Introductory questions

1. **How do you define alternative procedures? How do you distinguish them from jurisdictional procedures and arbitration procedures?**

Alternative procedures typically include early neutral evaluation, negotiation, conciliation and mediation. Some of the alternative procedures are voluntary; others are mandatory, depending on the legal topic to be dealt with. In Austrian administrative law only voluntary alternative procedures exist.
The main form of alternative procedure, which can be found in Austrian administrative law is the so-called "Schlichtungsverfahren" or conciliation procedure.
Another form of alternative procedure is the establishment of an ombudsperson (*Ombudsstelle*), carrying out preliminary proceedings.

Contrary to jurisdictional and arbitral procedures, where judges or arbitrators decide on a dispute in the form of a judgement or arbitral award, parties of alternative procedures create their own solutions i.e. in the form of an amicable settlement or a contract (*gütliche Einigung*; § 6 Abs. 6 WVRG 2014; § 3 Abs. 5 NÖ Vergabe-Nachprüfungsgesetz). Negotiations in alternative procedures are not public and the procedures are less rigid regarding their form. Usually alternative procedures help to avoid rising costs of litigation and time delays.

2. **Do alternative procedures such as those defined above exist in your country? If no alternative procedures exist in your country, do you plan to create such procedures? Can you articulate your current thinking in this domain?**

Alternative procedures exist in Austria and can be found in the following fields:

- ✓ Public Contracts and Public Procurement
- ✓ Energy Control
- ✓ Postal/Telecommunication/Broadcasting Law
- ✓ Environmental Law
- ✓ Traffic Law
- ✓ Law regulating civilian service[1]

I. The goals and scope of alternative procedures

1. **With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?**

The main objectives of these procedures are:

- ✓ Relief for the court system
- ✓ Efficient use of resources
- ✓ Early dispute prevention
- ✓ Production of outcomes that are lawful, effective and accepted by the parties

[1] Civilian service can be done instead of military service.

- ✓ Enhance customer satisfaction, strengthen business resolutions

The main advantages of these procedures are:

- ✓ Cost reduction
- ✓ Shorter Procedures
- ✓ Effectiveness
- ✓ Protection of business relationships
- ✓ Secrecy

2. **Are alternative procedures used in your country in administrative matters? Since when? What factors contributed to their development and what is the proportion of administrative disputes that are resolved each year by such procedures?**

In general, alternative procedures have started emerging in the 1990s and are now being used increasingly, also in administrative matters.

In the area of **environmental law**, alternative procedures, such as mediation, have been in use since the 1990s.

In **public procurement**, alternative procedures have been used for approximately twenty years. At an early stage these procedures were mandatory, the idea was to avoid formal procedures. Since the ECJ has ruled (C-230/02, Grossmann Airservice, C-410/01, Fritsch, Chiari & Partner), that making access to the review procedures provided for by the Remedies-Directive (89/665) conditional on prior application to a conciliation procedure is contrary to that directive's objective of speed and effectiveness, such conciliation procedures are no longer obligatory.

3. **Do rules restricting recourse to alternative procedures in administrative matters exist in your country? In your opinion, what are the types of litigation for which these procedures would not be appropriate?**

No general restricting rules exist in Austria.

4. **Do instruments organising the use of alternative procedures in administrative matters exist in your country? If so, are these instruments legally binding (hard law/soft law)?**

See question I.2.
Typically the fact that alternative procedures exist is enshrined in the law. Most laws foresee that the agency or regulation authority dealing with the alternative procedure has to make its own guidelines regulating the details of the alternative procedure.
As concerns **public procurement** at the federal level, legislation and execution in matters of legal protection for the award of public contracts is regulated by national law (Bundesvergabegesetz 2006), which does not foresee alternative procedures. Alternative procedures are stated in specific laws of the provinces, as far as mainly public clients, who are

attributed to the relevant province, are concerned. Hence, every province has its own law regulating legal protection for the award of public contracts.
The laws regulating legal protection for the award of public contracts of two of the nine *Länder,* those of Vienna and Lower Austria, establish so-called conciliation offices (*Schlichtungsstellen*) in order to receive amicable settlements between the parties.
The Carinthian procurement law concerning legal protection states the establishment of an ombudsperson, who issues a reasoned statement of whether the decision of the public clients violates procurement law.
These mentioned procedures do not have the pouvoir to decide in a legally binding manner.

5. **If your State is a member of the European Union, how was the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters transposed into national law?** *Caution! This question is only asked insofar as the said directive can weigh on "administrative" matters in accordance with your domestic law.*

The transposition into Austrian national law of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, namely into the "EU-Mediations-Gesetz", does not have impact on "administrative" matters.

II. The stakeholders in alternative procedures

1. **What categories of natural or legal persons have recourse to alternative procedures? Can all legal persons governed by public law use them?**

In general, all natural or legal persons can have recourse to alternative procedures. In particular, the specific administrative law governs who is eligible to apply for an alternative procedure.

