

[Home](#) > Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

## 1.1. Decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives<sup>[1]</sup>

The Aarhus Participation Act 2018 (*Aarhus Beteiligungsgesetz 2018*) – an amendment of the Waste Management Act (*Abfallwirtschaftsgesetz 2002 – AWG 2002*), Water Act (*Wasserrechtsgesetz 1959 – WRG 1959*) and Air Pollution Control Act (*Immissionsschutzgesetz – Luft – IG-L*) – and the Air Emission Act (*Emissionsgesetz-Luft 2018*) introduced provisions on access to justice in the areas of waste, water and air protection on federal level.

On the provincial level, main provisions on access to justice can be found in the different Nature Protection Acts of the federal provinces. Apart from Styria and Upper Austria, provinces have also introduced provisions on access to justice in their hunting legislation (*Jagdgesetze*). Burgenland, Carinthia, Salzburg, Tyrol, and Vorarlberg have additionally introduced similar provisions in their Fisheries Acts (*Fischereigesetze*). The province of Vienna has recently sent out for public consultation a draft law amending its corresponding legislation (*Wiener Nationalparkgesetz, Wiener Naturschutzgesetz, Wiener Fischereigesetz* and *Wiener Jagdgesetz*).

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission and its content (in particular, the conditions to be fulfilled and any time-limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The appeal against the first level administrative decision must be submitted to the authority that issued the decision in first instance. This authority then has the option of settling the complaint by means of a preliminary decision (*Beschwerdevorentscheidung*), which has to be issued within two months. The concerned party can then file an application for submission (*Vorlageantrag*) within two weeks to the authority that issued the decision and ask for the complaint to be submitted to the administrative court for decision. The administrative court subsequently decides on the matter (unless the complaint is to be dismissed or the proceedings discontinued). If the authority has failed to investigate the matter sufficiently, the Administrative Court can overturn the contested decision and refer the matter back to the authority to issue a new decision. The authority is bound by the legal assessment on which the administrative Court based its decision.

The requirements for the recognition of an environmental NGO as being entitled to appeal are laid down in Section 19 EIA Act.<sup>[2]</sup> This provision requires it to be organised in the form of a non-profit organisation for at least three years, to have at least 100 members and to have environmental protection as its main objective. Federations must comprise at least five member associations. All organisations must prove every three years that they still meet the recognition requirements.

Individuals are entitled to review procedures if their subjective rights are affected by a decision. This can be the case in water, clean air, waste management or hunting and fishing procedures.

Generally, decisions of an administrative authority must be appealed against within four weeks after the decision has been issued. The appeal needs to be made in written form and must include the name of the decision, the authority concerned, the reasons for appeal and actions required.

Even before the entry into force of the Aarhus Participation Act, national courts were inclined to grant access to justice by direct application of EU legislation with reference to European case-law.<sup>[3]</sup> Recent cases show that this

practice remains in areas not regulated by the Aarhus Participation Act, such as the Forestry Act (*Forstgesetz 1975 - ForstG*).<sup>[4]</sup>

Although authorities may not directly grant access to justice where it is not provided by national law, for cases determined by European law access to justice rights are mainly granted before regional Administrative Courts. There are however still decisions by these courts, even within the realm of EU law, denying legal standing and access to justice or restricting it.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

If an appeal is filed, Administrative Courts can review the decision in terms of its procedural as well as substantive legality. 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.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Administrative decisions in environmental law can (only) be challenged directly at the Federal Administrative Court, which serves as the administrative review body in environmental procedures. The appeal, however, must first be submitted to the authority that issued the decision in first instance. This authority then has the option of settling the complaint by means of a preliminary decision (*Beschwerdevorentscheidung*; see 2.1.1.).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

In general, the principle of preclusion (*Präklusion*) applies:<sup>[5]</sup> Except for the project applicant, any party loses its party status and thus standing if it does not raise any objections until at least one day before the hearing or during the hearing. However, preclusion can only occur if the hearing was published properly as determined in Section 42 [General Administrative Procedure Act](#) (*Allgemeines Verwaltungsverfahrensgesetz 1991 - AVG*) and in the area-specific legislation (in most environmental procedures, an electronic online platform is used).

