

Austria

The purpose of this legal analysis is to discover the legal framework and practice of the respective Member State and whether the costs of bringing a case are a barrier to access to justice.

I. Country information

Currency: *Euro (EUR)*

EUR exchange rate: -

GDP per capita: *EUR 30.900 (2008) – 123,1% of EU average*

Human Development Index: *0.951 (2008 – 14th position in the list of countries)*

II. Administrative and judicial procedural costs

A) Administrative procedural costs

What is the amount of procedural duty or fee to be paid for an appeal (in EUR)?

As a general rule an appeal in an administrative procedure is practically free of charge. Only EUR 13,20 has to be paid for an appeal (Art 14 Tarifpost 6 par 1 Act on Duties (Gebührengesetz - GG)). There is an exception for administrative criminal proceedings where 20% of the penalty that has been imposed at a lower instance has to be paid if the appeal is not successful at least in parts (Arts 64 – 66 Verwaltungsstrafgesetz/Administrative Penal Act).

Who pays the procedural duty or fee for an appeal?

The appellant has to bear the cost for the appeal.

Is there a waiver or an allowance, based either on the nature of the case or on personal characteristics of the appellant?

No.

Who bears the costs if the appeal was successful (is there a refund of procedural duty or fee)?

No.

Who bears the costs of evidence in an administrative procedure?

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The general rule according to Art 74 General Administrative Law Act (Allgemeines Verwaltungsverfahrensgesetz, 1991, AVG) that each party to the proceedings bears his/her costs him/herself.

How much is approximately the total cost of evidence in a typical environmental administrative procedure (in EUR)?

Even though the participation in administrative proceedings and the appeal against the decision of an authority is free of charge, costs can be prohibitively high, in particular in EIA proceedings. The reason for this is the fact that within EIA, in order to have a realistic chance of success, participants have to engage legal and technical assistance. The costs can in this case add up to EUR 15.000 to 20.000, depending primarily on the costs for expert opinions. Also without expert opinions the cost for legal assistance will be prohibitively high, minimum around EUR 5.000.

B) Judicial procedural costs

a) Administrative¹ judicial procedure

What is the amount of procedural duty or fee to be paid for the start of a procedure (in EUR)?

When a case is to be decided by the Highest Administrative court or by the Constitutional Court, a fee of EUR 220 is to be deposited in the beginning of the proceeding (Art 24 par 3 No 2 Verwaltungsgerichtshofgesetz/Highest Administrative Court Act (VwGG) and Art 17a No 1 Verfassungsgerichtshofgesetz/Constitutional Court Act (VfGG)). It has to be noted that before these two courts the representation by a lawyer is mandatory. This may raise the possible cost (in case of loss of the lawsuit) to several thousand Euros depending on the agreement with the lawyer.

What is the amount of procedural duty or fee to be paid for an appeal (in EUR)?

Also in this case EUR 13,20 have to be paid for an appeal according to Art 14 Tarifpost 6 par 1 GG. For proceedings before the Highest Administrative Court or the Constitutional Court it is EUR 220 respectively.

Who pays the aforementioned procedural duty or fee?

The fee has to be paid by the natural or legal person filing the appeal at the competent court or tribunal.

Is there a waiver or an allowance, based either on the nature of the case or on personal

¹ Administrative judicial procedures are court procedures where the procedural or substantive legality of an administrative decision is decided by a court of law, based on the motion of a plaintiff against the administrative body as a defendant.

characteristics of the appellant?

There are a couple of provisions regulating waivers for example for victims of the Nazi regime and there is the possibility to apply for legal aid in administrative penal proceedings. Both possibilities are not relevant in practice for environmental proceedings.

Who bears the costs of evidence in the procedure?

According to Art 74 of the General Administrative Law Act (Allgemeines Verwaltungsverfahrensgesetz 1991, AVG) each participant to the proceeding has to bear the costs arising from the proceedings him/herself.

How much is approximately the total cost of evidence in a typical environmental administrative judicial procedure (in EUR)?

There is no information available.

To what extent does the “loser pays principle” prevail in such procedures?

Between the parties involved in the procedures the implementation of the “loser pays principle” is an exception. In most cases the determination that expenses of other involved persons has to be covered will only be made if, for example due to unexcused absence, those expenditures are frustrated (e.g. a witness or an expert does not show up for a hearing).

