

***Periculum in Mora***  
**in Austrian Administrative Procedure and Environmental Law**

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## I. Introduction

When danger is imminent, an immediate reaction is essential. The legal order reflects this when it references a specific concept: *periculum in mora*. The literal translation of this Latin phrase to English is “danger in delay”; however, a more apt translation is “imminent danger”, whereas the German translation takes a verbatim approach with “*Gefahr im Verzug*” (and its variations “*Gefahr in Verzug*”, “*Gefahr im Verzuge*” and “*Gefahr am Verzuge*”). Both the English and the German legal practice and jurisprudence use the native terms as well as the Latin phrase. In this paper, the terms “*periculum in mora*”, “imminent danger” and “danger in delay” are used synonymously.

The objective of provisions referring to imminent danger is typically to enable an accelerated reaction of some sort, depending on the respective circumstances. A prominent example of this is section 57(1) of the Austrian General Administrative Procedure Act 1991<sup>1</sup> (AVG)<sup>2</sup>, which allows an administrative authority to issue an administrative decision without any prior investigation procedure when urgent measures are required because of imminent danger. This instrument, called “*Mandatsbescheid*” (which may be translated to “administrative order”), marks a procedural anomaly, as administrative decisions almost always necessitate an

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<sup>1</sup> Austrian Federal OJ 1991/51; all Austrian federal statutes can be accessed via <https://www.ris.bka.gv.at/Bund/> with their title, amendments can be found by their OJ number.

<sup>2</sup> This is the abbreviation for “Allgemeines Verwaltungsverfahrensgesetz 1991”.

investigation procedure.<sup>3</sup> But it is not just general provisions of procedural law: substantive rules address danger in delay too. An example thereof is section 122(1) of the Austrian Water Rights Act 1959<sup>4</sup> (WRG 1959)<sup>5</sup>, which states that in cases of imminent danger, the district administrative authority may issue the necessary interim injunctions. In environmental law, the prevention of imminent dangers is particularly crucial, as the threats posed to humans and nature are often irreversible, which in turn makes this area an intriguing field of study.

Against this backdrop, the paper at hand explores the phenomenon of *periculum in mora* in Austrian administrative procedure and environmental law.<sup>6</sup> A requirement for this exploration is an investigation of the term *periculum in mora* itself.

## II. Deconstructing *Periculum in Mora*

Historically, the origin of the expression *periculum in mora* is attributed to the Roman historian Titus Livius, who in his work “Ab urbe condita” (“From the Founding of the City”) in the 1st century BC wrote: “*postremo, cum iam plus in mora periculi quam in ordinibus conseruandis praesidii esset, omnes passim in fugam effusi sunt.*”<sup>7</sup> Translated into English, this means that, at last, when there was more danger in remaining on the field than safety in keeping their ranks, they all scattered in all directions in a flight. The phrase *periculum in mora* thus appears to derive from this account of a battle between Roman and Gallic forces, where the Romans, initially maintaining order, finally reach a point where staying in formation was more dangerous than attempting to escape. Thus, its original meaning was not a legal one at all.

Terminologically, danger in delay does not mean – as it might seem at first – that a danger is in a state of delay. The danger in question is certainly not delayed in the sense of occurring at a later time than expected. The word “delay” in this case does

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<sup>3</sup> See section 56 AVG.

<sup>4</sup> Austrian Federal OJ 1959/215.

<sup>5</sup> This is the abbreviation for “Wasserrechtsgesetz 1959”.

<sup>6</sup> It should be noted that, while the scope of this paper is restricted to administrative law, the concept of *periculum in mora* appears in various areas of the law. An example from private law can be found in section 1190(2) of the Austrian Civil Code as amended by the GesbR-RG, Austrian Federal OJ I 2014/83.

<sup>7</sup> Cf. Hillen, *Titus Livius. Römische Geschichte. Buch XXXV-XXXVIII*, 3rd edn. (Munich, 1998) 396 f.

not describe the state of the danger but explains its precondition. The particular nature of *periculum in mora* arises from the fact that a danger (presumably) materialises if defensive measures are taken only with delay, i.e. belatedly. For example, the pollution of a stream through leakage of manure from a damaged tank requires immediate action, because if measures are taken with delay, the danger of a pollution of said stream will materialise. Hence, Benke and Meissel define the meaning of *periculum in mora* as a risk arising from delay, which is why haste is required.<sup>8</sup>

Dogmatically, *periculum in mora* is a legal prerequisite. Its legal significance derives from the legal consequences attached to it: the instruments which allow for measures to prevent imminent danger from materialising. To further grasp the theoretical structure of this legal concept, a brief examination of its three components is in order. Two of those components – *periculum*, meaning danger, and *mora*, meaning delay – are already reflected in the term itself. The third one follows from context: the legally protected good.

There is no unanimous consensus amongst Austrian legal scholars on what exactly constitutes a danger, but rather differing opinions and complex definitional approaches that, for instance, distinguish between abstract, concrete, current and inevitable dangers.<sup>9</sup> Since all those approaches can be utilised for the purposes at hand, there is no need to engage in depth with the ongoing debate. It suffices to refer, by way of example, to Wiederin's definition; in this definition, a danger is a state in which, according to competent judgement, the unimpeded course of objectively foreseeable events gives rise to the reasonable expectation that damage will occur.<sup>10</sup> One can agree with Hauer that the abstract concept of danger is as devoid of substance as it is capable of being filled with different concrete contents.<sup>11</sup> This naturally applies to *periculum in mora* too: the nature of an imminent danger

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<sup>8</sup> Benke and Meissel, *Juristenlatein. Lateinische Fachausdrücke und Redewendungen der Juristensprache*, 4th edn. (Vienna, 2021) 283.