Regarding environmental organisations, the preclusion rules differ in each legislative act. Sometimes it is sufficient for the NGO to elaborate in its appeal why the points in question are being raised for the first time; in other cases it is not possible to file an appeal if the NGO has not submitted a statement in the preceding administrative procedure.<sup>[6]</sup>

5) Are there some grounds/arguments precluded from the judicial review phase?

Individuals, apart from the project applicant, must allege interference with the subjective publicly granted rights.

In water procedures, environmental organisations may only raise arguments concerning potentially significant adverse effects on water quality.<sup>[7]</sup> In waste management procedures, access to justice for environmental organisations is limited to breaches of EU environmental law.<sup>[8]</sup> In procedures regarding air quality plans or national air pollution control programmes, persons need to be directly concerned.<sup>[9]</sup> Similar limitations can be found in most provincial provisions.

6) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

The right to a fair trial derives from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which has constitutional status in Austria. This includes the right to a fair trial in administrative justice. Furthermore, the right to party status derives from the constitutional principle of equality.<sup>[10]</sup>

Access to justice by the public in environmental trials aims to grant standing to all actors who are perceived as having a substantial interest in the respective case. They have the possibility to make known the elements on which their claim is based and can discuss any claim, evidence or document presented to the judge through an intervention mechanism. However, economic inequalities between parties (despite pro bono legal assistance), e.g. because of costly expert opinions, remain.

7) How is the notion of “timely” implemented by the national legislation?

Regarding interventions by parties, the notion of “timely” is interpreted as “submitted within the legal timeframe”, or in case of a hearing, until the date of the hearing. This is mostly decided on a case-by-case basis. E.g. if there are new facts or evidence presented in a complaint, the authority or the court must notify the other parties thereof without delay and give them the opportunity to comment within a reasonable period of no longer than two weeks”, or in case of a hearing, until the hearing.

Regarding the decision-making obligation, authorities and courts are generally asked to issue decisions as soon as possible and “without unnecessary delay” (*ohne unnötigen Aufschub*), no later than the given deadline.[11] If the authority or court has not made a decision on a matter within six months or, if the law provides for a shorter or longer period allowed for a decision, within that period, parties can file a complaint alleging breach of the duty to reach a timely decision. In case of authorities the respective Administrative Court decides on the complaint (*Säumnisbeschwerde*), in case of Administrative Courts (*Fristsetzungsantrag*), the Supreme Administrative Court. The complaint is first filed with the court or authority who has the chance to make up for its omission within two weeks.

Administrative courts must decide within a timeframe of at maximum 6 months.[12]

8) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

There is no injunctive relief system, but an appeal generally has suspensive effect according to the general administrative rules of procedure. During the preliminary proceedings, the administrative authority may exclude the suspensive effect of the appeal, if – after weighing public interests and interest of other parties concerned – early enforcement of the decision is required due to the risk of delay. The Administrative Court can rule out the suspensive effect for the same reason. According to certain provisions such as Section 43a of the Upper Austrian Nature and Landscape Protection Act (*Oö. Natur- und Landschaftsschutzgesetz 2001 – Oö. NSchG 2001*), the suspensive effect of appeals is excluded unless the authority grants it upon application.

9) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive, and do these include express statutory reference to a requirement that costs should not be prohibitive?

Legal costs and fees in judicial review consist of court fees (to be paid when filing a claim or appeal), lawyers’ fees and actual expenses such as expert/translator costs and travel costs of witnesses. Lawyers have to be paid for each individual performance which the lawyer makes in the course of the proceeding. The parties’ own costs, such as internal investigations costs or the costs to prepare the proceedings, are not considered as reimbursable.

