



**Le juge administratif
et
le droit communautaire
de l'environnement**

**National administrative courts
And
Community
Environmental law**

Autriche-Austria

**Réponse
au questionnaire
Answer to
The questionnaire**

Preparation of Seminar for Councils of State and Supreme Administrative Jurisdictions,
January 2008, Brussels

1. Information for citizens and public participation in environmental issues

a) Application of laws regarding information for citizens and public participation in environmental issues

There are different ways to get access to environmental information:

- As a party to a proceeding: All parties to a specific administrative proceedings have guaranteed access to the files and the information contained therein,
- as a member of the public under the federal and provincial Freedom of Information laws (Auskunftspflichtgesetze),
- as a member of the public under the Information on the Environmental Act (Umweltinformationsgesetz 1993 as amended),
- as a member of the public in the context of proceedings concerning a regional plan or a specific project (such as a project subject to an environmental assessment procedure)

Judgments given by the Administrative Court:

The request to receive information on whether there is a permit for a particular mining of brash and whether this activity is performed professionally/commercially (and therefore a permit would be required) is not to be considered as an information falling under the information on the environment act, since no request to receive information concerning the environment was made (2. June 1999, Zl. 99/04/0042).

Information which can be attained easily by other means is not excluded from the information which can be requested under the Information on the Environment Act. Information concerning the number of parking lots in the context of an enterprise and information on the content of a permit for an enterprise is to be considered as environmental information, since such a permit usually contains environmental data. (12. July 2000, Zl. 2000/04/0064).

Information about whether and how often an authority has taken an action in the context of a particular product is not protected; considering the risk of public prejudgement there is an prevailing interest of the person concerned for this information not being made public (31. March 2003, ZL. 2000/10/0052).

According to the Austrian Environmental Impact Assessment Act 2000 (Umweltverträglichkeitsprüfungsgesetz 2000, UVP-G 2000) there are several ways for the "public concerned to participate in the environmental decision making procedures" as a party to the proceeding:

- as a public procurator of the environment (set up under the laws of provinces of Austria), according to some laws on natural protection the public procurator of the environment has the right to participate in the administrative proceedings,
- as a citizen's initiative (200 persons entitled to vote in the local community or a neighbouring community), or
- as an environmental organization formally recognized by the Federal Minister for the Environment in consultation with the Federal Minister of Trade and Labour,
- non-governmental organizations may also represent or support neighbours (who are parties to the proceedings) or buy pieces of land and in this way secure participation in the proceedings.

Judgments given by the Administrative Court:

- A citizen's initiative under § 19 sect. 5 of the Austrian Environmental Impact Assessment Act has the right to claim rights only after the project has formally been made public according to the Environmental Assessment Act (8. September 1998, Zl. 96/03/0266)
- A citizen's initiative under § 19 sect. 5 of the Austrian Environmental Impact Assessment Act has the right to claim that any law that directly or indirectly aims to protect humans or the environment against negative effects or impacts is violated (including the claim that a Directive [75/442/EEC] had not been implemented into Austrian law). It may also claim that the clearing of wood is not in conformity with the Forestry Act 1975 (Forstgesetz 1975) (18. October 2001, Zl. 2000/07/0229).

- In a case concerning the enlargement of a mining project in Salzburg (Saalfelden) a citizen's initiative (200 persons entitled to vote in the local community or a neighbouring community) was recognized as a party to the proceeding under § 19 sect. 5 of the Austrian Environmental Impact Assessment Act. Similarly its right to file a complaint with the Administrative Court was recognized. The right to claim compliance with environmental law as a subjective right ("Einhaltung von Umweltschutzvorschriften als subjektives Recht") was given a broad interpretation. In this context the Court also applied several provisions of additional protocols to the "Alpine Convention" (24. February 2006, ZI. 2005/04/0044).
- A public procurator of the environment has no standing in a proceeding concerning a permit for a track for a ski lift in a skiing slope of 15,4 hectares (26. February 2007, ZI. 2006/10/0206). The trace of a lift is not to be included in the concept of skiing area according to the Law on the Protection of Nature of Vorarlberg (Vorarlberger Gesetz über Naturschutz und Landschaftsentwicklung 1997). The court did not rule that the Aarhus Convention has affected the interpretation of this provincial law (concerning the change of the natural surface of more than 10 hectares for skiing slopes).

b) Scope of jurisdiction of the Court

Failure to comply with obligations to make information public normally does not seem to lead to the simple annulment of the permit in every case. However all relevant information including expert opinions has to be given to the parties of the proceedings who have to be heard and been given the opportunity to make comments. Relevant violations of this obligation will lead to the annulment of the permit. Therefore a permit will have to be annulled in cases where information has not been given to the public and thereby prevented a party to take part in the proceedings and to make relevant objections.