The “loser pays principle” is not applied before the UVS regarding environmental proceedings and not at all before the UUS (UVS = Unabhängiger Verwaltungssenat, Independent Administrative Senate and UUS = Unabhängiger Umweltsenat, Independent Environmental Senate). The only relevant example is the proceeding before the highest administrative court. When the appellant loses the case against the authority, s/he has to pay a sum based on values contained in the Ordinance on Reimbursement before the Highest Administrative Court 2008 (VwGH Aufwandersatzverordnung 2008). According to the current values this adds up to EUR 1.300. In case s/he prevails a lump sum will be paid (around EUR 2.500). In addition there are provisions in the VfGG (Art 61a and Art 88) and the VwGG (Arts 47 to 60) determining how the “loser pays principle” is supposed to be applied in detail.

b) Civil² judicial procedure

What is the amount of procedural duty or fee to be paid for the start of a procedure (in EUR)?

² Civil judicial procedures are court procedures where the legality of a natural or legal person's conduct is decided by a court of law, based on the motion of a plaintiff against the natural or legal person as a defendant.

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The amount to be payed is dependent on the value of the claim. The exact amounts are contained in the Act on Court Costs (Gerichtsgebührengesetz, GGG). They can vary between EUR 19 (for a claim worth less than EUR 150) and EUR 1.661 plus 1,2% of the value of the claim (for a claim worth more than EUR 363.360) (TarifPost 1 GGG).

What is the amount of procedural duty or fee to be paid for an appeal (in EUR)?

Also in this case the procedural fee depends on the value of the claim. The amount varies between EUR 15 (for a claim worth less than EUR 150) and EUR 2.443 plus 1,8% of the value of the claim (for a claim worth more than EUR 363.360) (TarifPost 2 GGG). It has to be noted that representation by a lawyer is mandatory in appeal procedures (Art 463 par 2 Civil Judicial Procedure Act (Zivilprozessordnung, ZPO)) which leads to increased cost for the plaintiff.

Who pays the aforementioned procedural duty or fee?

The procedural (or court) fee in general has to be paid by the plaintiff (Art 7 par 1 No 1 GGG).

Is there a waiver or an allowance, based either on the nature of the case or on personal characteristics of the appellant?

If legal aid (according to the Arts 63-73 ZPO) is granted, according to Art 9 GGG, the court fee does not need to be paid. Other waivers only concern state organs according to Art 10 GGG.

Who bears the costs of evidence in the procedure?

Every party to the procedure has to bear his/her own costs, including the cost for evidence in the first place (Art 40 par 1 ZPO). Because the “loser pays principle” prevails in civil judicial proceedings, the costs of evidence (for example for expert opinions) has to be covered by the loser proportionately (see below).

How much is approximately the total cost of evidence in a typical environmental civil judicial procedure (in EUR)?

This question can not be answered within this analysis because there are not enough examples for civil judicial procedures concerning environmental questions.

To what extent does the “loser pays principle” prevail in such procedures?

The loser has to cover his/her own costs including the court fee as well as the costs of the opponent. The costs are seperated proportionaltely according to the “quota” of winning or losing (Art 43 ZPO). For example if the plaintiff demands EUR 10.000 and is granted EUR 5.000, each of the opponents has to bear his/her own cost. The separation of the cost is decided by the court and pronounced as part of the decision.

c) Legal aid (optional questions)

Is there a state supported scheme in your country for providing legal assistance in administrative or judicial procedures?

Yes, there is a scheme for legal aid in Austria.

If your answer is yes, please detail briefly:

The provisions governing legal aid are Arts 63 to 73 ZPO. Basically legal aid can be demanded if a party to the procedure is not able to cover the cost of the procedure without jeopardizing its “necessary subsistence”. “Necessary subsistence” is the subsistence necessary to support a “simple lifestyle”, him/her and family (Art 65 ZPO).

Who can use such legal aid?

Anyone fulfilling the criteria mentioned above.

What kind of procedures is eligible for legal aid?

Art 8 of the Act on Court Costs (Gerichtsgebührengesetz, GGG) determines that the general provision on legal aid (Art 63 to 73 Civil Judicial Procedure Act (Zivilprozessordnung, ZPO) are to be applied to all kinds of proceedings, therefore also to those outside the civil judicial procedures unless there are specific provisions in the corresponding acts. Also before the VwGH the provisions of the ZPO are to be applied mutatis mutandis (Art 61 VwGG). There are specific provisions on legal aid regarding procedures before the highest courts (see above).