There are no administrative review procedures, as complaints against decisions must be addressed to the Administrative Courts. In review proceedings before the administrative Courts each party shall bear all its costs incurred.[13] Unless provided differently, the authority bears the costs incurred for its activities performed in the administrative proceeding *ex officio*.

For administrative procedures there is a cost category for every motion. The cost categories are stated in the Austrian Official Tax Regulation (*Bundesverwaltungsabgabenverordnung 1983 – BvwAbgV*).

The most costly part of filing an administrative appeal is usually the submission of expert opinions. Expert fees are subject to wide fluctuations, depending on every individual case. The expert fees for the evaluation of major projects in different fields (e.g. a project with an amplitude of 10 acres or transport infrastructure of at least 10 km length) without detailed on-site research can range up to EUR 50.000,-. It is also possible that the parties engage “private experts” to provide a report on a topic. However, these reports are only treated as private documentation and prove nothing but the opinion of the author. There are no statutory provisions avoiding prohibiting costs of expert opinions.

10) Can the court provide an exemption from procedural costs, duties, filing fees, taxation of costs, etc.? Any other national characteristics linked to this topic?

If someone has a low income and is in a precarious financial situation, it is possible to apply for legal aid. Legal aid

may be granted if it is covered by Article 6 ECHR or Article 47 ECFR. Part of the legal aid might be as well he temporary exemption from procedural costs. Legal aid must be applied for by the date of filing the complaint at the latest. Part of the legal aid might be temporary exemption from the procedural costs.

## 1.2. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with national implementing legislation for the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[14]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Implementing provisions to the SEA Directive on Federal and Provincial level currently do not grant members of the public access to review procedures. There is no option to challenge either the substance or procedural issues such as ineffective or missing public participation.

The only option to challenge a plan or programme exists if it was issued as a law[15] or ordinance[16]. This right to review before the Constitutional Court, however, is limited to a small number of persons (see 2.2.2.)

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Regarding constitutional rights, Article 144 of the Federal Constitutional Law provides for individuals to make claims before the Constitutional Court (*Verfassungsgerichtshof - VfGH*) if their fundamental rights are infringed. Its basic requirements are the interference with the individual's "subjective right", i.e. that the party can only object to norms that exist to protect an individual on the one hand, and an infringement of an individual's fundamental right on the other hand. Constitutional rights that can be linked to environmental protection are, for example, the right to justice, the right to life, the right to health, the right to respect for private and family life.

The scope of review if the Constitutional Court includes the conformity of ordinances with constitutional or legal provisions as well as with provision of underlying ordinances - from a procedural as well as a substantive aspect.[17] If the Constitutional Court pronounces an act or ordinance to be unconstitutional or illegal, all courts and administrative authorities are bound by the Constitutional Court's decision. The law or ordinance continues to apply to the circumstances affected before the ruling. Only the case in point is exempted from this rule.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

For an application to the Constitutional Court, administrative review procedures must be exhausted in case of administrative decisions. However, as pointed out above under 2.2.1, SEA legislation in general does not provide for administrative review of members of the public.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure - to make comments, participate at hearing, etc.?

As there are no specific regulations on access to justice in the area of SEA, there are no relevant requirements.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

There are no rules on injunctive relief in this regard.

If the Constitutional Court pronounces an act or ordinance to be unconstitutional, all courts and administrative authorities are bound by the Constitutional Court's decision. The law or ordinance continues to apply to the circumstances affected before the ruling. Only the case in point is exempted from this rule.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The fee for filing an appeal with the Constitutional Court is EUR 240. Legal assistance is required. Legal aid or pro bono legal assistance (*Verfahrenshilfe*) can be granted in the scope of applicability of Article 6(1) ECHR or Article 47 ECFR.

Apart from the regulated lawyer's fees according to the Attorney's Tariff Act (*Rechtsanwaltstarifgesetz*) (see 2.1.9), there are no statutory guarantees that costs are not prohibitive.

