>6</sup> Gesetz betreffend die Errichtung eines Verwaltungsgerichtshofes, *Reichsgesetzblatt* Nr. 36/1876, section 5.

<sup>7</sup> R. HERRNRIIT, *Grundlehren des Verwaltungsrechtes*, Tübingen, J.C.B. Mohr, 1921, pp. 468 ff.; L. ADAMOVICH, *Grundriss des österreichischen Staatsrechtes (Verfassungs- und Verwaltungsrechtes)*, 2<sup>nd</sup> edition, Wien, Österreichische Staatsdruckerei, 1932, p. 294.

<sup>8</sup> For some exceptions, cf. J. ULBRICH, *Lehrbuch des österreichischen Verwaltungsrechtes*, Wien, Manz, 1904, pp. 362 f., and T. OLECHOWSKI, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich*, op. cit., pp. 181 ff.

<sup>9</sup> For an overview of the evolution cf. K. RINGHOFER, *Der Verwaltungsgerichtshof*, Graz-Wien-Köln, Styria, 1955, pp. 87 ff., and P. OBERNDORFER, *Die österreichische Verwaltungsgerichtsbarkeit. Ein Grundriß für Studium und Praxis*, Linz, Trauner, 1983, pp. 28 ff.

<sup>10</sup> For a good presentation of the peculiarities of the Austrian model, cf. G. WINKLER, *Die Entscheidungsbefugnis des österreichischen Verwaltungsgerichtshofs im Lichte der Gewaltentrennung, in Staatsbürger und Staatsgewalt. Verwaltungsrecht und Verwaltungsgerichtsbarkeit in Geschichte und Gegenwart vol. I*, edited by H. R. Külz and R. Naumann, Karlsruhe, C.F. Müller, 1963, pp. 279 ff.

<sup>11</sup> K. RINGHOFER, *Der Verwaltungsgerichtshof*, op. cit., pp. 212 ff.

<sup>12</sup> R. WALTER, *Österreichisches Verfassungsrecht. System*, Wien, Manz, 1972, pp. 671 f.; G. RESS, Das subjektive öffentliche Recht, in *Allgemeines Verwaltungsrecht*, edited by H. P. Rill, Wien, Orac, 1979, pp. 105 ff. (113 ff.).

public interests<sup>13</sup>. This was a rather rare case and the opportunity was used even more rarely.

Third, the Court was not allowed to review those matters in which the administration was given discretionary power. At first, the discretion was a complete taboo, the Court simply lacked jurisdiction over discretionary decisions<sup>14</sup>. In 1920 the jurisdiction was extended but the control density was reduced: when it came to discretionary matters, the Court was only entitled to review whether the administrative body had lawfully applied its statutory discretion<sup>15</sup>. Yet, with further development, this restriction lost its significance because the Supreme Administrative Court itself intensified the control<sup>16</sup>.

Fourth, the Court could only rescind the contested decision; it was neither authorised able to modify it nor to decide on the merits of the case<sup>17</sup>. This characteristic, known as the cassation principle, marked the Austrian system of administrative jurisdiction for almost 140 years. It can be traced back to a compromise between the parliament and the government which was achieved after tough negotiations in 1875<sup>18</sup>. The parliament wanted the Court to resolve the matters within its jurisdiction to the full extent. It accused the government of a constitutional breach, because it refused to accept the Court's power to judge the case on its merits. The government countered with the accusation of an administrative breach: if the Supreme Administrative Court was allowed to have full jurisdiction, this would lead to a breakdown of the administration, which would then be replaced by the Court. This circumstance would, however, contravene the principle of the separation of powers. The Supreme Administrative Court should only have judicial, but not the executive power.

In practice, the cassation principle meant that the Supreme Administrative Court could give the citizens only a partial win. When the unlawful administrative decision was set aside by the court, this did not automatically lead to the desired victory. Instead, the case was referred back to the authority, that

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<sup>13</sup> W. ANTONIOLI, *Allgemeines Verwaltungsrecht*, Wien, Manz, 1954, pp. 297 f.

<sup>14</sup> R. HERRNRITT, *Handbuch des österreichischen Verfassungsrechtes*, Tübingen, J.C.B. Mohr, 1909, p. 194.

