



# **Barriers of Access to Justice**

## **Austria**

**Clarification and assessment of status quo regarding barriers of access to justice in the Member States**

Country Study

***Justice and Environment 2018***

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#### I. INTRODUCTION

There are a number of barriers in front of effective access to justice (legislative and practical) in each Member State. The current survey is supposed to produce a clear, first-hand information from practitioners from the EU MS on the range and gravity of barriers of effective access to justice in environmental matters. For this, we are using a combination of research and polling to identify and categorize the barriers of access to justice. There will be 5 major blocks identified by the objectives of regulation and there will be 3 types of questions in each block, i.e. legislative, practical and scoring. Within each type, there may be more questions depending on the number of issues analyzed.

#### II. THE BARRIERS IN DETAIL

Objective	Indicator (example)
Sufficient legal standing	conditions of standing for individuals (e.g. affectedness) conditions of standing for eNGOs preconditions of access (e.g. prior participation)
a) legislation	<ul style="list-style-type: none"><li>- what are the criteria of legal standing for individuals in environmental matters?</li></ul> <p>In terms of the area of administrative law:</p> <p>Standing criteria are laid out in either the General Administrative Procedures Act and the sectoral law(s) in question, i.e., the EIA Law, water law provisions, etc. Generally, Austria follows a strict impairment of rights doctrine.</p> <p>Neighbours, e.g. in water law, EIA procedures</p> <ul style="list-style-type: none"><li>- In EIA procedures individuals may participate as part of a citizen initiative, or as neighbours.</li><li>- In certain cases for industrial installations affected neighbours also have standing (GewO), and under the construction laws of the federal state in question</li><li>- In ELD cases: individuals who may have been affected by environmental damages</li><li>- In other cases (nature protection, often water law...): no legal standing for individuals granted by the Austrian law.</li></ul>

In terms of civil law:

- §368 ABGB provides civil causes of action for neighbouring property owners in typical nuisance type case, such as due to noise, emissions, smells, polluted water, etc.

In terms of criminal law:

- The penal code (StGB, see especially §§180-183) lays out a number of provisions, yet unsurprisingly the right of prosecution belongs to the public prosecutor and the public has no legal claim to a conviction nor can the public be a party to the criminal proceeding. Under certain limited circumstances there is a duty for public authorities who have been informed of certain criminal acts to inform the prosecutor and the failure to do so can give rise to penalties of their own.
- what are the criteria of legal standing for eNGOs in environmental matters?

Generally, the application of the same restrictive impairment of rights doctrine has meant eNGOs lack standing. Only in a few areas eNGOs have enjoyed special status and in the wake of the “Protect” case are now being granted standing.

- In EIA cases: eNGOs need the official recognition by the environmental ministry; the requirements are: 1) Environmental protection needs to be the primary aim of the organization. This aim has to be reflected in the organisation’s statutes. (2) The organisation works on a non-profit basis. (3) The organization has to fulfil point 1) for more than three years before the application. There are some concerns that the criteria may become stricter in the future
- Since the CJEU decided in the case “Protect”, several administrative courts have given legal standing to eNGOs, e.g. in a nature protection case and a water case.
- are there preconditions of access to justice in environmental matters (besides of course fulfilling the criteria of legal standing)?
  - In EIA cases eNGOs have to register at the ministry and prove that they fulfill certain criteria. (See above).
  - Citizen initiatives have to hand in 200 signatures of individuals eligible to vote in the municipality or adjacent municipality.

	<ul style="list-style-type: none"> <li>• Parties invited by the authorities have to participate in the administrative procedure, otherwise they will “lose” their legal standing.</li> </ul>
<p>b) practice</p>	<ul style="list-style-type: none"> <li>- do the criteria of legal standing for individuals in environmental matters pose a barrier to access to justice? <ul style="list-style-type: none"> <li>• Yes. However, some changes in the legislation are expected due to the recent CJEU decision “Protect”, which may address some – but not all – of these barriers.</li> </ul> </li>   <li>- do the criteria of legal standing for eNGOs in environmental matters pose a barrier to access to justice? <ul style="list-style-type: none"> <li>• Since the CJEU decided in the case “Protect” in December 2017, administrative courts granted legal standing to eNGOs in a nature protection case as well as in a water case. A reaction by the lawmakers is expected.</li> <li>• However, it is clear that not all barriers will be removed, i.e., proper implementation of the access to justice provisions will take place only in limited (EU-related) environmental sectors.</li> </ul> </li>   <li>- do the preconditions of access to justice in environmental matters (if they exist) pose a barrier to access to justice?</li>   <li>- The issue of the need to intervene timely in a procedure has become a problem in some cases, because (as the Protect case illustrates) it has not always been clear that a legally recognizable intervention could have been made in the first place. This legal issue is complex and the subject of litigation by ÖKOBÜRO concerning the <i>Schwarze Sulm</i> case (essentially appealing to the Highest Administrative Court the question of whether we were “an omitted party”, which would mean we had certain protected rights which were ignored and which could have serious effects for the decision-making at issue.</li>   <li>- Especially individuals and citizens’ initiatives report it is hard to always know that a procedure has been opened, let alone a decision made, making timely intervention in the procedure and/or timely appeals to the courts very difficult</li> </ul>