In **postal, telecommunication/broadcasting law**, all customers of postal services, interest groups and service providers of postal services can submit a request for alternative procedures to the regulatory authority.

Transportation **laws** provide an alternative procedure to customers, regional authorities and interest groups.

According to the **energy control law**, all users of the energy network, energy providers, network operators or any other company working in the electricity and natural gas sector can submit their complaint to the regulation authority.

The law regulating **environmental sustainability assessments (UVP-G)** foresees that if during the approval procedure considerable conflicts of interests between those applying for a project and other parties involved arise, then the authority, upon request of the applicant, can

suspend the assessment and launch mediation procedures. The result of the mediation can be submitted to the authority in charge and needs to be taken into consideration in the assessment of the sustainability.

The **law regulating the civilian service** foresees that the Governor of a Land shall introduce a mediation board in order to solve complaints of those doing their civilian service.

The alternative procedures in the field of **procurement law** can only be used by enterprises involved in a public procurement procedure.

2. **Can the parties to an administrative dispute entrust the conducting of mutual agreement procedure to a third party? What role is this third party called upon to fulfil?**

In most cases it is either the regulatory authority or the judge who is in charge of leading the agreement procedure, hence no third party can be entrusted with this procedure.

In the case of **environmental sustainability assessments** a third party can be the mediator (see question no II.1.). This procedure only exists before the case is submitted to the administrative court (see question II.4.).

In the field of **procurement law**, only the foreseen procedures in the relevant laws of the *Länder* (as mentioned in question I.4.) can be applied.

3. **Do standards regulating the activity of these third parties exist in your country (required qualifications, continuing vocational training, remuneration, deontology etc.)? Do authorities with responsibility for the supervision of compliance with these standards exist (public bodies, professional organisations, non-profit organisations – possibly operating under licence, etc…)?**

As alternative procedures are led either by the regulating authority or the judge of the administrative court, the general standards in place for these authorities apply (see question II.2.).

There are no specific rules as to which standards third parties, intervening as mediators, in administrative law matters shall fulfil.

We are not aware of any such authorities with responsibility for the supervision of compliance with these standards.

4. **Can the administrative courts invite or oblige parties to litigation brought before them to pursue an alternative procedure? Can the administrative court entrust a mediation mission to a third party?**

In case there are several parties with opposing claims involved in a proceeding, judges at administrative courts of first instance can carry out settlement proceedings (§ 43 Abs. 5 AVG). Throughout these settlement proceedings the judge shall find a just solution representing an equilibrium between public interest and the opposing interests of the parties.

The administrative court cannot entrust a mediation mission to a third party.

5. Can the administrative court itself conduct mediation proceedings? In your opinion, what are the advantages and drawbacks of a mutual agreement procedure conducted by a judge? In what types of litigation does the direct intervention of a judge appear most appropriate?

See question II.4.

Regarding **public procurement** procedures, the law of Tyrol concerning the legal protection for the award of public contracts, explicitly states, that the Administrative Court of the province Tyrol may - until the contract is awarded - carry out a settlement procedure.

III. The procedures of alternative procedures

1. Can you detail the different alternative procedures applicable in administrative matters in your country? How do the parties choose between the various alternative procedures available?

In **postal and telecommunication/broadcasting law**, the so called *Rundfunk und Telekom Regulierungs-GmbH* (RTR GmbH) is in charge as regulatory authority and can proceed to conciliatory procedures. All customers of postal or telecommunication services, interest groups and service providers of postal or telecommunication services can submit a request for alternative procedures to the regulatory authority. These claims can be based on the quality of services or on disputes regarding payment of services arising between the user and the service provider. A claim can also be based on the alleged infringement of the telecommunications or postal services law.
The service providers are obliged to participate in such conciliatory procedures and to disclose all information necessary for the proceedings. The regulatory authority has to try to reach a consensual agreement or otherwise inform the parties of its view of the case. The regulatory authority has to establish its own guidelines regarding the conciliatory procedure. These guidelines have to be duly published and need to foresee reasonable deadlines for the conciliatory procedures. (cf, § 122 TKG/ § 38 PMG)

In transportation matters, the agency for passenger rights provides conciliation procedures for railway, bus, ship and flight transportation. **The railway law and shipping law** provides an alternative procedure to its customers, regional authorities and interest groups. These procedures are foreseen in case of disputes regarding the transportation of customers, luggage or goods.