<sup>15</sup> H. KELSEN, G. FROEHLICH, A. MERKL, *Die Bundesverfassung vom 1. Oktober 1920*, Wien-Leipzig, Deuticke, 1922, pp. 242 ff.; R. HERRNRITT, *Österreichisches Verwaltungsrecht. Ein Grundriß der Rechtstheorie und Gesetzgebung der inneren Verwaltung*, Tübingen, J.C.B. Mohr, 1925, p. 137.

<sup>16</sup> B. RASCHAUER, *Allgemeines Verwaltungsrecht*, Wien-New York, Springer, 1998, pp. 299 ff.

<sup>17</sup> K. RINGHOFER, *Der Verwaltungsgerichtshof*, op. cit., pp. 220 f.; L. K. ADAMOVICH, B.-C. FUNK, *Allgemeines Verwaltungsrecht*, Wien-New York, Springer, 1980, pp. 350 f.

<sup>18</sup> For details and references, see T. OLECHOWSKI, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich*, op. cit., pp. 154 ff.

had issued the unlawful decision in the first place. It was now obliged to issue a new, this time lawful decision and was thereby bound by the legal grounds on which the Court reasoned its setting aside order<sup>19</sup>. However, the administrative body in question had to consider any legal or factual changes which had occurred since then. Administration would often find yet another reason to do the same thing again, as it had done in the first round, so the citizen had to appeal against the new decision once again to the Supreme Administrative Court. This could go on repeatedly back and forth between the administration and the Court. In complicated proceedings, five or more complaints and set aside orders were by no means uncommon

## 2. Outlines of the reform of 2012/2013.

This kind of system of administrative jurisdiction was considered anachronistic already 100 years ago<sup>20</sup>. When the monarchy collapsed in 1918, the social democrats wanted to introduce a two-stage administrative jurisdiction. This was prevented by an alliance of centralized bureaucracy, seeing it as a threat for its positions, and the federal states, fearing for their own influence. Austria evolved further towards an administrative state<sup>21</sup>, a development that also had its advantages after World War II. However, the accession to the European Convention on Human Rights caused some difficulties. Its Art. 6 states that everyone has the right to a fair and public hearing by an independent and impartial tribunal, in the determination of his civil rights or in any criminal charges against him. The European Court of Human Rights in Strasbourg interpreted the scope of this guarantee extensively and also established that the re-evaluation of the questions of fact is also guaranteed under Art. 6. The Austrian legal situation was not in accordance with this, since the administration was the one determining the facts of the case and the Supreme Administrative Court was bound by its determination<sup>22</sup>.

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<sup>19</sup> P. OBERNDORFER, *Die österreichische Verwaltungsgerichtsbarkeit*, op. cit., pp. 166 f., 185 ff.

<sup>20</sup> A prominent critic was Karl Renner, the founder of the republic, who headed the first government in 1918 as well as in 1945 and became president in December 1945. See K. RENNER, *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Österreich. Erster Teil: Nation und Staat*, Leipzig-Wien, Deuticke, 1917, pp. 215 ff.

<sup>21</sup> Cf. E. WIEDERIN, *Evolution and Gestalt of the Austrian State*, in *The Max Planck Handbooks in European Public Law vol. 1: The Administrative State*, edited by A. v. Bogdandy, S. Cassese and P. M. Huber, Oxford, OUP, 2017, pp. 124 ff. (126 f., 149 f.).

<sup>22</sup> Cf. C. KOPETZKI, *Zur Anwendbarkeit des Art. 6 MRK im österreichischen Verwaltungsstrafverfahren*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht vol. 42*, 1982, pp. 1 ff, and C. GRABENWARTER, *Verfahrensgarantien in der Verwaltungsgerichtsbarkeit. Eine Studie zu Artikel 6*

The accession to the European Union only increased and deepened this problem, because the right to a fair trial pursuant to Art. 47 CFREU is applied wherever the citizens' rights are in question. It is irrelevant whether the claims come from a civil or public law matter.

Shortly before the accession, Austria tried to use a French approach to this problem and established collegial bodies within the administration, that were part of the administration and as such, not really genuine courts<sup>23</sup>. However, their members were not bound by any administrative directives; moreover, they were employed on a long-term basis for at least six years, if not even permanently. The experience with these administrative senates is ambivalent because they were a sort of hybrid beings. Yet, since there was no other way to fulfill the guarantees of the Convention and the Charter, over time they gradually gained competences. Moreover, some further special senates were also established using the same pattern: the special senate for asylum matters, then the senate for public procurement, and finally, the senate for finance and taxation matters<sup>24</sup>. The result was a complex, difficult, expensive system consisting of many tracks and working at different paces.