<sup>9</sup> Cf. the instructive remarks from Müllner, *Rechtliche Rahmenbedingungen der Katastrophenbekämpfung* (Vienna, 2016) 17 ff. See further Davy, *Gefahrenabwehr im Anlagenrecht* (Vienna, 1990) 409 ff; Hauer, *Ruhe, Ordnung, Sicherheit. Eine Studie zu den Aufgaben der Polizei in Österreich* (Vienna, 2000) 115 ff; Wiederin, *Einführung in das Sicherheitspolizeirecht* (Vienna/New York, 1998) paras. 203 ff.

<sup>10</sup> Wiederin, *Sicherheitspolizeirecht* para. 203.

<sup>11</sup> Hauer, *Ruhe* 116 f.

depends on the respective context. It may, for example, arise from a building at risk of collapse<sup>12</sup>, an open barrel full of oil<sup>13</sup> or deficiencies in medical training<sup>14</sup>.

The legally protected goods at stake are in turn as varied as the potential dangers. To draw from the examples above, a building at risk of collapse could injure people and destroy property, an open barrel full of oil could contaminate groundwater and deficiencies in medical training could jeopardise public health. The legally protected good depends on the regulatory context and, hence, so does the understanding of what constitutes a danger.

Whilst general instruments for averting danger in delay (such as the previously mentioned “*Mandatsbescheid*” under section 57(1) of the AVG) are in principle open to an application in respect of all dangers and legally protected goods, specific instruments have a narrower scope of application. For instance, when section 31(3) of the WRG refers to imminent danger, the provision solely relates to a danger of water pollution, regardless of its cause; the protected good in this context is thus just water quality.

Finally, as demonstrated, the element of delay does not mean that the danger is in a state of delay, but rather that a danger (at least with a certain degree of probability) will materialise if defensive measures are only adopted with delay. The delay in question therefore describes the urgency of a danger, meaning the period of time that is likely to remain until the danger materialises.

### III. Parameters of *Periculum in Mora*

A lawful application of instruments to avert danger in delay requires them to only be used when the legal prerequisite of imminent danger is met. To determine whether the condition of *periculum in mora* applies, three key criteria have to be considered: the significance of the danger, the probability of the danger materialising and the urgency to act.

Although these factors are closely interrelated and must be evaluated in an overall assessment, they can nevertheless be distinguished. The significance of the danger measures the severity of potential damage. To put it simply: it is significant whether

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<sup>12</sup> Austrian Supreme Administrative Court 26 June 2013, 2011/05/0102. The decisions of the Supreme Administrative Court can be accessed via <[www.ris.bka.gv.at/Vwgh](http://www.ris.bka.gv.at/Vwgh)> with their case number.

<sup>13</sup> Austrian Supreme Administrative Court 23 May 1989, 85/07/0244.

<sup>14</sup> Austrian Federal Administrative Court 7 February 2023, W227 2266337-1.

it is only some plasterwork that is crumbling or an entire building on the brink of collapse. Next, the probability of the danger materialising assesses how certain the impending occurrence of the damage in question is. And lastly, the urgency to act indicates the level of imminence of a danger, namely whether the time remaining until the expected occurrence of the damage is a matter of weeks, days, hours or even less.

### A. The Significance of the Danger

Regarding the significance of the danger, the Austrian Supreme Administrative Court<sup>15</sup> has repeatedly held that the exclusion of the suspensive effect of a complaint is intended only to prevent the occurrence of significant disadvantages for a party or serious disadvantages for the public interest.<sup>16</sup> The Austrian Constitutional Court<sup>17</sup> shares this view and emphasises that not every disadvantage can be seen as constituting *periculum in mora*.<sup>18</sup> In a case where the question of imminent danger was crucial, the Supreme Administrative Court ruled on the issue of a doctor's incapacity to practise due to her alcohol use disorder. The Court stated that, in any event, serious detriment to the public interest (namely health interests) is to be feared and thus danger is in delay, even if the doctor's alcohol use disorder had not yet led to a direct threat to the health and lives of patients.<sup>19</sup> This illustrates the interplay between the significance of the danger and the urgency to act: where serious harm (in this case: to legally protected health interests) is to be feared, there need not be a high level of imminence in order to assume *periculum in mora*.

However, the occurrence of serious or significant disadvantages does not appear to be a universal requirement. With regard to the possibility to seize evidence in cases of *periculum in mora* pursuant to section 96 of the Austrian Fiscal Offences Act<sup>20</sup>

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<sup>15</sup> Hereafter in this paper, references to Austria's Supreme Administrative Court omit the mention of Austria and refer only to the "Supreme Administrative Court".

<sup>16</sup> See for example: Supreme Administrative Court 16 December 2020, Ra 2020/11/0207; 11 April 2018, Ro 2017/08/0033.

