

COUNTRY STUDIES CONCERNING STATE AID - AUSTRIA



Country Study
Justice and Environment 2023

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How can eNGOs and other members of the public have access to information about any possible planned state aid or an actually granted state aid? Specifically, are there national registers? Please answer not only as to general information “out there”, but specifically indicate whether, in your view, this register is fit for the purposes of mounting a timely legal challenge of any such aid. 15

Background

In March 2021, the Aarhus Convention Compliance Committee (ACCC) found in favor of J&E member organization ÖKOBÜRO and its member, GLOBAL 2000, in the communication they had brought, namely [ACCC/C/2015/128 \(EU\)](#). Specifically, the Committee [found that](#):

- (a) *By failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on State aid measures taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, the Party concerned fails to comply with article 9 (3) of the Convention;*
- (b) *By failing to provide any procedure under article 9 (3) of the Convention through which members of the public are able to challenge decisions on State aid measures taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, the Party concerned also fails to provide an adequate and effective remedy regarding such decisions as required by article 9 (4) of the Convention.*

Accordingly, the Committee made the following recommendation:

The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of that annex, recommends that the Party concerned take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on State aid measures taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, in accordance with article 9 (3) and (4) of the Convention.

Questions

What courts have competence to make a judgment when allegedly unlawful state aid government measures are challenged in court? Administrative? Civil? Constitutional?

a. Federal/ regional regulations and programs for state aid

In Austria, state aid can be granted in various ways. Different state bodies can award state aid: the federal and regional governments, as well as municipalities. There is no unified legislation on state or provincial level, that regulates state aid in general.

On federal level, the Federal Budget Act (*Bundeshaushaltsgesetz 2013*)¹ contains some regulations for federal funding. The act defines a concept of subsidies which, at the federal level, includes both direct (i.e. cash grants) and indirect subsidies (i.e. foregone revenue). Among other things the Federal Budget Act includes an obligation to lay down uniform provisions on the granting of subsidies via ordinance (*Verordnung*).

On this basis, the federal government issued the Ordinance of the Federal Minister of Finance on General Framework Guidelines for the Granting of Subsidies from Federal Funds (ARR 2014)². It regulates funding by the federal government through private law contract (thus in areas where the federal government is not competent to regulate matters through legislation or act through administrative decisions). According to the ARR 2014, subsidies may in principle only be granted within the framework of subsidy programs on the basis of special guidelines, and must include certain contents. The competent federal ministers can delegate the implementation of funding programs under the ARR 2014 to regional administrative bodies (*Landeshauptleute*).

¹ Legal information system of the federal government, Federal Budget Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=bundesnormen&Gesetzesnummer=20006632>.

² Legal information system of the federal government, Ordinance of the Federal Minister of Finance on General Framework Guidelines for the Granting of Subsidies from Federal Funds (*Verordnung des Bundesministers für Finanzen über Allgemeine Rahmenrichtlinien für die Gewährung von Förderungen aus Bundesmitteln (ARR 2014)*), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008920>.

Furthermore, the Environmental Subsidy Act (*Umweltförderungsgesetz*)³ establishes guidelines for funding programs to protect the environment on (inter-) national level in various areas. These include orderly disposal and water management, energy efficiency, pollution and GHG emission reductions, biodiversity protection etc. The competent federal ministers, advised by a commission, decide on awarding funding and determining the processing agency. Based on the Environmental Subsidy Act, the "Investment Promotion Guidelines for Environmental Promotion in Austria"⁴ were issued in April 2022 to ensure compliance with EU state aid legislation and provide flexibility in subsidy policy. The guidelines specify eligibility requirements, as well as the volume and form of subsidies.

On regional level, the "Guidelines 2022 for Environmental Subsidies in Upper Austria"⁵ were issued on the grounds of § 7 Environmental Protection Act for Upper Austria (*Oberösterreichisches Umweltschutzgesetz*)⁶.

Outside the field of environmental-related aids, the Austrian Communication Office (*Kommunikationsbehörde Austria*) is also competent to e.g. recover unlawfully received aids.⁷

No specific regulations on state aid can be found in competition laws (e.g. Federal Act Against Unfair Competition (*Bundesgesetz über unlauteren Wettbewerb*))⁸.

b. Competent courts deciding on challenged state aid decisions

The different state bodies issue state aid in the form of administrative decisions or by private law contracts. Thus, there are also no specialized courts for the enforcement of State aid rules, but the court competency depends on the legal form of the state aid decision.

³ Legal information system of the federal government, Federal Act on the Promotion of Measures in the Areas of Water Management, the Environment, the Remediation of Contaminated Sites, Land Recycling, Biodiversity and the Protection of the Environment Abroad and on the Austrian JI/CDM Program for Climate Protection (*Bundesgesetz über die Förderung von Maßnahmen in den Bereichen der Wasserwirtschaft, der Umwelt, der Altlastensanierung des Flächenrecyclings, der Biodiversität und zum Schutz der Umwelt im Ausland sowie über das österreichische JI/CDM-Programm für den Klimaschutz*), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010755>

⁴ Available at: https://www.umweltfoerderung.at/fileadmin/user_upload/umweltfoerderung/uebergeordnete_dokumente/IFRL_UFI.pdf

⁵ Guidelines 2022 for Environmental Subsidies in Upper Austria (*Richtlinien 2022 zur Umweltförderung in Oberösterreich*), available at: <https://www.land-oberoesterreich.gv.at/282963.htm>.