After almost twenty years of muddling through, a substantial reform was passed in 2012<sup>25</sup> and 2013<sup>26</sup>, making the situation once again more transparent, simpler, more uniform and more rapid, without incurring more costs. This reform is based on four pillars<sup>27</sup>.

The first important change was a radical abolition of internal administrative remedies. In the past, almost always there were two, often even three instances<sup>28</sup>; today, the first instance authority is the last instance authority at the

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*EMRK auf der Grundlage einer rechtsvergleichenden Untersuchung der Verwaltungsgerichtsbarkeit Frankreichs, Deutschlands und Österreichs*, Wien-New York, Springer, 1997, pp. 294 ff.

<sup>23</sup> Cf. F. KOJA, *Allgemeines Verwaltungsrecht. Lehr- und Handbuch für Studium und Praxis*, 3<sup>rd</sup> edition, Wien, Manz, 1996, pp. 836 ff.; H. MAYER, *Die unabhängigen Verwaltungssenate in den Ländern, in Verfassungsänderungen 1988*, edited by R. Walter, Wien, Manz, 1989, pp. 83 ff.; for their procedure R. THIENEL, *Das Verfahren der Verwaltungssenate*, 2<sup>nd</sup> edition, Wien, Verlag Österreich, 1992.

<sup>24</sup> Cf. *Verfassungsrecht*, 7<sup>th</sup> edition, Wien, Facultas, pp. 285 ff.

<sup>25</sup> Cf. Verwaltungsgerichtsbarkeits-Novelle 2012, *Bundesgesetzblatt I* Nr. 51/2012, for the constitutional changes.

<sup>26</sup> Cf. Verwaltungsgerichtsbarkeits-Ausführungsgesetz 2013, *Bundesgesetzblatt I* Nr. 3/2013, for the implementing laws.

<sup>27</sup> For an overview, cf. R. THIENEL, *Neuordnung der Verwaltungsgerichtsbarkeit*, Wien, LexisNexis, 2013, pp. 4 ff., and H. MAYER, G. KUCSKO-STADLMAYER, K. STÖGER, *Grundriss des österreichischen Bundesverfassungsrechts*, 11<sup>th</sup> edition, Wien, Manz, 2015, pp. 450 ff.; for a commentary on the constitutional provisions, see R. FABER, *Verwaltungsgerichtsbarkeit*, Wien, Verlag Österreich, 2013.

<sup>28</sup> See F. KOJA, *Allgemeines Verwaltungsrecht*, op. cit., pp. 779 ff.

same time<sup>29</sup>. As a result, the administration has only one shot and therefore has to get things right straightaway.

The second foundation of this reform is the establishment of eleven new administrative courts: nine state administrative courts, one for each Austrian federal state, and two federative administrative courts - one for the finance and taxation matters and one for miscellaneous matters, which we call administrative matters<sup>30</sup>. With more than 200 judges, both federative courts are quite large. They also have some regional offices, to enable those outside Vienna to assert their rights as well.

The third characteristic is the changed role of the Supreme Administrative Court<sup>31</sup>. It used to have a broad jurisdiction, now it is the final appellate court with jurisdiction mostly over those cases that raise legal questions of essential importance<sup>32</sup>.

The fourth change is the most important one for the topic of this conference: the jurisdictional limits of the old Supreme Administrative Court were pushed back, and the new administrative courts, in principle, extensively review the administration. They determine the facts and they conclusively resolve the cases brought before them, instead of just setting aside the contested decision and passing the ball back to the administration. In Austrian legal terminology the *terminus technicus* for this is that the court decides on the merits of the case itself.

Cassatory or reformatory decision? What kind of powers should the administrative courts have? Should they only say yes or no to the contested administrative act, without being able to modify it? Just like in the monarchy, this question was once again the major point in the debate over the reform, yet this time the outcome was a very different one. At first, there were also some concerns about the separation of powers. Namely the federal states were afraid that the administrative courts would take the administration away from them and that they would do more than just control. Yet, the vast majority dismissed

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<sup>29</sup> There is only one exception for municipalities in their own sphere of competence: cf. Art. 132 para. 6 Bundes-Verfassungsgesetz.