<sup>17</sup> Hereafter in this paper, references to Austria's Constitutional Court omit the mention of Austria and refer only to the "Constitutional Court". The decisions of the Constitutional Court can be accessed via <<https://ris.bka.gv.at/Vfgh/>> with their case number.

<sup>18</sup> Constitutional Court 3 December 2024, G 10/2024 et al.

<sup>19</sup> Supreme Administrative Court 16 December 2020, Ra 2020/11/0207.

<sup>20</sup> Austrian Federal OJ 1958/129.

(FinStrG)<sup>21</sup>, the Supreme Administrative Court has ruled that even the slightest danger is sufficient for seizure.<sup>22</sup> In the case of an interim injunction under section 122(1) of the WRG, on the other hand, the Court insisted on a significant and concrete danger to one of the legal goods and interests protected by the WRG.<sup>23</sup> Under different circumstances, a situation of *periculum in mora* was assumed for residents of a retirement home, because care *lege artis* could not be guaranteed in terms of staffing, professional standards and formal requirements due to certain deficits.<sup>24</sup> In this case, a number of apparent shortcomings had altogether reached the critical threshold of significance.

Consequently, there is no uniform answer as to how significant a danger must be in a specific case to fulfil the respective criterion for *periculum in mora*. Yet, in my view, a crucial factor in assessing the significance of a danger ought to be the importance of the legally protected good in question within the legal order. A danger constituting *periculum in mora* is rather to be assumed when a person's health or even life is at stake than when there is merely a risk of a minor financial loss. The factor of irreversibility is also relevant here, particularly in cases of personal injuries, but also in connection with environmental damages. If, for example, animals are killed, trees are felled or rivers are polluted, these actions cannot in themselves be reversed. However, the Supreme Administrative Court does not interpret reversibility as the restoration of the same, identical state, but rather of a similar state, and thus does not view the issue of reversibility in cases of environmental damage all too strictly.<sup>25</sup>

## B. The Probability of the Danger Materialising

According to the Supreme Administrative Court, the use of measures to avert imminent danger is lawful if the intervening administrative authority's assumption that there was imminent danger was reasonable.<sup>26</sup> Based on the facts of the case, the Constitutional Court also stipulates as a prerequisite that the materialisation of the danger can be reasonably assumed.<sup>27</sup> Therefore, *periculum in mora* may mean that a

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<sup>21</sup> This is the abbreviation for "Finanzstrafgesetz".

<sup>22</sup> Supreme Administrative Court 23 May 1990, 89/13/0161.

<sup>23</sup> Supreme Administrative Court 21 February 2002, 2001/07/0124.

<sup>24</sup> Supreme Administrative Court 3 June 1997, 97/08/0130.

<sup>25</sup> Cf. Supreme Administrative Court 21 March 2013, AW 2013/05/0011.

<sup>26</sup> Supreme Administrative Court 26 June 2018, Ra 2016/05/0081.

<sup>27</sup> Constitutional Court 18 June 1976, B 322/74.

danger actually exists. However, the mere probability of a danger is also sufficient to assume imminent danger. The decisive factor in this is the reasonable assumption of a dangerous situation by an *ex ante* assessment, so by taking the beforehand perspective. This *ex ante* assessment is subject to review by the courts.<sup>28</sup>

Concerning seizure under section 89(2) of the FinStrG, the Supreme Administrative Court has ruled that specific circumstances must suggest that the object at risk of forfeiture will, with a high degree of probability, be removed from the reach of the authority concerned if it is not immediately secured.<sup>29</sup> Therefore, the Court demanded a high probability that the danger will materialise; in the (translated) words of the Supreme Administrative Court: “The danger must, so to speak, already be tangible.”<sup>30</sup> In a similar context, however, the Court has held that imminent danger is to be assumed even where the seizure appears to be at risk for any reason and that even the slightest danger is sufficient, because the purpose of securing evidence takes precedence.<sup>31</sup>

As with the significance of the danger, the Supreme Administrative Court does not always appear to apply the same standard when assessing the necessary probability of a danger materialising. The degree of probability required is a matter to be decided on a case-by-case basis.<sup>32</sup> It must be determined through an expert assessment of the facts of the case, although there may well be cases in which a danger is so obvious that there is no need to consult an expert.<sup>33</sup> The administrative authority with jurisdiction must make its decision on the basis of the factual and legal situation prevailing at the time of its decision. In other words: the existence of *periculum in mora* cannot be assessed on the basis of hypothetical circumstances that existed in the past, but only by taking into account the current situation.<sup>34</sup>

In any event, there must be a sufficient factual basis to assume danger in delay. In a case concerning the risk of a groundwater contamination posed by construction

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<sup>28</sup> See for example: Supreme Administrative Court 8 March 1990, 90/16/0008.

<sup>29</sup> Supreme Administrative Court 8 March 1990, 90/16/0008.

<sup>30</sup> Ibid.

<sup>31</sup> Supreme Administrative Court 20 March 1997, 94/15/0046.

<sup>32</sup> Supreme Administrative Court 26 June 2018, Ra 2016/05/0081.

<sup>33</sup> Cf. Supreme Administrative Court 17 January 1989, 88/07/0117; Bumberger and Hinterwirth, *Wasserrechtsgesetz*, 3rd edn. (Vienna, 2020) section 122 E 24.