To what extent does legal aid cover full costs of legal assistance in the procedures?

According to Art 64 par 1 ZPO all kinds of costs (including court fees, cost of evidence, cost of an attorney) can be covered by the legal aid scheme.

III. Country evaluation

Which are the most significant [a) administrative, b) administrative judicial, c) civil judicial] procedures in your country in the protection of the environment?

- a. *EIA procedures and IPPC permits, individual environmental permits for projects not covered by EIA and IPPC;*
- b. *administrative judicial review of the above mentioned permits;*

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- c. *claims of neighbors against activities endangering or damaging their property or health, no NGO involvement in civil judicial procedures, no protection of the general environment.*

In Austria, recourse to civil courts regarding environmental law issues does not happen regularly. The costs at stake may be high if a civil judicial procedure is started, nevertheless the real access to justice problem lies somewhere else.

The reason why in Austria there only very few examples of civil court cases based on environmental law provisions is that legal action against an act or omission by an authority or against damage done to the environment by an operator can only be taken if “damage” has occurred. “Damage” in this sense can only be damage to property or to health, damage to the environment, which is not covered by these two options, cannot be considered.

This limits the amount of possible plaintiffs to a minimum, namely to those persons whose property rights have been infringed, for example the owner of a well which has been poisoned by an industrial facility close by. This situation is problematic in two ways. On the one hand there is no possibility for precautionary action, because it is only possible to file a complaint ex post, therefore after the damage has occurred. On the other hand everyone apart from those directly and/or personally affected are excluded from the proceedings. An NGO will in most cases not be able to fulfill the criterion of a damage to health or property. A complaint cannot be based on general environmental law because an infringement does not affect anybody, neither an NGO nor a natural or legal person, in the sense of the demanded precondition.

If a civil judicial procedure takes place further problems arise. It is very difficult to provide evidence for the causality of an administrative act or omission or of the misconduct of an operator for an environmental damage (meaning damage to property or health otherwise the proceeding wouldn't have taken place at all). At the same time the quantification of the damage is causing problems. The determination of the value of a claim is important because the court fee, which has to be paid by the plaintiff (as well as the determination of the competent court), is dependent on this amount. At the same time the quantification of environmental damage is in most cases very difficult.

An example for a problematic court case is the case Wabl vs. the city of Graz and the Province of Styria. The case revolved around the failure of authorities to introduce air quality action plans to reach a compliance with PM10 limit values which had been excessively exceeded. The plaintiff had to claim damage to his health in order to be able to file the complaint. Up to now he was not able to prove the causality of specific omissions of the competent authorities for his health problems. It is very hard to provide proof for this.

*For information on the case please see OEKOBUERO Newsflash edition July 2008:
<http://www.oekobuero.at/start.asp?showmenu=yes&fr=&b=1441&ID=223607>*

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According to your evaluation, does your country meet the requirements of the Aarhus Convention regarding expenses of seeking administrative and/or judicial remedies?

No.

In particular the cost for evidence in EIA proceedings, the lack of possibility to initiate an administrative environmental proceeding and the limit to access civil judicial procedures as a remedial possibility are decisive factors to conclude that Austria does not meet the requirements of the Aarhus Convention as regards access to justice in general and as regards the expenses of seeking remedies in specific.

What arguments support your above position?

No possibility for the public to initiate an administrative procedure. High costs for evidence in administrative judicial procedures. Limited access to judicial remedies in the civil judicial procedure. For an argumentation see above.

What recommendations can you formulate in this matter?

There is a variety of suggestions formulated by NGOs in the past years, in particular regarding the cost of evidence in the most important environmental procedure, the EIA procedure. In order to provide for effective public participation in EIA procedures funding has to be provided. The idea is to establish a “public participation fund” providing for funding for legal aid and for expert opinions for NGOs or local groups participating in the procedure.

The introduction of an Act on Environmental Liability covering damages done to the environment could provide for more diligence from the side of operators and authorities. An interest of NGOs and local groups in the protection of the environment (provided for by the law) supplementing the dogma of “damage done to health or property” as the only basis for civil judicial remedies should be opened up for civil society.

IV. Contact information:

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