### 1.3. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with the public participation requirements of Article 7 of the Aarhus Convention in respect of plans and programmes not submitted to the procedures set out in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[18]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

There are no general provisions granting members of the public access to review procedures according to Article 7 of the Aarhus Convention. There is neither an option to challenge the substance nor procedural issues such as ineffective or missing public participation.

The only option to challenge a plan or programme exists if it was issued as a law[19] or ordinance[20]. This right to review before the Constitutional Court, however, is limited to a small number of persons.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Regarding constitutional rights, Article 144 of the Federal Constitutional Law provides for individuals to make claims before the Constitutional Court (*Verfassungsgerichtshof - VfGH*) if their fundamental rights are infringed. Its basic requirements are the interference with the individual's "subjective right", i.e. that the party can only object to norms that exist to protect an individual on the one hand, and an infringement of an individual's fundamental right on the other hand. Constitutional rights that can be linked to environmental protection are, for example, the right to justice, the right to life, the right to health, the right to respect for private and family life.

The scope of review if the Constitutional Court includes the conformity of ordinances with constitutional or legal provisions as well as with provision of underlying ordinances - from a procedural as well as a substantive aspect.[21] If the Constitutional Court pronounces an act or ordinance to be unconstitutional or illegal, all courts and administrative authorities are bound by the Constitutional Court's decision. The law or ordinance continues to apply to the circumstances affected before the ruling. Only the case in point is exempted from this rule.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

For an application to the Constitutional Court, administrative review procedures must be exhausted. However, as pointed out above under 2.3.1, SEA legislation in general does not provide for administrative review of members of the public.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure - to make comments, participate at hearing, etc.?

As there are no specific regulations on access to justice in the scope of Article 7 Aarhus Convention, there are no

relevant requirements.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

There are no rules on injunctive relief in this regard.

If the Constitutional Court pronounces an act or ordinance to be unconstitutional, all courts and administrative authorities are bound by the Constitutional Court's decision. The law or ordinance continues to apply to the circumstances affected before the ruling. Only the case in point is excepted from this rule.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The fee for filing an appeal with the Constitutional Court is EUR 240. Legal assistance is required. Legal aid or pro bono legal assistance (*Verfahrenshilfe*) can be granted in the scope of applicability of Article 6(1) ECHR or Article 47 ECFR. Apart from this option and from the regulated lawyer's fees according to the Attorney's Tariff Act (*Rechtsanwaltstarifgesetz*), there are no statutory guarantees that costs are not prohibitive.

## 1.4. Decisions, acts or omissions also concerning plans and programmes required to be prepared under EU environmental legislation[22]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the content of the plan (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The only regulatory frameworks currently granting access to justice regarding plans or programmes are the Air Pollution Control Act (*Immissionsschutzgesetz – Luft – IG-L*) and the Air Emission Act (*Emissionsgesetz-Luft 2018 – EG-L 2018*). When filing such application, natural persons must demonstrate that they are directly concerned. A person is directly concerned if their health may be endangered as a result of the breach of a limit value. Environmental organisations must append information and data supporting their official recognition pursuant to Section 19 EIA Act.[23]

To date, it is not clear how effective access to justice in this area is, as these rights have only been introduced recently and practical experience has still to be gained. However, already existing case law shows that the effectiveness of an appeal crucially depends on its timing as breaches of limit values are either diminishing or subject to meteorological circumstances which lead to years with breaches followed by years where limit values are met.

It should be noted that even before the entry into force of the amendments to the IG-L and the EG-L 2018 introducing access to justice, access to justice has been granted by direct application of EU law in conjunction with the Aarhus Convention in the area of air protection.[24] It therefore could be possible that national courts directly apply other EU environmental provisions in conjunction with the Aarhus Convention in a similar way.[25] From the existing case-law it can be assumed that environmental organisations should be recognised according to Section 19 of the EIA Act and individuals should be affected in the subjective publicly granted rights.