<sup>34</sup> Supreme Administrative Court 29 April 2019, Ro 2018/20/0013.

waste, the Austrian Supreme Court ruled that an accelerated enforcement was not required merely because an expert could not rule out a risk to water bodies.<sup>35</sup> Rather, it would have been necessary to clarify whether the danger was imminent and what degree it might reach. In this case, the facts established were too scant for this assessment, which rendered the assumption of imminent danger unlawful.<sup>36</sup> It follows that a sufficient factual basis is a requirement for the lawful application of instruments to avert *periculum in mora*.

This makes sense, but it is problematic on a practical level at the same time. It makes sense because otherwise the authority granted on the basis of specific instruments construed to avert imminent danger might be all too easily abused. But in practice, investigating and establishing the facts of the case takes time, which is particularly scarce in cases of *periculum in mora* and, therefore, thwarts the aim of the instruments in question.

Consequently, the requirement for the investigation into the facts must not be interpreted overly rigorously, as this would impede the ability to avert *periculum in mora*. For example: the distinctive feature of the “*Mandatsbescheid*” lies precisely in the fact that it can be issued without a prior investigation procedure in cases of imminent danger. If the existence of such a danger were to require full proof,<sup>37</sup> the advantage of omitting the investigation procedure would vanish. Reflecting this, the Supreme Administrative Court ruled that the scope of necessary measures is often particularly difficult to predict in cases of imminent danger, since there is insufficient time to make detailed enquiries; this is why misjudgements tending towards over-capacity must be viewed against the backdrop of avoiding the accusation of an insufficient reaction to the danger presumably posed.<sup>38</sup>

### C. The Urgency to Act

The final criterion upon assessing the existence of *periculum in mora* is the urgency to act. The Supreme Administrative Court has specified this criterion primarily in the context of construction law. According to its case law, imminent danger refers to a

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<sup>35</sup> Supreme Court 13 December 2002, 1 Ob 229/02m.

<sup>36</sup> Ibid.

<sup>37</sup> Cf. section 45(2) of the AVG, stipulating that “the authority shall evaluate, in its free judgment, carefully taking into consideration the result of the investigation, whether a fact is to be assumed as substantiated or not.”

<sup>38</sup> Supreme Administrative Court 23 May 1989, 85/07/0244.

concrete threat that has reached a certain level of urgency.<sup>39</sup> The Court requires the existence of an acute danger situation in order for immediate defensive measures to be permissible.<sup>40</sup> The Court makes this particularly clear in the statement that defensive action must be so urgent that there is no time left to give a hearing to the person threatened by the intervention, to issue an order to him or her by means of an administrative decision and to enforce this decision in compliance with procedural rules.<sup>41</sup> Summed up, this means that there is simply no time for the regular procedure. A general assertion can be derived thereof: the reference point for assessing the urgency to act is the duration of the procedure normally required to avert the danger in question.

A rather recent decision by the Constitutional Court supports this argument. The case centred on a road traffic law provision suspending a certain right to be heard. This right is otherwise provided for in the procedure for issuing a regulation in cases of *periculum in mora*. The Court ruled that there was no danger in delay in this case because it would have been possible to involve the municipalities entitled to a hearing (e.g. by transmitting the draft of the regulation), as evidenced by the fact that the issuing procedure lasted over five weeks and an expert opinion had been obtained.<sup>42</sup> Apparently, the Constitutional Court considered the concept of *periculum in mora* in relation to the procedure which is usually to be followed.

Admittedly, the case law does not contain an unambiguous statement regarding this suspected relationship; rather, it relies on descriptive terms. Regarding interim injunctions under the WRG, for example, the Supreme Administrative Court has clarified that *periculum in mora* refers to a situation that requires immediate intervention to avert harm.<sup>43</sup> Terms such as “acute,” “immediate” and “urgent”, which are frequently used by the Supreme Administrative Court to characterise situations of imminent danger, certainly suggest that a rather high degree of urgency is required.

The case law of the Constitutional Court regarding violations of the right of the home during house searches is consistent with this. According to the case law in question,

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<sup>39</sup> Supreme Administrative Court 31 January 2006, 2005/05/0028.

<sup>40</sup> Supreme Administrative Court 30 September 1980, 0016/78.

<sup>41</sup> Supreme Administrative Court 17 March 1992, 91/05/0172.

<sup>42</sup> Constitutional Court 28 November 2023, V 240/2022 et al.

<sup>43</sup> Supreme Administrative Court 21 February 2002, 2001/07/0124.

a strict standard must be applied when assessing if there is imminent danger.<sup>44</sup> However, the respective doctrine that *periculum in mora* is only to be assumed in exceptional cases cannot be applied to other areas of the law without further ado. That is because the right of the home is a fundamental right; hence, severe infringements require particular justification.

If, on the other hand, provisions for averting imminent danger are included in laws that do not allow for such severe infringements of fundamental rights, there is no need to apply the same rigorous standard. Rather, in the interest of effective administrative enforcement, it could be argued that a swift response to acute threats is in the public interest (and often in the interest of private individuals too) and should thus not be rendered virtually impossible by restrictive interpretation.