The shipping law foresees that customers first have to submit their claims to the shipping company before submitting their claim to the agency for passenger rights.
The railway law provides that in case there are several similar claims of passengers of essential importance, these can be jointly addressed. These claims can be based on a violation of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations or on unlawful regulations in the conditions of carriage including the regulations for compensation. The service providers are obliged to participate in such conciliatory procedures and to disclose all information necessary for the proceedings. The agency for passenger rights has to establish guidelines regulating the conciliatory procedures. It also has to inform the rail-control commission if the outcome of the alternative procedure is negative and of eventual compensation payments. It is the rail-control commission which decides whether the decision of the agency on the compensation of a ticket price due to delays or cancellation of trains becomes valid. (§ 78a EisbG, §32 KflG, 87a SchFG)

According to the **energy control law**, all users of the energy network, energy providers, network operators or any other company working in the electricity and natural gas sector can submit their complaint to the so-called E-control GmbH (Ltd.). The E-control GmbH shall try to find an amiable solution to the conflict within 6 weeks.
The chamber of labour needs to be involved in cases regarding consumers. The E-control GmbH can request experts to participate in the conciliatory proceedings.
The introduction of a conciliatory procedure puts the due date of the amount to be paid on hold or the immediate payment of an amount representing the average of the last three months payment can be demanded. The E-control GmbH has to establish guidelines regulating the conciliatory procedures.

The law regulating **environmental sustainability assessments (UVP-G)** foresees that if during the approval procedure considerable conflicts of interests between those applying for a project and other parties involved arise, then the authority, upon request of the applicant, can suspend the assessment and launch mediation procedures. The result of the mediation can be submitted to the authority in charge and needs to be taken into consideration in the assessment of the sustainability.

The **law regulating civilian service** foresees that the Governor of a Land shall introduce a mediation board in order to solve complaints of those doing their civilian service.

Regarding **public procurement** several regions have specific rules. At the office of the Lower Austrian Provincial Government, the Lower Austrian conciliation office for public contracts is established (§ 2 NÖ Verg-NG). Entrepreneurs may apply at the conciliation office for a review procedure. With the application for a review procedure to the conciliation office, the period for filing an application for review to the Administrative Court of the Province Lower Austria is suspended for the duration of the conciliation procedure (§ 11 Abs. 7 NÖ Verg-NG). The conciliation office must as soon as possible, at the latest within two weeks, in oral, non-public hearings by applying objective criteria work towards an amicable settlement

between the parties of the dispute. If need be, the conciliation office must present proposals to settle disputes (§ 3 Abs. 5 NÖ Verg-NG).

At the office of the Vienna Provincial Government, the Vienna conciliation office for procurement issues is established. In single-stage procurement procedures, it is possible to appeal to the conciliation office until the latest day of submission of tenders, whereas in two- and multistage procurement procedures, it is possible to appeal to the conciliation office until the latest day of submission of participants' applications. The competence of the conciliation office focuses on tender- and participation documents and their corrections.
The application of the conciliation office is optional. In case an entrepreneur files an admissible application to the conciliation office, the period for filing an application for review to the Administrative Court of the Province Lower Austria is suspended for the duration of the conciliation procedure (§ 6 Abs. 3 WVRG 2014). The conciliation office must as soon as possible, at the latest within two weeks, in oral, non-public hearings by applying objective criteria work towards an amicable settlement between the parties of the dispute. If need be, the conciliation office must present proposals to settle disputes (§ 6 Abs. 6 WVRG 2014).

At the office of the Carinthian Provincial Government, an ombudsperson in procurement matters is established. Upon application, the ombudsperson carries out a preliminary procedure. Such an application may be filed by a commissioning principal, an entrepreneur and the relevant representation of interests (§ 3 Abs. 2-5 K-VergRG 2014). Applications, of which the content indicates, that the claimed violation of rights or the claimed damage obviously do not exist or the claimed violation of rights does evidently not have any influence on the further procurement procedure, are to be dismissed without any further procedure. In all other cases, the ombudsperson must at the latest within two weeks issue a reasoned statement of whether the decision of the public clients violates procurement law (§ 2 K-VergRG 2014). The period for filing an application for review are suspended for the duration of the preliminary proceeding before the ombudsperson (§ 14 Abs. 6 K-VergRG 2014).

Legislation and execution in matters of legal protection for the award of public contracts lie with the Provinces, as far as mainly public clients, who are attributed to the relevant province, are concerned. Hence, every province has its own law regulating legal protection for the award of public contracts and parties do not have the possibility to choose between them (see question I.4.).

2. **Do administrative appeals, mandatory prior to referral to the administrative court, exist in your country? Do optional such appeals exist? How are they organised? Does the lodging of an administrative appeal modify the conditions governing the filing and review of subsequent recourses to the court? For example, can the parties present arguments, not produced during a prior administrative appeal, before the administrative court?**

In general, there are no administrative appeals prior to referral to the administrative court of first instance. In a normal appeal before the administrative courts arguments have to be

brought before the court, however, further arguments can still be produced after the filing of an appeal.