<sup>30</sup> Cf. A. HAUER, *Gerichtbarkeit des öffentlichen Rechts*, 3<sup>rd</sup> edition, Linz, Pedell, 2014, pp. 9 ff.

<sup>31</sup> Cf. M. KÖHLER, *Verwaltungsgerichtsbarkeit neu – Veränderungen im Verfahren vor dem VwGH*, in *Öffentliches Recht Jahrbuch 2014*, edited by G. Baumgartner, Wien-Graz, Neuer Wissenschaftlicher Verlag, 2014, pp. 83 ff.

<sup>32</sup> Cf. D. KOLONOVITS, G. MUZAK, K. STÖGER, *Grundriss des österreichischen Verwaltungsverfahrensrechts einschließlich der Verfahren vor den Verwaltungsgerichten und dem VwGH*, 10<sup>th</sup> edition, Wien, Manz, 2014, pp.743 f., 756 f; E. WIEDERIN, Die Rechtsfrage von grundsätzlicher Bedeutung, in *Das Verfahren vor den Verwaltungsgerichten*, edited by M. Holoubek and M. Lang, Wien, Linde, 2015, pp. 33 ff.

these concerns, mostly due to three arguments. First, it is faster and less expensive if the administrative courts decide the case to its very end. It often takes a little; usually it is enough just to make some minor corrections of the decision, for instance by revising the facts of the case, modifying the reasoning and adjusting the verdict. Second, the judgment is more in line with the rule of law, because the citizens get what they want and need directly from the court: the administration is no longer able to impede the case by pulling out another argument out of the hat, in order to deny the citizen's request. Finally, the experience with the senates showed that the administration too prefers to get rid of the case as soon as it reaches the court. Sometimes there was almost the impression that the authorities would delegate the matter upwards.

### **3. The legal framework of full jurisdiction and its limits.**

So, lots of reasons for the decision on the merits. Were the expectations confirmed by practice? Before I move on to the Austrian experience, I would like to explain briefly those constellations that require a reformatory decision, and those where the administrative courts are also given an option to set aside the contested act and refer it back to the issuing authority instead.

As this was a central issue, some answers can already be found in the Federal Constitution itself<sup>33</sup>. Unlike the Italian or the German Constitution, the Austrian Constitution is very detailed, and it depicts all the essential elements of the new system of administrative jurisdiction. According to its Art. 130 para. 4, there are three constellations in which the decision on the merits is compulsory, so the administrative court does not have an option:

- in administrative penal matters,
- when the relevant facts of the case have been established,
- when the facts of the case have still not been established, but the administrative court itself can do this more efficiently than it would be the case after setting aside the decision of the administrative authority.

Where there are no constitutional obligations for decision on the merits, the compulsion might still arise out of procedural provisions. Namely, the Administrative Courts Proceedings Act further states that the administrative court has to decide on the case merits if the administrative authority did not

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<sup>33</sup> Bundes-Verfassungsgesetz (B-VG), *Bundesgesetzblatt* Nr. 1/1930, last changed by *Bundesgesetzblatt I* Nr. 138/2017.



object to this when submitting the complaint<sup>34</sup>. In practice, these objections occur seldom, if ever. I have personally never seen a single one and I also do not know anybody who has.

However, one cannot simply conclude that the decision on the merits is always required, since there are two exceptions to this rule.

First, instead of deciding on the merits of the case, the court is required to set aside the contested administrative act and refer it back to the authority, if the law provides the authority with discretion and the Constitution does not oblige the court to do otherwise<sup>35</sup>. Here it can be noticed that the principle of separation of powers has been considered after all – the administration is the one who should make use of the legal gaps and ambiguities, because it is closer to the people and enjoys greater democratic legitimacy than the court.

Second, the court has an option, when the authority failed to carry out the required investigations of the facts<sup>36</sup>. In this case it can set aside the contested decision and refer the matter back to the authority for the issue of a new administrative decision. Yet, the court is not obliged to do so and it may also decide the case by itself.

Rule, opposite rule, exception, opposite exception – these confusing regulations are causing quite some problems of understanding because they are not consistent in themselves<sup>37</sup>. Those who emphasize the principle of procedural economy and the fact that the authority fails to make an objection will favor the decision on the merits; those who highlight the authority's failure to undertake the necessary investigations will consider the referral to the authority possible already when there are small procedural irregularities.