#### D. The Overall Assessment

The provided overview of the parameters of *periculum in mora* has shown that it is difficult to define at which point the legal prerequisite is considered to be met in different normative contexts. It follows from the case law of the Supreme Administrative Court that the assumption of *periculum in mora* in general requires an assessment on the grounds of a fact-based expert opinion.<sup>45</sup> It must therefore be assessed on a case-by-case basis whether *periculum in mora* is at hand.<sup>46</sup>

The relevant criteria – namely the significance of the danger, the probability of the danger materialising and the urgency to act – must be considered in conjunction with one another in an overall assessment. A particular significance of the danger may, for example, lead to an assessment in which a reduced urgency to act carries less weight. From a methodical point of view, this overall assessment can be seen as some sort of flexible system (“*bewegliches System*”). Caution is warranted when specific criteria or conditions regarding the required danger in delay are stipulated. Such stipulations may especially limit the scope of the legally protected goods at stake. As a result, a comprehensive assessment of the individual case based on an expert opinion alongside an examination of the relevant provisions of the law is essential when applying instruments to avert *periculum in mora*.

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<sup>44</sup> See for example: Constitutional Court 4 March 1991, B 1191/90.

<sup>45</sup> Cf. Supreme Administrative Court 22 March 1988, 87/07/0108; Bumberger and Hinterwirth, *Wasserrechtsgesetz* section 122 E 24.

<sup>46</sup> See for example: Supreme Administrative Court 26 June 2018, Ra 2016/05/0081.

#### IV. General Instruments of Administrative Procedural Law

This section presents certain instruments that are generally available to administrative authorities and administrative courts in administrative matters, which is why they can be labelled as the general instruments for averting *periculum in mora*. The following analysis is restricted to provisions of the AVG, although other laws, such as the Austrian Administrative Enforcement Act 1991<sup>47</sup> (VVG)<sup>48</sup>, the Austrian Administrative Penal Act 1991<sup>49</sup> (VStG)<sup>50</sup> and the Austrian Proceedings of Administrative Courts Act<sup>51</sup> (VwGVG)<sup>52</sup>, contain general instruments too. The AVG comprises provisions on averting imminent danger in sections 3, 4, 5, 7, 13, 57 and 64, but only a few are presented hereafter, since the aim of this depiction is not to showcase the full toolkit of administrative procedure, but to illustrate the principal ideas behind the instruments. The distinctive feature of these instruments is that, in principle, they may or must be applied by any in administrative proceeding conducted by an administrative authority, although there are, of course, exceptions.<sup>53</sup>

##### A. Territorial Jurisdiction Depending on the Reason for Action

To determine the territorial jurisdiction of an administrative body, section 3 of the AVG distinguishes between three different types of administrative matters; the law provides for different territorial links for these three different types of matters. A distinction is made between matters regarding items of immovable property, matters regarding the operation of a business or the performance of any other permanent activity and other matters. For other matters, the territorial jurisdiction depends

“first of all on the permanent residence (place of business) of the party involved, in case of doubt of the party prosecuted or under obligation, then on the place where the party is staying, finally on the place of the last permanent residence (place of business) or of the last stay in this country, however, if none of the afore-stated reasons for jurisdiction can apply or whenever there is imminent

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<sup>47</sup> Austrian Federal OJ 1991/53.

<sup>48</sup> This is the abbreviation for “Verwaltungsvollstreckungsgesetz 1991”.

<sup>49</sup> Austrian Federal OJ 1991/52.

<sup>50</sup> This is the abbreviation for “Verwaltungsstrafgesetz 1991”.

<sup>51</sup> Austrian Federal OJ I 2013/33.

<sup>52</sup> This is the abbreviation for “Verwaltungsgerichtsverfahrensgesetz”.

<sup>53</sup> See Kolonovits, Muzak and Stöger, *Grundriss des österreichischen Verwaltungsverfahrensrechts*, 12th edn. (Vienna, 2024) paras. 57.

danger, on the reason for action by the authority; if even such criteria cannot determine the jurisdiction, such jurisdiction will be with the respective highest authority having jurisdiction in the subject matter”.<sup>54</sup>

The intricate system established by section 3 of the AVG is therefore overruled in cases of *periculum in mora*: whenever there is imminent danger, the territorial jurisdiction depends on the reason for action by the authority. In this context, the Supreme Administrative Court has emphasised that imminent danger establishes territorial jurisdiction based on the location of the reason for action without regard to the other criteria in said provision.<sup>55</sup> The reason for action is to be understood as the grounds the administrative authorities’ intervention.

Determining territorial jurisdiction based on the reason for action by the administrative authority as a means of averting imminent danger serves to simplify the decision-making process. By establishing a clear and evident territorial link, no time needs to be spent on a cumbersome process of determining the jurisdiction in question.

## **B. Insignificance of a Conflict of Interests**

Section 7(1) of the AVG stipulates that administrative officers shall abstain from exercising their office and have appointed a substitute in a number of cases, for example in matters in which they themselves are involved or if there are any other important reasons resulting in doubts as to them being fully unbiased.