	<p>Caselaw of Interest:</p> <ul style="list-style-type: none"> <li>- VfGH 14.12.2016, V87/2014: An application of an eNGO concerning the repeal of an area planning regulation was rejected. The constitutional court argued that legal standing for eNGOs in this kind of procedure is neither granted by the Austrian constitutional law, nor by Art 9 Abs 3 of the Aarhus Convention.</li> </ul>
<p>c) scoring</p>	<p>On a scale of 1 to 5 please score the following in terms of how strongly they mean a barrier to access to justice in environmental matters:</p> <p>1: very weak, 2: weak, 3: intermediate, 4: strong, 5: very strong</p> <p>criteria of legal standing for individuals in environmental matters: 4</p> <p>criteria of legal standing for eNGOs in environmental matters: 4 (but moving towards 3)</p> <p>preconditions of access to justice in environmental matters: 3</p>

Objective	Indicator (example)
Availability of legal remedies and adequacy	<p>review against administrative acts or omissions</p> <p>review against actions or omissions of private persons</p> <p>scope of challenges brought in a review (review of substantive issues, of formal issues, of discretionary decisions, standard of review, general court competence to hear claims, etc.)</p> <p>availability of injunctive relief</p> <p>effective remedies available when challenges are successful</p>
a) legislation	<p>- is there a review of administrative acts by the court?</p> <p>Yes. Since 2014 administrative acts can be reviewed by the administrative courts. That is to say, the courts enjoy this competence, but due to the above standing restrictions (as well as associated restrictions on scope that also stem from the impairment of rights doctrine), many administrative acts remain unchallenged.</p> <p>- is there a review of administrative omissions by the court?</p> <p>If the omission is based on a decision or where there is a duty to make a decision and the right to apply for the initiation of a procedure exists, the parties may file a complaint against it. If there is no decision, parties may apply for a declaratory decision and initiate a complaint procedure against it afterwards. The applicant has to prove a “special legal interest” in terms of the declaratory decision, such as the lack of effective legal remedy against the omission. We call this a claim of omission (“<i>Säumnisbeschwerde</i>”).</p> <p>Following the “Protect Decision”, the Highest Administrative Court recognized an eNGOs right to challenge not just decisions, but also omissions Ra 2015/07/0074-6, from 19. February 2018. (This case related to air emissions/quality plans)</p> <p>But the problem is still in many cases registering an environmental problem to the competent authority is not viewed as a legally recognized application to start a procedure and triggers no “party” rights or obligations on the part of the administrative authority upon which such a claim of omission could be based. The national law implementing the EUTR is a key example. Under the EUTR the public should be able to bring in a so-called substantiated concern, but there are currently no administrative law provisions which would make this a lawfully recognized “application for a procedure”, meaning any inaction, omissions, delays, etc., cannot not be legally challenged in court.</p>

- is there a review of acts of private persons by the court?

Neighbours may bring action against emissions; individuals who may be affected by environmental damages may file an environmental complaint under the national legislation implementing the ELD (see to that effect the *Gert Folk* decision of the CJEU). There are still major problems implementing the ELD, however.

- is there a review of omissions of private persons by the court?

If there is a decision by an authority stating a private person's duty, it can be executed by the state. Individuals may report the omission to the authority. If there is no such decision, individuals may argue that they have a legal interest in filing a declaratory action (*Feststellungsklage*). As a result, the court needs to decide whether there is an unlawful omission or not.

- what is the scope of challenges brought in a review?

We are focusing mainly on administrative law here; a more detailed evaluation of civil and criminal law scope provisions and practice is not undertaken.

An administrative complaint may cover substantive and/or procedural reasons. The administrative court is not bound to the facts found by the authority.

- what kind of injunctive reliefs are available in environmental matters?