The fact that the constitution requires the administrative court to decide on the merits of the case if it can establish the relevant facts more efficiently in terms of time and cost shows, however, that not every incomplete inquiry opens a door for a referral

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<sup>34</sup> Section 28 para. 3 1<sup>st</sup> sentence Verwaltungsgerichtsverfahrensgesetz (VwGVG), *Bundesgesetzblatt I* Nr. 33/2013, last changed by *Bundesgesetzblatt I* Nr. 138/2017.

<sup>35</sup> Section 28 para. 4 1<sup>st</sup> sentence VwGVG.

<sup>36</sup> Section 28 para. 3 2<sup>nd</sup> sentence VwGVG.

<sup>37</sup> For an overview of the discussion, cf. J. HENGSTSCHLÄGER, D. LEEB, *Verwaltungsverfahrensrecht. Verfahren vor den Verwaltungsbehörden und Verwaltungsgerichten*, 5<sup>th</sup> edition, Wien, Facultas, 2014, pp. 554 f.; D. KOLONOVITS, G. MUZAK, K. STÖGER, *Grundriss des österreichischen Verwaltungsverfahrensrechts*, op. cit., pp. 477 ff.; C. GRABENWARTER/M. FISTER, *Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit*, 4<sup>th</sup> edition, Wien, Verlag Österreich, 2014, pp. 232 ff.; K. PABEL, Das Verfahren vor den Verwaltungsgerichten, in *Handbuch der Verwaltungsgerichtsbarkeit*, edited by J. Fischer, W. Steiner and K. Pabel, Wien, Jan Sramek, 2013, pp. 379 ff. (410 ff.); M. ZUSSNER, Zur Wahl der Verwaltungsgerichte zwischen kassatorischer und reformatorischer Entscheidung, in *Zeitschrift für Verwaltung*, 2015, pp. 451 ff.

#### 4. Setting the course: The interpretation by the Supreme Administrative Court.

In his first landmark decision, the Supreme Administrative Court – the competent highest court – decided in favor of a strict priority of the decision on the merits. The case was about a man, who obtained a weapon prohibition order, because he was shooting into the water of an artificial lake with an un-registered semi-automatic gun while drunk. As a result, the authority prohibited him to own a firearm. The shooter complained, and the administrative court of Upper Austria upheld his complaint and set aside the contested decision<sup>38</sup>. In its opinion the prohibition order was excessive, since it did not contain any temporal or functional limits. An absolute ban would be possible only under very specific circumstances. Therefore, the case had to be referred back to the authority, so that it could determine any specific references, which could justify the absolute prohibition order. This was supported by the argument that the authority should be left with some room for executive discretion. Due to their function the administrative courts must limit themselves to the review of legality.

The authority filed a final complaint against this and the Supreme Administrative Court ruled in its favor<sup>39</sup>. It concluded the the administrative court should not have referred the case back to the authority, instead it should have decided on the merits of the case itself. First, the law does not provide the authority with discretion. Second, the weapon prohibition order can and must be expressed in an absolute manner. Third, thereout follows that the substantial facts of the case were clear, and that the decision on the merits was even constitutionally required. Fourth, the authority did not make any objection, so that the decision on the merits would have also been appropriate due to the procedural economy, even if the facts of the case were not fully established.

The Supreme Administrative Court was also not convinced by arguments concerning the separation of powers. Quite accurately, it noted that the Constitution itself rejected these arguments once it extensively compelled the administrative court to pass reformatory rulings. Against this backdrop, the legal provisions regulating the remaining margin must also be interpreted in line with the priority of reformatory decision.

This means that, in principle, the investigative gaps should be closed by

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<sup>38</sup> Landesverwaltungsgericht Oberösterreich, judgment of 17 February 2014, LVwG-750135/2/Gf/Rt.

<sup>39</sup> Verwaltungsgerichtshof, judgment of 26 June 2014, Ro 2014/03/0063.

the administrative court if and to the extent that this is faster or less expensive<sup>40</sup>. The referral is only appropriate in case of significant gaps, which could be closed more efficiently by the authority.