If an administrative body burdened with a conflict of interest takes action, such action is in principle unlawful.<sup>56</sup> However, the actions of biased administrative officers do not constitute illegitimacy, where section 7(2) of the AVG applies: “In any case of imminent danger, if it is not possible to immediately appoint a substitute, also an administrative officer who is biased is entitled to perform the necessary official acts himself.” Provided there is imminent danger, even a biased official may lawfully perform the necessary official acts. Besides the element of *periculum in mora*,

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<sup>54</sup> Section 3(3) of the AVG. This translation is taken from the Legal Information System of the Republic of Austria, a web-based information system on Austrian law which is coordinated and operated by the Federal Chancellery of Austria; this translation is also used regarding other provisions of the AVG referred to in this paper: <[https://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_51/ERV_1991_51.pdf)>.

<sup>55</sup> Supreme Administrative Court 18 March 1994, 90/12/0113.

<sup>56</sup> See Hengstschläger and Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz*, 1. Teilband, 2nd edn. (Vienna, 2014) section 7 of the AVG para. 22.

another prerequisite for this is that the substitution of the biased official cannot be effected “immediately”.

According to Hengstschläger and Leeb, the question of whether a representative can intervene “immediately” must be assessed with due regard to the nature and urgency of the official act to be performed.<sup>57</sup> The word “immediately”, in my opinion, is intended to convey that the timely averting of the imminent danger must not be impeded by the process of arranging for a substitute.

The rationale behind this provision is that a possibly biased decision is preferable to no decision at all and to the potential damage that would result from inactivity. Thus, section 7(2) AVG permits averting imminent danger by allowing an administrative body to take action despite conflicts of interest in a particular matter. The provision serves to expedite proceedings through temporarily omitting the procedure of appointing a substitute for a biased administrative officer.

### C. Exclusion of the Suspensive Effect of an Appeal

Appeals and complaints against administrative decisions have suspensive effect, provided they are admissible and filed in due time.<sup>58</sup> For appeals, this is stipulated in section 64(1) of the AVG. With the introduction of the two-tier administrative jurisdiction in Austria in 2014, this provision has, however, lost most of its practical significance, as appeals are now only possible within a municipality’s inherent sphere of competence, as long as the administrative appeal process is not excluded by legislation.<sup>59</sup> Nevertheless, section 64 of the AVG is of more than mere theoretical significance, as it is largely identical in its wording to the provisions on the suspensive effect of complaints to the administrative courts under sections 13 and 22 of the VwGVG, which regulate the proceedings before administrative courts. Since the substantive requirements are identical,<sup>60</sup> case law and legal literature can be utilised conversely. This includes the provisions concerning the exclusion of the suspensive effect of the legal remedy. Amongst these provisions is section 64(2) of the AVG:

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<sup>57</sup> Hengstschläger and Leeb, *Kommentar* section 7 of the AVG para. 16.

<sup>58</sup> See section 64(1) of the AVG and section 13(1) and section 22(2) of the VwGVG.

<sup>59</sup> See article 115(2) and article 118(4) Federal Constitutional Act (“Bundes-Verfassungsgesetz”), Austrian Federal OJ 1930/1.

<sup>60</sup> Cf. Fister, ‘Verwaltungsgerichtsbarkeit neu – Die Neuerungen im Administrativverfahren’, in Baumgartner (ed.), *Öffentliches Recht. Jahrbuch 14* (Vienna, 2014) 11 (18).

“The authority may exclude the suspensive effect by an administrative decision if, after having considered the affected public interests and the interests of other parties, the early enforcement of the contested administrative decision or the exercise of the authorisation granted by the contested administrative decision is urgently required because of imminent danger. It is recommendable to include a statement to this effect already in the administrative decision given on the main issue.”

Where the appellant’s interest in the suspensive effect is set against the interest of another party or against public interests in excluding the suspensive effect, these interests must be weighed against one another.<sup>61</sup>

As Hauer aptly observed, the enforcement of an administrative decision is ultimately generally either in public or private interest or in both: in cases of decisions imposing obligations on private individuals, the law on which the decisions are based, by definition, establishes the public interest in ensuring that the imposed obligation is fulfilled. Decisions which, on the other hand, grant rights to private individuals, are enforced in the interest of those private individuals. Since such interests are present in all administrative decisions, they do not in themselves constitute a sufficient criterion for deciding whether an appeal should be denied suspensive effect. A criterion of this kind can be found in the element of imminent danger, which relates to the interests previously weighed.<sup>62</sup> Hence, a balancing of interests is only the basis for the following decision determining whether immediate action is required due to imminent danger.

As a result, section 64(2) of the AVG provides the administrative authority with an instrument allowing it to exclude the suspensive effect of an appeal against an administrative decision in order to avert imminent danger. The defensive effect is not achieved through an acceleration of the standard procedure, but by modifying the legal effects normally attributed to a contested legal act and thereby granting interim legal protection. The rationale behind this is that *periculum in mora* can sometimes only be averted by enforcing the contested decision early.

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<sup>61</sup> See for example: Walter and Thienel, *Die österreichischen Verwaltungsverfahrensgesetze, I. Band*, 2nd edn. (Vienna, 1998) section 64 of the AVG para. 7.

<sup>62</sup> Hauer, ‘Der Ausschluss der aufschiebenden Wirkung im Anlagengenehmigungsverfahren’ (2002) *ÖJZ* 621 (626).