In the matters of the own sphere of competence of the municipalities there is a two-stage channel of appeal, which can be excluded by law. In matters of the own sphere of competence, the Federation and the province have a right of supervision over the municipality (Art. 118 B-VG)

None of the before mentioned alternative procedures are mandatory. All procedures mentioned under III.1. are optional.

Regarding **public procurement** see question I.2.

3. **What are the general principles regulating alternative procedures (adversarial principle, impartiality, rules of confidentiality, time limits, etc…)? How much autonomy do parties have with regard to the organisation of the deployment of an alternative procedure?**

Most of the specific laws mentioned above foresee that the agency dealing with the conciliatory procedure has to establish its own guidelines for these procedures.

4. **Does the initiation of an alternative procedure allow the suspension or interruption of periods of limitation? And of time limits for judicial appeals?**

See question III.1.

5. **Can the court intervene, even partially, during the course of an alternative procedure? If so, in what way?**

See question III.1.

IV. The efficacy of alternative procedures

1. **Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?**

n/a

2. **What is the proportion of administrative disputes that are definitively resolved by alternative procedures? What are the factors in success, or failure?**

n/a

3. **What is the legal standing of an agreement reached by means of an alternative procedure? Can such an agreement be referred to the administrative court for approval?**

In general, the legal standing of an agreement reached by means of an alternative procedure is regulated by the specific administrative law. In case civil rights positions are brought forward by the parties, then the agreement has the legal standing of a private settlement according to civil law (cf. § 1380 Allgemeines Bürgerliches Gesetzbuch).

Concerning environmental sustainability assessments, mediation proceedings can be ended by a private law agreement concluded between the parties participating in the mediation process. The project applicant has to submit the agreement to the authority in charge of the environmental sustainability assessment. The authority shall take this agreement into consideration, when taking its own decision regarding the environmental sustainability of a project. However the authority is not formally bound to this private law agreement (art. 18 (1) B-VG), it could also render a decision deviating from the private law agreement. In administrative law the concept of putting an issue beyond dispute, as it exists in private law, does not exist.

4. **What instruments and procedures are available to the parties in the case of a violation of the agreement reached by means of an alternative procedure, potentially approved by the administrative court?**

The law regulating legal protection for the award of public contracts of Lower Austria states, that an action for annulment is permitted, in case the tenderer or applicant can substantiate , that the public client has not or does not abide by the result of the amicable settlement (§ 9 Abs. 3 Z 4 NÖ Vergabe-Nachprüfungsgesetz).

5. **Do you consider it necessary to further develop alternative procedures in your country? Why? In what form?**

n/a

Relevant laws for the questionnaire

1. **Bundesverfassungsgesetz (Federal Constitutional Law):** Art. 14b Abs. 3, Art. 118;
2. **Allgemeines Verwaltungsverfahrensgesetz 1991 (General Administrative Procedure Act 1991 – AVG):** § 43 Abs. 5;
3. **Allgemeines Bürgerliches Gesetzbuch (Civil Code):** § 1380;
4. **Vergaberecht (Procurement Law):**
   - Bundesvergabegesetz 2006 (Federal Procurement Act 2006)
   - Wiener Vergaberechtsschutzgesetz 2014 (Law concerning the Legal Protection in the Award of Public Contracts of Vienna 2014): §3, § 6;
   - NÖ Vergabe-Nachprüfungsgesetz (Law concerning the Legal Protection in the Award of Public Contracts of Lower Austria): § 2, § 3 Abs. 5, § 9, § 11;
   - Kärntner Vergaberechtsschutzgesetz 2014 (Law concerning the Legal Protection in the Award of Public Contracts of Carinthia 2014): § 2, § 3, § 14;
   - Tiroler Vergabenachprüfungsgesetz 2006 (Law concerning the Legal Protection in the Award of Public Contracts of Tyrol 2006): § 5 Abs. 5;
5. **Telekommunikationsgesetz (Telecommunications Law):** § 115 (3), §§121(3) und 122;
6. **Postmarktgesetz (Postal Market Act):** § 38, §§ 53 und 54;
7. **Verkehrsrecht (Transportation Law):**
   - Eisenbahngesetz 1957 (Railway Law 1957): § 78a;
   - Kraftfahrliniengesetz (Public Transportation Law): § 32b;
   - Schifffahrtsgesetz (Shipping Law): §§ 71a und 87a;
8. **Energie-Control-Gesetz (Energy Control Law):** § 26;
9. **Umweltverträglichkeitsprüfungsgesetz 2000 (Law concerning environmental sustainability assessments 2000):** § 16 Abs. 2;
10. **Zivildienstgesetz 1986 (Law regulating Civilian Service):** § 55 Abs 4;
11. **Urteile EuGH (ECJ judgements):**
    - C-230/02, Grossmann Airservice
    - C-410/01, Fritsch, Chiari & Partner