2) Does the form in which the plan or programme is adopted make a difference in terms of legal standing (see also Section 2.5 below)?

Applications to the Constitutional Court to challenge a plan or programme are only admissible if they are adopted in the form of an act or ordinance.

3) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

According to the Air Pollution Control Act (*Immissionsschutzgesetz – Luft – IG-L*) and the Air Emission Act (*Emissionsgesetz-Luft 2018 – EG-L*) the application or the complaint must be established in a clearly and well-

argued fashion explaining why the requirements for the establishment or the revision of an air quality plan or the National Air Pollution Programme are met or why, in their entirety, the measures provided for in the plan or programme are inappropriate to ensure compliance with the relevant limit values or emission reduction commitments.

The Administrative Court can review the plan or programme in terms of its procedural and substantive legality. 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.

4) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Within a period of eight weeks following the announcement of a national air pollution control programme or air quality plan, natural persons directly concerned by the breach of a limit value as well as environmental organisations recognised pursuant to Section 19 EIA Act (UVP-G 2000), within their relevant geographical scope of recognition, must file a reasoned application for examination of the programme or plan with respect to the appropriateness of the measures it sets out in their entirety, to ensure compliance with the emission reduction commitments in due time or limit values as soon as possible, with the Provincial Governor (air quality plan) or the Federal Minister for Climate Action, Environment, Energy, Mobility, Innovation and Technology (national air pollution control programme). The responsible authority must decide on this application by way of official notice. It is also possible to file a reasoned application for the establishment of a plan or programme or, if a plan or programme has already been established, an application for its revision with the Provincial Governor or Federal Minister.

Subsequently, the entitled members of the public may file a complaint against official notices issued in the matters described above at the Provincial Administrative Court (in case of national air pollution control programmes with the Administrative Court of Vienna).

5) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

According to the Air Pollution Control Act (*Immissionsschutzgesetz – Luft – IG-L*) and the Air Emission Act (*Emissionsgesetz-Luft 2018 – EG-L 2018*) it is not necessary to participate in the public consultation phase in order to have standing to challenge a plan or programme.

6) Are there some grounds/arguments precluded from the judicial review phase?

In order to be admissible, an application or complaint according to the Air Pollution Control Act (*Immissionsschutzgesetz – Luft – IG-L*) or the Air Emission Act (*Emissionsgesetz-Luft 2018 – EG-L 2018*) must establish the reasons in a clearly and well-argued fashion of why the requirements for the establishment or the revision of a plan or programme are met or why, in their entirety, the measures provided for in the plan or programme are inappropriate to ensure compliance with the relevant limit values or emission reduction commitments. These are the only arguments that can be brought by environmental NGOs. Individuals may only file a complaint on the grounds that they are directly affected by the relevant plan or programme.

7) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

The right to a fair trial derives from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which has constitutional status in Austria. This includes the right to a fair trial in administrative justice. Furthermore, the right to party status derives from the constitutional principle of equality.<sup>[26]</sup>

Access to justice by the public in environmental trials aims to grant standing to all actors who are perceived as having a substantial interest in the respective case. They have the possibility to make known the elements on which their claim is based and can discuss any claim, evidence or document presented to the judge through an intervention mechanism.

8) How is the notion of “timely” implemented by the national legislation?

The general rules on administrative procedures apply: If a member of the public applies for a review of an air

quality plan according to the Air Pollution Control Act (*Immissionsschutzgesetz – Luft – IG-L*) or a national air pollution control programme according to the Air Emission Act (*Emissionsgesetz-Luft 2018 – EG-L 2018*), the Provincial Governor or Federal Minister must react by official notice within 6 months from the date of the application. In case of an appeal to the Administrative Court, the Court must decide within another 6 months.

9) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

There are no provisions on injunctive relief in this regard.

10) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The fee for filing an appeal with the Administrative Court is EUR 30. There are no statutory provisions to ensure that costs are not prohibitive. Apart from optional fees for expert opinions or legal assistance, however, there should generally not be any relevant additional costs.