## V. Specific Instruments of Environmental Law

This chapter presents a limited selection of environmental law instruments aimed at averting imminent danger. While the chosen examples stem from waste management law, commercial plant law, water law and nature conservation law, it should be noted that there are many more areas of environmental law containing provisions concerning *periculum in mora*. Environmental law in general is particularly well-suited as a subject of study and reference on this topic as there is a myriad of relevant instruments in this field. At the same time, the prevention of imminent danger is particularly vital in environmental matters, because people's lives, health and property, as well as nature in its various forms, are affected.

### A. Waste Treatment Orders

Waste must be collected, stored, transported, moved or treated in accordance with the relevant provisions of waste management law. In addition, waste must be treated safely to prevent harm to the public interest. Otherwise, the administrative authority having jurisdiction must, pursuant to section 73(1) of the Austrian Waste Management Act 2002<sup>63</sup> (AWG)<sup>64</sup>, issue an administrative decision instructing the person responsible to take the necessary measures or prohibiting their unlawful conduct by means of a waste treatment order.

Whilst a waste treatment order is usually issued in the form of an administrative decision, section 73(2) of the AWG stipulates that the administrative authority must immediately order the necessary measures in the event of imminent danger. If need be, the administrative authority must have the measures carried out right away, with the costs to be borne by the person liable. This provision allows the exercise of direct administrative authority to issue orders or enforce coercive measures in cases of *periculum in mora*.<sup>65</sup> Which measures are necessary within the meaning of the law must generally be assessed on a case-by-case basis, taking into account the specific circumstances of the individual case.<sup>66</sup> If the legal requirements are met, the administrative authority must issue a waste treatment order or have it carried out right

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<sup>63</sup> Austrian Federal OJ I 2002/102.

<sup>64</sup> This is the abbreviation for "Abfallwirtschaftsgesetz 2002".

<sup>65</sup> See for example: Scheichl, Zauner and Berl, *Abfallwirtschaftsgesetz 2002*, 2nd edn. (Vienna, 2025) section 73 para. 44.

<sup>66</sup> Supreme Administrative Court 25 September 2014, Ro 2014/07/0080.

away; it has no discretion in this matter.<sup>67</sup> In summation, section 73(2) of the AWG not only allows for, but demands an exemption from the regular course of proceedings.

## **B. Immediate Measures Concerning Commercial Plants**

In the context of commercial plants, section 360 of the Austrian Trade Regulation Act<sup>68</sup> (GewO)<sup>69</sup> permits temporary enforcement and safety measures. A special case of *periculum in mora* is separately addressed in section 360(4) of the GewO: if the administrative authority has reason to believe that immediate measures on site are necessary to avert danger to human life, health or to property caused by an activity subject to the GewO, the authority may take such measures without prior proceedings except notifying the operator.

Although the wording of the authorisation does not refer explicitly to imminent danger, it is clear that this provision is aimed for cases of *periculum in mora*. The courts and the literature agree that immediate measures according to section 360(4) of the GewO are to be understood as the exercise of direct administrative authority to issue orders or enforce coercive measures.<sup>70</sup> This fact can be derived from the wording of the law alone, which states that immediate measures may be taken before an administrative decision is issued. As with section 73(2) of the AWG, the provision contains an authorisation for a specific exercise of direct administrative authority.

## **C. Exemption from Obtaining a Water Association Statement**

In order to achieve specific objectives (including the supply of drinking water and extinguishing water) through measures extending across the territories of several municipalities, water associations may be established as bodies governed by public law.<sup>71</sup> Such water associations are subject to consultation requirements: pursuant to section 95(3) of the WRG, the administrative authorities entrusted with the administration of this federal law must first obtain a statement from the association

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<sup>67</sup> See Bumberger, Hochholdinger, Niederhuber and Wolfslehner, *Abfallwirtschaftsgesetz 2002*, 2nd edn. (Vienna, 2014) section 73 K 3.

<sup>68</sup> Austrian Federal OJ 1994/194.

<sup>69</sup> This is the abbreviation for “Gewerbeordnung 1994”.

<sup>70</sup> See for example: Supreme Administrative Court 17 December 1982, 82/04/0167; Giese, ‘Einstweilige Zwangs- und Sicherheitsmaßnahmen’, in Baumgartner, Bergthaler and Pürgy (eds.), *Die gewerbliche Betriebsanlage*, 5th edn. (Vienna, 2025) para. 357, 6.3.

<sup>71</sup> Section 87(1) of the WRG.

before taking action in matters affecting a water association's purpose, except in cases of imminent danger. This establishes, in the case of *periculum in mora*, an exemption from a procedural rule: whilst the statement of an affected water association must be sought in the ordinary course of proceedings, such a statement may be dispensed in cases of imminent danger.

#### **D. Exemption from Extending an Invitation for Nature Conservation**

In the Austrian province of Salzburg, section 40(2) of Salzburg's Nature Conservation Act<sup>72</sup> (Sbg NSchG)<sup>73</sup> applies when measures are required for the conservation, protection or maintenance of a natural monument, a protected natural feature, a protected area, or an area covered by a landscape management plan. It stipulates that, unless there is imminent danger, the landowners and other persons entitled to dispose of the property shall first be called upon to carry out the measures, provided that they can be expected to execute them in a professional manner; the province or municipality must invite them to carry out the relevant measure.