Complaints in the administrative procedure normally have a suspensive effect, the decision of the authority may not be executed until the court has decided upon the complaint. Some environmental laws grant exceptions from this general rule, additionally the authority may deny the suspensive effect due to the overriding interest of the other party.

On the other hand, an appeal "Revision" to the Highest Administrative Court normally has no suspensive effect, though this can be applied for and is given in certain limited contexts.

In the field of civil law (e.g. omissions, emissions...) injunctions may be granted by the court, if necessary to avert the threat of irreparable danger.

- what are the conditions of applying an injunctive relief by the court?

See directly below

b) practice	<ul style="list-style-type: none"> <li>- what is the scope and depth of review by the courts in practice?</li> </ul> <p>In cases of administrative law, the administrative courts do have the obligation to review the case in full depth just like an authority in the first instance would. This usually includes the option to see new evidence and hear experts/witnesses. While the court has to review all facts deemed necessary for a ruling, the scope of judicial review is usually set out by the complaints brought forward.</p> <p>In cases of civil law the scope and facts have to be presented by the complainants.</p> <ul style="list-style-type: none"> <li>- what is the practice of courts in applying injunctive relief in environmental cases?</li> </ul> <p>Usually, a complaint has suspensory effect on the decision of the authority, so the project is halted until a decision by the court is made. This can be ruled out, however, and is likely to change with upcoming amendments to the procedural law. Our experience of injunctive relief is not that good, as the courts are rather cautious to grant them. Special rules on injunctive relief can be found in some specialised laws, but are not part of the usual administrative court proceedings.</p> <p>See also the above comments regarding an appeal (Revision) to the Highest Administrative Court.</p> <ul style="list-style-type: none"> <li>- does this mean a barrier to effective access to justice?</li> </ul> <p>As long as there is a suspensory effect to complaints, injunctive relief is not an issue in most cases.</p> <ul style="list-style-type: none"> <li>- are the judicial remedies effective when challenges are successful?</li> </ul>
c) scoring	<p>On a scale of 1 to 5 please score the following in terms of how strongly they mean a barrier to access to justice in environmental matters:</p> <p>1: very weak, 2: weak, 3: intermediate, 4: strong, 5: very strong</p> <p>scope and depth of review by the courts: 3</p> <p>conditions of applying an injunctive relief: 3</p> <p>effectiveness of judicial remedies: 3</p>

Objective	Indicator (example)
Timeliness of access to justice	<p>deadline for submitting an administrative complaint: deadline for bringing a court action</p> <p>deadline set for administrative review</p> <p>deadline set for judicial review:</p> <p>deadline for requesting and granting an injunction</p> <p>average length of procedures: no general data available; for EIA procedures 18,4 months (median in 2016); 7 months from the time the authority has all necessary documents;</p>
a) legislation	<ul style="list-style-type: none"> <li>- what is the deadline for submitting an administrative remedy in environmental matters?</li> </ul> <p>We believe the Austrian situation is rather different here, at least since 2014, than many other countries, included for example Czechia. Would the Austrian Ombudsman in the case of maladministration count here (Volksanwaltschaft?) count? That is an extra-judicial remedy that can only be used where no legal remedies exist. There is no exhaustion of administrative remedies as such anymore – in other words, 1<sup>st</sup> instance decisions by competent authorities are challengeable (depending on the legal basis, federal or federal state) in the federal/federal state administrative court directly.</p> <p>The Volksanwaltschaft (ombudsmen) are thus a body that performs a complementary function only, and are not part of the link in the administrative/appeals chain.</p> <p>Please note the Austrian environmental ombudsmen are regulated by the applicable federal state laws and perform yet another function entirely (they are essentially charged with protecting the environment and enjoy special status as claimants under various laws, including the nature protection laws). While they can and do serve as an invaluable resource and point-of-contact for the public (<i>Anlaufstelle</i>), and may do so even more in the future, they are neither intervening administrative authorities which must first be exhausted, nor proper ombudsmen as understood in the classic sense. Rather they are special bodies which hold special claimant rights.</p> <ul style="list-style-type: none"> <li>- what is the deadline for bringing a court action in environmental matters?</li> </ul> <p>4 weeks after delivery of the decision</p> <ul style="list-style-type: none"> <li>- what is the deadline set for the competent authority for administrative review?</li> </ul> <p>N/A</p>