## 1.5. Executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts[27]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedure for adopting or the content of the decision, act or omission of the national regulatory act (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Executive regulations and/or generally applicable legally binding normative instruments may, under certain circumstances, be challenged before the Constitutional Court, if they have the legal form of an act or ordinance.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Regarding constitutional rights, Article 144 of the Federal Constitutional Law provides for individuals to make claims before the Constitutional Court (*Verfassungsgerichtshof*) if their fundamental rights are infringed. Its basic requirements are the interference with the individual's "subjective right", i.e. that the party can only object to norms that exist to protect an individual on the one hand, and an infringement of an individual's fundamental right on the other hand. Constitutional rights that can be linked to environmental protection are, for example, the right to justice, the right to life, the right to health, the right to respect for private and family life.

The Constitutional Court can also be addressed regarding decisions of an Administrative Court if the complainant claims to have been infringed in his/her constitutionally guaranteed rights by the decision. Furthermore, a person who claims to be infringed in his/her rights directly by an ordinance contrary to law, may address the Constitutional Court if the ordinance has become effective without a judicial decision having been rendered or without a ruling having been rendered.

The scope of review if the Constitutional Court includes the conformity of ordinances with constitutional or legal provisions as well as with provision of underlying ordinances – from a procedural as well as a substantive aspect.[28] In case of administrative decisions, the Constitutional Court has full competency of cognition (*volle Kognitionsbefugnis*) and may also collect new evidence.[29]

If the Constitutional Court pronounces an administrative decision, an act or ordinance to be unconstitutional or illegal, all courts and administrative authorities are bound by the Constitutional Court's decision. The law or ordinance continues to apply to the circumstances affected before the ruling. Only the case in point is exempted from this rule.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

For an application to the Constitutional Court, administrative review procedures must be exhausted.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

As the procedure before the Constitutional Court is of exceptional character, there are no relevant requirements apart from the exhaustion of administrative review.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

There are no rules on injunctive relief in this regard.

If the Constitutional Court pronounces an act or ordinance to be unconstitutional, all courts and administrative authorities are bound by the Constitutional Court's decision. The law or ordinance continues to apply to the circumstances affected before the ruling. Only the case in point is excepted from this rule.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The fee for filing an appeal with the Constitutional Court is EUR 240. Legal assistance is required. Legal aid or pro bono legal assistance (*Verfahrenshilfe*) can be granted in the scope of applicability of Article 6(1) ECHR or Article 47 ECFR. Apart from this option and from the regulated lawyer's fees according to the Attorney's Tariff Act (*Rechtsanwaltstarifgesetz*), there are no statutory guarantees that costs are not prohibitive.

7) Is it possible to bring a legal challenge before a national court concerning any related EU regulatory act with a view to a validity reference under Article 267 TFEU, and if so how[30]?

Administrative Courts must issue a preliminary request according to Article 267 TFEU if they deem it adequate. The Supreme Administrative Court and the Constitutional Court as final instance are obliged to do so if they have doubts regarding the application or interpretation of EU law. An applicant may suggest a preliminary procedure in the appeal.

[1] This category of case reflects recent case-law of the CJEU such as *Protect C-664/15, the Slovak brown bear case C-240/09*, see as described under the [Commission Notice C/2017/2616](#) on access to justice in environmental matters

[2] All federal and provincial acts currently granting access to justice refer to the requirements of Section 19 EIA Act.

[3] E.g. Supreme Administrative Court (VwGH) 28 March 2018, 2015/07/0555; Administrative Court of Lower Austria (NÖ LVwG) 9 April 2018, LVwG-AV-751/001-2017.

[4] Supreme Administrative Court (VwGH) 20. December 2019, Ro 2018/10/0010.

[5] Section 42 General Administrative Procedure Act (AVG).

[6] E.g. according to the Nature Protection Acts of Vorarlberg or Carinthia.