In cases of imminent danger, however, this participatory element is dispensed with. The procedure to be followed is as if the invitation had not been accepted within the specified time limit or as if the measure had not been taken: depending on the area of responsibility, the province or municipality has to carry out the necessary conservation, protection or maintenance itself.<sup>74</sup> The reasoning behind this is clearly that, in cases of *periculum in mora*, there is no time to extend an invitation and wait for a response or for the concerned party to take action.

### **VI. Structuring Variety: A System of Instruments**

All instruments designed to avert imminent danger pursue the same objective: enabling immediate action to prevent impending harm. This common denominator unites provisions that otherwise regulate quite different matters. In terms of their function, most of the various instruments of administrative procedure and environmental law can be divided into four categories: exemptions from procedural rules, authorisations to exercise direct administrative authority to issue orders or enforce coercive measures, emergency jurisdictions and interim legal protection.

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<sup>72</sup> Salzburg State OJ 1999/73.

<sup>73</sup> This is the abbreviation for "Salzburger Naturschutzgesetz 1999".

<sup>74</sup> Section 40(2) of the Sbg NSchG.

### A. Exemptions from Procedural Rules

Provisions referring to *periculum in mora* often allow exemptions from certain procedural rules that must be observed during the regular course of proceedings, i.e. under ordinary circumstances. An example of this is section 7(2) of the AVG: whilst a biased administrative officer would normally have to refrain from exercising his or her functions, in cases of imminent danger, the officer in question may and must perform the necessary official acts when a replacement cannot be arranged immediately.

The exemption from obtaining a water association statement as per section 95(3) of the WRG and the exemption from extending an invitation for nature conservation according to section 40(2) of the Sbg NSchG obviously fall into the same category, as does the “*Mandatsbescheid*” on the grounds of section 57(1) of the AVG, an administrative decision which may be issued without any prior investigation procedure.

A characteristic feature of exemptions from procedural rules is that the procedure to be followed in principle does not change fundamentally but can be carried out more quickly. As a rule, the procedure for issuing a decision is expedited. However, the administrative act used to avert the danger remains an administrative decision.

### B. Authorisations to Exercise Direct Administrative Authority to Issue Orders or Enforce Coercive Measures

Although almost exclusively found among the specific instruments of environmental law and not among the general instruments of administrative procedure, authorisations to exercise direct administrative authority to issue orders or enforce coercive measures represent an important option to avert imminent danger. Its procedural flexibility makes this category of instruments particularly suitable for urgently required administrative action. Examples of these types of instruments are waste treatment orders according to section 73(2) of the AWG and immediate measures concerning commercial plants as per section 360(4) of the GewO.

Admittedly, an authorisation to exercise direct administrative authority to issue orders or enforce coercive measures could also be interpreted as an exemption of procedural rules. This is due to the fact that the administrative procedure that would otherwise have to be conducted – culminating in an administrative decision – is dispensed in favour of the exercise of direct administrative authority. But since this equates to a fundamentally different administrative act, a category of its own seems only adequate.

### C. Emergency Jurisdictions

According to section 3(3) of the AVG, territorial jurisdiction is determined on the basis of the reason for action by the administrative authority in cases of imminent danger. This establishes an emergency jurisdiction. While this a rather rare form of instrument to avert *periculum in mora*, Tezner had already observed it at the end of the 19th century.<sup>75</sup> The distinctive aspect of this instrument is that the jurisdiction of a specific administrative authority is constituted without altering its competence to take specific actions: an emergency jurisdiction merely stipulates who may take action, but not what form that action takes. Also, following this understanding, section 7(2) of the AVG is not to be regarded as providing an emergency jurisdiction, because the jurisdiction remains with the same administrative authority; the provision addresses only the respective administrative officer.

### D. Interim Legal Protection

Interim legal protection can be ensured, first and foremost, by the exclusion of the suspensive effect of an appeal or complaint. Accordingly, section 64(2) of the AVG falls into this category: this provision and similar instruments allow for a provisional disposition regarding the effects of a decision. Beyond the exclusion (or grant) of the suspensive effect of a legal remedy, interim legal protection may also be provided through the active imposition of measures, i.e. interim injunctions. As stated before, the interim injunction based on section 122(1) of the WRG is exemplary of this; such an injunction may be issued in cases of imminent danger, either *ex officio* or upon request, depending on whether public interests or the protection of third parties is at stake.

## VII. Conclusion

*Periculum in mora* describes a situation in which a certain danger is imminent. When the law refers to this concept, it is usually to enable an accelerated reaction of some sort, depending on the respective circumstances. Thus, it stipulates instruments to avert imminent danger. The lawful application of those instruments requires them to only be used when the legal prerequisite of *periculum in mora* is met. To determine this, three key criteria must be regarded in an overall assessment: the significance of the danger, the probability of the danger materialising and the urgency to act. The necessary overall assessment is akin to a flexible system. Looking at Austrian

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<sup>75</sup> See Tezner, *Handbuch des österreichischen Administrativverfahrens* (Vienna, 1896) 53.

administrative procedure and environmental law, most of the various instruments to avert imminent danger can be divided into four categories: exemptions from procedural rules, authorisations to exercise direct administrative authority to issue orders or enforce coercive measures, emergency jurisdictions and interim legal protection.

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