	<ul style="list-style-type: none"> <li>- what is the deadline set for the court for judicial review?</li> </ul> <p>The administrative court has to decide within six months.</p> <p>Four weeks after delivery of the written decision. If the decision is announced during the hearing, the legal remedy (“Berufung”) needs to be announced within 14 days after delivery of the protocol.</p>
b) practice	<ul style="list-style-type: none"> <li>- what is the average actual duration of an administrative review process?</li> </ul> <p>n/a</p> <ul style="list-style-type: none"> <li>- what is the average actual duration of a judicial review process?</li> </ul> <p>?</p> <ul style="list-style-type: none"> <li>- what is the average actual duration of a judicial case against a private person?</li> </ul> <p>Civil court procedures have a median duration of 6 months (district level) respectively 12 months (federal state level).</p> <ul style="list-style-type: none"> <li>- what is the average actual duration of granting an injunction?</li> </ul> <p>n/a</p>
c) scoring	<p>On a scale of 1 to 5 please score the following in terms of how strongly they mean a barrier to access to justice in environmental matters:</p> <p>1: very weak, 2: weak, 3: intermediate, 4: strong, 5: very strong</p> <p>the average actual duration of an administrative review process: N/A</p> <p>the average actual duration of a judicial review process: 3</p> <p>the average actual duration of granting an injunction: ?</p>

Objective	Indicator (example)
Costs of access to justice	fees for administrative review: fees for judicial review: rules of bearing costs of procedures: costs for/necessity of expertise: cost capping mechanisms, legal aid, etc.: A
a) legislation	<ul style="list-style-type: none"> <li>- what are the fees for administrative review in environmental matters?</li> </ul> <p>The Volksanwaltschaft (Ombudsman) is cost-free. But note as outlined above this is an extra-judicial body that can only be used where there are no legal remedies. This is not some level of review that needs to be exhausted prior to judicial remedies.</p> <ul style="list-style-type: none"> <li>- what are the fees for judicial review in environmental matters?</li> </ul> <p>30 Euros filing fee (administrative court); 240 Euros filing fees (Highest Administrative Court, Constitutional Court)</p> <p>For civil law: Fees depend on the amount in dispute (e.g. amount in dispute is 150 Euro – 300 Euro → 41 Euros fee for filing)</p> <ul style="list-style-type: none"> <li>- what are the rules of bearing costs of procedures in environmental matters?</li> </ul> <p>There are no special rules concerning environmental matters.</p> <p>In administrative procedures the authority bears the costs for expertise, if the expert belongs to the staff of the authority or administrative court. In other cases the party who caused the order of the expert. This latter rule caused major concerns in an ELD case stemming from 2016. (Cited below).</p> <p>In civil procedures parties carry their costs on their own, the prevailing party may claim reimbursement by the opponent. The court determines the extent of the reimbursement as part of the decision. Eligible for compensation are only the “necessary” costs.</p> <ul style="list-style-type: none"> <li>- are there any cost capping mechanisms, legal aid, etc.?</li> </ul> <p>There is the possibility to apply for legal aid in the administrative procedure as well as in the civil procedure. The requirements are a low income and the necessity of legal aid for the applicant in the relevant case.</p> <p>There is no cost capping mechanism.</p>

b) practice

- what are the average actual fees for administrative review in environmental matters?

Without extra costs for experts or legal representation, costs in the regular administrative procedures remain under 100 Euros. Legal remedies to the highest courts (constitutional court, highest administrative court) are very cost intensive, as it is necessary to hire an attorney to file the complaint, which can easily cost tens of thousands of Euros (For example ÖKOBÜRO's recent appeal regarding *Schwarze Sulm*, will cost five figures despite only needing a few days). Filing fees are 240 Euros. The prevailing party may claim cost reimbursement by the opponent.

- what are the average actual fees for judicial review in environmental matters?

Costs in civil cases depend highly on the amount in dispute, the duration of the procedure and the necessity of expert's opinion. Only attorneys may file legal remedies against decisions of the first instance.

- how do courts apply the rules of bearing costs of procedures in environmental matters?

The Kwizda case (Provincial Administrative Court of Lower Austria, LVwG-AV-31/006-201) was a precedent case that had a significant chilling effect for purposes of not only the ELD, but also raises concerns once standing criteria under article 9(3) are remedied.

- what are the typical costs in environmental cases?

See answers above. Costs depend highly on which kind of procedure is applicable. In general, the costs in administrative procedures in terms of direct fees are much lower than in civil procedures. Lawyer's fees and expert fees are the main issue.

- how high are the costs of experts?

Depending on the scope of the expertise prices may range between several hundred and several thousand Euros.