## **5. Court decisions on the third runway of Vienna Airport.**

The traffic at the Vienna Airport is currently managed through two main runways, although the number of the passengers has been growing for years now. In order to prevent capacity bottlenecks, the Airport planned an expansion and applied for the construction of a third runway. The state government of Lower Austria was the competent authority. It conducted the environmental impact assessment, that resulted in a positive outcome. The affected citizens and some public action groups complained successfully against this permit: in February 2017 the court forbade the construction of the third runway<sup>41</sup>. Indeed, there have been several public interests in favor of the expansion of the airport: the demand for flight connections would be on the rise, Austria's business location would profit and the expansion would be beneficial for the flight safety. The effects of the expansion concerning the tax revenues and plants and animals protection were evaluated as neutral by the court. However, the court saw negative effects regarding the environment protection, especially the climate protection and regarding the land consumption because 661 hectares of the farmland would have to be sacrificed.

In its final consideration, the court concluded that the public interests against the construction prevailed. First, the climate protection is highly valued both in Austrian constitutional law and European law. Second, Austria is bound by the national and international law to reduce its greenhouse gas emissions. The expansion of the airport might make it impossible to fulfill these obligations. Third, the preservation of the valuable farmland is necessary to secure the supplies for future generations.

It was not only the airport that was shocked by this ruling. It provoked a debate that was just as heated as the debate over the Constitutional Court's de-

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<sup>40</sup> In the same line: Verwaltungsgerichtshof, judgments of 30 September 2014, Ro 2014/22/0022; 12 November 2014, Ra 2014/20/0029; 15 December 2014, Ro 2014/17/0121; 7 February 2015, Ra 2014/09/0027; 26 March 2015, Ro 2015/22/0011; 30 June 2015, Ra 2014/03/0054; 30 June 2015, Ra 2015/03/0022; 26 April 2016, Ro 2015/03/0038; 22 June 2016, Ra 2016/03/0027; 6 July 2016, Ro 2015/01/0013; 21 February 2017, Ro 2016/12/0004; 30 March 2017, Ro 2015/03/0036; 29 September 2017, Ro 2015/10/0027; 28 February 2018, Ra 2016/04/0061.

<sup>41</sup> Bundesverwaltungsgericht, judgment of 2 February 2017, W109 2000179-1/291E.

cision on the presidential election. Environmental organizations cheered because finally an independent court had taken the environmental protection seriously. Representatives of industry, trade and commerce, however, saw a massive danger to the business location. Due to their pressure, delegates of the governing party made a parliamentary proposal to enact a constitutional commitment to growth, employment and a competitive business location<sup>42</sup>. The governors, who are the states' prime ministers, questioned the reform itself and called for the reconsideration of the recently established full jurisdiction of administrative courts and for the return to the cassation model<sup>43</sup>. The three judges who passed the judgment were verbally abused in the public and confronted with criminal charges from the prosecutor's office<sup>44</sup>. The airport launched a marketing campaign in favor of the third runway and filed two appeals: a final complaint before the Supreme Administrative Court claiming the illegality of the administrative court's decision and a complaint to the Constitutional Court, in which it asserted a constitutional infringement.

Already in June 2017, which means only four months after the court's ruling, the Constitutional Court decided in favor of the airport and annulled the contested decision<sup>45</sup>. The Constitutional Court held that the federal administrative court had gravely misapplied the law and thereby acted arbitrarily. First, the court should have only considered the emissions during the takeoff and landing without including the emissions during the flight in its calculations. Second, the court should have only taken into account those public interests which have been explicitly stipulated in the Aviation Act. Apart from these, the court is not allowed to include in its assessment the environmental protection which is postulated as a state objective in the Austrian Constitution<sup>46</sup>, Austrian international commitments, or any political declarations of intent made by the government.

This ruling pleased the politics. Austria was spared from enacting new state objectives such as growth, employment and competitiveness<sup>47</sup>, and no one talked about reversing the reform any longer. Yet, just like the administra-

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<sup>42</sup> Initiativantrag Nr. 2172/A XXV. Gesetzgebungsperiode.

<sup>43</sup> Der Standard 19 April 2017.

<sup>44</sup> W. BERGTHALER, *Gerichte und Gerichte*, in *Zeitschrift für Verwaltungsgerichtsbarkeit*, 2017, pp. 73 f.

<sup>45</sup> Verfassungsgerichtshof, judgment of 29 June 2017, E 875, 886/2017.

<sup>46</sup> Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung, *Bundesgesetzblatt I* Nr. 111/2013, section 3.