[7] Section 102(5) Water Act (WRG).

[8] Section 42(3) Waste Management Act (AWG).

[9] Section 9a(12) Air Pollution Control Act (IG-L); Section 6(9) Air Emission Act (EG-L).

- [10] *Schulev-Steindl, E. (2018), Verwaltungsverfahrenrecht<sup>6</sup>. Vienna: Verlag Österreich. (p 27)*
- [11] Section 34 Proceedings of Administrative Courts Act (VwGVG).
- [12] *Ibid.*, para 1.
- [13] Section 74 General Administrative Procedure Act (AVG).
- [14] The SEA Directive relates to plans and programmes. These are also covered by Article 7 and Article 9(3) of the Aarhus Convention.
- [15] Article 140 Federal Constitutional Law (B-VG); Sections 62-65a Constitutional Court Act (*Verfassungsgerichtshofgesetz 1953 - VfGG*).
- [16] Article 139 Federal Constitutional Law (B-VG); Section 57-61a Constitutional Court Act (*Verfassungsgerichtshofgesetz 1953 - VfGG*).
- [17] *Berka, W. (2012), Verfassungsrecht<sup>4</sup>. Vienna: SpringerWienNewYork (para 1113 et seq)*
- [18] See findings under [ACCC/C/2010/54 for an example of a plan not submitted to SEA but subject to the public participation requirements of Article 7 of the Aarhus Convention.](#)
- [19] Article 140 Federal Constitutional Law (B-VG); Section 62-65a Constitutional Court Act (*Verfassungsgerichtshofgesetz 1953 - VfGG*).
- [20] Article 139 Federal Constitutional Law (B-VG); Section 57-61a Constitutional Court Act (*Verfassungsgerichtshofgesetz 1953 - VfGG*).
- [21] *Berka, W. (2012), Verfassungsrecht<sup>4</sup>. Vienna: SpringerWienNewYork (para 1113 et seq)*
- [22] These fall within the scope of both Article 7 and Article 9(3) of the Aarhus Convention. See also relevant case-law of the Court of Justice of the European Union such as Case C-237/97, *Janecek* and cases such as *Boxus and Solvay* C-128/09-C-131/09 and C-182/10, as referred to under the Commission Notice C/2017/2616 on access to justice in environmental matters.
- [23] This requires them to be organised in the form of a non-profit organisation for at least three years, to have at least 100 members and to have environmental protection as their main objective. Federations must comprise at least five member associations. All organisations must prove every three years that they still meet the recognition requirements. (See above, Sec 1.4.3.)
- [24] Supreme Administrative Court (VwGH) 19 February 2018, Ra 2015/07/0074 *et al.*
- [25] E.g. provisions regarding the positioning of sampling points in accordance with the criteria laid down in the Ambient Air Quality Directive 2008/50/EC as dealt with in Case C-723/17 (*Craeynest*).
- [26] *Schulev-Steindl, E. (2018), Verwaltungsverfahrenrecht<sup>6</sup>. Vienna: Verlag Österreich. (p 27)*
- [27] Such acts come within the scope of Article 8 and Article 9(3) of the Aarhus Convention. An example of such an act concerns the decision of the national administration that featured in Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774
- [28] *Berka, W. (2012), Verfassungsrecht<sup>4</sup>. Vienna: SpringerWienNewYork (para 1113 et seq)*
- [29] *Frank, S. L. (2019), Gerichtsbarkeit des öffentlichen Rechts und europäische Gerichtsbarkeit. Vienna: Verwaltungsakademie des Bundes (123)*
- [30] For an example of such a preliminary reference see Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

The national language version of this page is maintained by the respective Member State. The translations have been done by the European Commission service. Possible changes introduced in the original by the competent national authority may not be yet reflected in the translations. The European Commission accepts no responsibility or liability whatsoever with regard to any information or data contained or referred to in this document. Please refer to the legal notice to see copyright rules for the Member State responsible for this page.