In cases concerning projects falling under directive 85/337/EEC the Independent Environmental Panel, a independent tribunal, is responsible to decide on appeals. It has the competence to decide in substance and to correct deficiencies of the procedure at the first instance.

The Administrative Court is - in principle - bound by the establishment of the facts by the authorities and tribunals (except in cases of a procedural error) which have decided the case before. The Administrative Court - being a court of cassation - may only quash the administrative decision or dismiss the complaint before it.

2. Regulation of waste and polluting installations

a) The regional district authority is responsible for ordering the restoration of polluted sites under Austrian law (§ 73 Waste Management Act 2002 [Abfallwirtschaftsgesetz 2002], §§ 21a, 33, 138 Water Rights Act [Wasserrechtsgesetz 1959 as amended], § 83 Trade Commerce, and Industrial Regulation Act [Gewerbeordnung 1994 as amended]). In principle the operator of the site/holder of the permit or the person who has caused the pollution (violated the law) is responsible for the restoration of the site. In some cases the authority may also order the elaboration of a project for the securement and the restoration by the person responsible. The authorities may also order appropriate action against the operator of a site for deposition of waste even after the operating activities have ended (§ 73 sec. 4 Waste Management Act 2002).

In cases where the operator of the site/holder of the permit or the person who has caused the pollution (violated the law) cannot be held responsible the owner of the site may be held responsible if he/she explicitly has given his/her consent to an illegal modification, illegal neglect or contamination of soil or if he/she has agreed to the contamination or voluntarily tolerated and has refrained from reasonable measures to prevent it. The same rule applies for a legal successor of the owner if he/she has had knowledge of the contamination or should reasonably have had such a knowledge (§ 138 sec. 4 Water Rights Act, see also § 74 Waste Management Act).

Contaminated sites are defined as sites where waste or dangerous substances are deposited and which constitute a "substantial risk for human health or the environment" (§ 2 Contaminated Sites Restoration Act 1989 [Altlastensanierungsgesetz 1989]). Contaminated sites are made public in a specific register (Altlastenkataster) and have to be restored according to a national priority plan. The operator is responsible to secure and restore the contaminated site. If the operator cannot be held responsible for restoration, the owner of the land who has given his consent to the disposal or who has tolerated it, has to refund the costs for securing

and restoration of the contaminated site. There is the possibility for the court to mitigate the sum to be paid or to dispense it in case of reduced default.

Case law, example:

- The person to be held liable under § 73 sec. 4 Waste Management Act need not be the owner of the waste to be removed but the person who collects, disposes or treats the waste (23. March 2006, Zl. 2005/07/0173)

In cases of a public authority refraining from an action prescribed by law, there is a public liability for negligent or culpable inaction for the damage incurred as a result thereof according to the Public Liability Act.

If no person can be held responsible for the securing or the restoration of a contaminated site, the federal government is obliged to perform the necessary measures, the costs have to be borne by the federal government (§ 18 Contaminated Sites Restoration Act).

Case law, example:

- The judgment of June 4 th, 1996, 1Ob3/96, concerned the question of liability of a province of Austria for its officials having granted illegal licences for the disposal of dangerous waste and for not having taken the necessary measures to prevent further damage to the ground water in an area about 50 km south of Vienna. This has caused very substantial costs for the federal government.

b) Scope of jurisdiction of the Court

In matters concerning measures under the Water Rights Act and the Waste Management Act the authority of first instance is the regional district authority, appeals are to be decided by the province governor's office.

Complaints against the decisions of these administrative authorities can be made to the Administrative Court which in principle is bound by the establishment of the facts by these authorities (except in cases of a procedural error). The Administrative Court - being a court of cassation - may only quash the administrative decision or dismiss the complaint before it and it has no power to amend the decision or impose other measures. In cases, where Article 6 par. 1

of the European Convention on Human Rights is applicable the Administrative Court is obliged to hold a public hearing if requested by the applicant.

Verwaltungsgerichtshof, Austria
Stefan Rosenmayr

Further information on the case law of the Administrative Court can be obtained on the website: <http://www.ris.bka.gv.at/vwgh/>, on the Austrian federal laws on the same website: <http://www.ris.bka.gv.at/bundesrecht/>, or: stefan.rosenmayr@vwgh.gv.at