<sup>47</sup> Cf. E. WAGNER, *Was bislang geschah: Staatszieldebatte/VfGH hebt Urteil Dritte Piste auf*, in *Recht der Umwelt*, 2017, pp. 149 ff., for criticism of these proposals.

tive court in the political debates, the Constitutional Court was also heavily criticized in the legal discussions<sup>48</sup>. And indeed, some elements of the judgment are bizarre, much of it is exaggerated. The fact that the Constitutional Court reached its verdict in record time gave the public the impression of a constitutional catastrophe which had to be prevented<sup>49</sup>. However, the accusation of arbitrariness lies on a rather weak footing<sup>50</sup>. Namely, the Federal Administrative Court applied the Aviation Act and, in doing so, interpreted the provision which obliged it to consider public interests systematically and in conformity with the constitutional and international law. This was also in line with the methodological standards. If the Federal Administrative Court had made a mistake in doing so, the Supreme Administrative Court could have pointed to this mistake and corrected it. The accusation of arbitrariness, on the other hand, is pulled out of thin air, because the Federal Administrative Court's interpretation of the Aviation Act was consistent with the previous case law of the Supreme Administrative Court, and the Federal Administrative Court thoroughly substantiated its conclusion. Thus, the critics used this accusation against the Constitutional Court itself and criticized it for poorly serving the Constitution and the rule of law<sup>51</sup>.

## 6. Concluding remarks.

What can we learn from this case? Quite some aspects are uniquely Austrian, yet some might possibly be generalized. There are three main points which should be highlighted.

First, the case shows that political decisions remain political even if they are taken by a court. Those who make front page decisions are bound to be drawn into a public debate whether they like it or not. The courts have little to

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<sup>48</sup> A. BALTHASAR, *Zu kurz gegriffen*, in *Zeitschrift für öffentliches Recht*, 2017, pp. 577 ff.; C. FUCHS, *Interessenabwägung, Ermessen, dritte Piste Flughafen Wien*, in *Österreichische Zeitschrift für Wirtschaftsrecht*, 2017, pp. 192 ff.; S. HUBER, *Interessenabwägung im LFG*, in *Zeitschrift für Verkehrsrecht*, 2017, pp. 325 ff.; F. KERSCHNER, *VfGH 3. Piste und juristische Methode: Verfassungskonforme Auslegung verfassungswidrig?* in *Recht der Umwelt*, 2017, pp. 190 ff.; V. MADNER, E. SCHULEV-STEINDL, *Dritte Piste – Klimaschutz als Willkür?* in *Zeitschrift für öffentliches Recht*, 2017, pp. 589 ff.; F. MERLI, *Ein seltsamer Fall von Willkür: Die VfGH-Entscheidung zur dritten Piste des Flughafens Wien*, in *Wirtschaftsrechtliche Blätter*, 2017, pp. 682 ff.; S. STORR, *Überlegungen zu Abwägungen*, in *Österreichische Zeitschrift für Wirtschaftsrecht*, 2017, pp. 184 ff.

<sup>49</sup> F. MERLI, *Ein seltsamer Fall von Willkür*, op. cit., p. 686.

<sup>50</sup> V. MADNER, E. SCHULEV-STEINDL, *Dritte Piste – Klimaschutz als Willkür?* op. cit., p. 599.

<sup>51</sup> F. KERSCHNER, *VfGH 3. Piste und juristische Methode*, op. cit., p. 195; F. MERLI, *Ein seltsamer Fall von Willkür*, op. cit., p. 687.

win in such a debate. They can only speak through their judgments, but not about them. Most often, they have already lost at the very moment when they try to defend their judgments publically. If their justification goes beyond the judgment itself, they admit that their reasoning was incomplete. If they only repeat the reasoning, they will be accused of not addressing the criticism at all.

Second, it became obvious that the exercise of discretion and decisions based on predictions are better off with the administration than with the courts. The legislator should therefore grant the administration priority and allow it some discretion. But even where the legislator failed to do so, courts would be well advised to show restraint in case of doubt. After the administration assessed the public interests and weighed them against each other, the courts should not weigh them otherwise without a compelling need. Courts have already enough to cope with finding a fair balance between the citizens and the administration.

Third, the Austrian example shows that the constitution is not the right place to regulate the jurisdiction of the administrative courts in detail. In the beginning, everybody was convinced that full jurisdiction makes sense; only a case later, after the third runway decision, many of them changed their opinion once again. This quick turnaround indicates that the decision is in better hands with the legislator.