- do the cost capping mechanisms, legal aid, etc. work in practice?

ÖKOBÜRO has no experience concerning this topic. In civil cases the costs deriving from reimbursement claims are not included by legal aid. Therefore a high risk remains even if fees and an attorney are financed by the state.

Even if the representation of an attorney is financed as a consequence of an application for legal aid, it is not being granted that the assigned attorney is an expert in the field of environmental law. The applicant

	<p>has no claim to choose a specific attorney even if it is possible to give preferences.</p> <p>There are no cost capping mechanisms in the Austrian law.</p> <ul style="list-style-type: none"> <li>- cite one or two court cases for any of the preceding issues, e.g. expert fees, legal aid, etc.:</li> <li>- GLOBAL 2000 had to pay near to 4.000 Euros for the commissioning of an expertise appointed by the court</li> </ul> <p>In the Kwizda case (see above).</p>
<p>c) scoring</p>	<p>On a scale of 1 to 5 please score the following in terms of how strongly they mean a barrier to access to justice in environmental matters:</p> <p>1: very weak, 2: weak, 3: intermediate, 4: strong, 5: very strong</p> <p>average actual fees for administrative review: 1</p> <p>average actual fees for judicial review: 1</p> <p>bearing costs of procedures in environmental matters: 4</p> <p>typical costs in environmental cases: 3/difficult to determine because standing requirements have not permitted cases to be brought forward to begin with</p> <p>functioning of cost capping mechanisms, legal aid, etc.: 3</p>

Objective	Indicator (example)
Availability of capacity building	<p>guidance on access to justice in environmental matters available for the public</p> <p>trainings provided for public officials and judges in access to justice</p> <p>access to information regarding judgments in relevant cases</p> <p>recognition of and state financial support to environmental legal advisory services by/to eNGOs</p>
a) legislation	<ul style="list-style-type: none"> <li>- is there an obligation by law to have guidance on access to justice in environmental matters available for the public?</li> </ul> <p>No.</p> <ul style="list-style-type: none"> <li>- are there trainings prescribed for public officials and judges in access to justice?</li> </ul> <p>No.</p> <ul style="list-style-type: none"> <li>- is access to information regarding judgments in environmental cases regulated by law?</li> </ul> <p>Believe so – but they are, see below as to practice.</p> <ul style="list-style-type: none"> <li>- are environmental legal advisory services and eNGOs recognized by law?</li> </ul> <p>Yes. There are nine environmental ombudsmen (one per country) who may be consulted concerning questions of environmental law. ENGos may register at the ministry for sustainability and tourism.</p>
b) practice	<ul style="list-style-type: none"> <li>- is there a guidance on access to justice in environmental matters available for the public?</li> </ul> <p>ÖB regularly publishes comments, studies, etc. on the subject – the environmental ministry shares information with the relevant authorities, but there is no central or definitive guidance, no.</p> <ul style="list-style-type: none"> <li>- are there trainings for public officials and judges in access to justice?</li> </ul> <p>No, this has been specifically noted by the ACCC which has been charged with reviewing implementation of the MOP Decision against Austria which includes provisions concerning capacity building – although a number of events were held; it was unclear whether in fact the requisite public officials and judges were in fact reached and it seems difficult indeed to reach these most important target groups, not merely for NGOs, but for the ministry. Thus only one lawyer was even present at a major capacity-building event in 2017.</p>

	<ul style="list-style-type: none"> <li>- is access to information regarding judgments in environmental cases ensured?</li> </ul> <p>Judgements by the highest courts can be read online, the same goes for decisions of administrative courts and civil courts in many cases (<a href="http://www.ris.bka.gv">www.ris.bka.gv</a>). Decisions by administrative authorities are not published online.</p> <ul style="list-style-type: none"> <li>- are environmental legal advisory services and eNGOs supported by the state?</li> </ul> <p>Yes.</p> <ul style="list-style-type: none"> <li>- cite one or two court cases for any of the preceding issues, e.g. guidance to the public, eNGO support, etc.</li> </ul>
c) scoring	<p>On a scale of 1 to 5 please score the following in terms of how strongly they mean a barrier to access to justice in environmental matters:</p> <p>1: very weak, 2: weak, 3: intermediate, 4: strong, 5: very strong</p> <p>lack of guidance on access to justice in environmental matters available for the public: 4</p> <p>lack of trainings for public officials and judges in access to justice: 5</p> <p>no access to information regarding judgments in environmental cases: 1</p> <p>no support for environmental legal advisory services and eNGOs: 3</p>

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