⁶ Legal information system of the federal government, Environmental Protection Act for Upper Austria, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LROO&Gesetzesnummer=10000480>.

⁷ Austrian Supreme Administrative Court (Ro 2015/03/0014).

⁸ Legal information system of the federal government, Federal Act Against Unfair Competition, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001898>.

State aid granted by an administrative decision can be challenged in front of the Administrative Court of the relevant region (Landesverwaltungsgerichte) or the Federal Administrative Court (Bundesverwaltungsgericht), depending on the authority issuing the decision. In certain cases where state aid is granted through tax relief, the Federal Finance Court (Bundesfinanzgericht) could also be competent.

State aid granted through a contract under private law can only be contested in front of civil courts. It seems that state aid is granted mostly through private law contract. This is e.g. the case for state aids granted on the grounds of the Environmental Subsidy Act or the ARR 2014 (see above), where a private law contract (here: Förderungsvertrag) is drawn up between the issuing public authority and the state aid recipient (§ 7 Environmental Subsidy Act, § 24 ARR 2014).

Whenever state aid is granted by **legislation**, the act would have to be challenged before the Austrian Constitutional Court (*Verfassungsgerichtshof*). Unconstitutional laws or unlawful ordinances can be challenged in a regulation review procedure (Art 139, Art 140 Federal Constitutional Law (*Bundesverfassungsgesetz*)⁹). In administrative proceedings, unconstitutional/ unlawful acts as basis for the state aid decision could be challenged on the grounds of Art 144 Federal Constitutional Act.

As to each of the courts identified in reply to answer 1, what requirements must be met in order to show standing? Specifically, could an NGO meet these requirements and initiate/file a case challenging potentially illegal state aid? Could other members of the public meet these requirements (presuming they are neither aid beneficiaries nor (potential) competitors Could

⁹ Legal information system of the federal government, Federal Constitutional Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=bundesnormen&Gesetzesnummer=1000138>.

this NGO join an ongoing case on any side of the legal dispute as an amicus curiae?

a. State aid granted through civil law contract

There are no specific rules for legal standing in state aid decisions. As mentioned above, e.g. § 7 Environmental Subsidy Act or § 24 ARR 2014 regulate an eligibility procedure, but do not elaborate on the standing of (third) parties in possible further procedures.

Concerning civil courts in general, procedural rules can be found in the Code of Civil Procedure¹⁰ (whereas the substantial law mainly follows the Austrian Civil Code¹¹).

Legal standing is primarily granted to the claimant and the defendant of the procedure (eg the parties to the state aid civil law contract). Third parties may join an already pending case, if they prove their independent legal interest in outcome of the dispute (*Nebenintervenient*). In case any law expressly declares an effect of the judgment on the intervening party, they might be entitled to rights as a party to the procedure. However, it must be proven that a subjective right of the party is violated to constitute legal interest. This is constantly denied for environmental issues. It is therefore unlikely that NGOs or other members of the public could initiate or file a case challenging potentially illegal state aid.

Austrian civil procedure law does not specifically provide for the concept of *amicus curiae*.

b. State aid granted through administrative decision (*Bescheid*)

The legal route for challenging administrative decisions is via the Administrative Courts. Rules governing procedure are the General Administrative Procedure Act¹² (*Allgemeines Verwaltungsverfahrensgesetz*) and the Administrative Court Procedure Act (*Verwaltungsgerichtsverfahrensgesetz*)¹³.

Third parties generally must prove the infringement of a right to be considered a party in administrative (court) procedures. The Austrian legal system traditionally includes a narrow

¹⁰ Legal information system of the federal government, Code of Civil Procedure, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699>.

¹¹ Legal information system of the federal government, Civil Code, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>.

¹² Legal information system of the federal government, General Administrative Procedure Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005768>.

¹³ Legal information system of the federal government, Austrian Administrative Court Procedure Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008255>

interpretation of the infringement of legal rights. Various forms of these required subjective rights infringements can be found in the substantive administrative law.

Concerning State Aid procedures there is a low probability of third parties (who are neither recipient of the state aid nor competitor) gaining legal standing based on the infringement of their individual rights.

In some administrative procedures, recognized environmental NGOs *ex lege* enjoy standing before administrative courts, such as in proceedings following the Environmental Impact Assessment Act (Umweltverträglichkeitsprüfungsgesetz¹⁴). Furthermore, the Aarhus Participation Act to some extent amended water (the Water Act (*Wasserrechtsgesetz 1959*)), waste (Waste Management Law (*Abfallwirtschaftsgesetz 2002*)) and immission legislation (Air Pollution Control Act (*Immissionsschutzgesetz-Luft*))¹⁵. by granting specific procedural rights to recognized environmental NGOs (as defined in § 19 para 7 EIA Act) However, the extent of these rights does not correspond to the rights of a party enjoying full legal standing in administrative procedures. Access to justice for NGOs has also been judicially recognizes in forestry-related proceedings.

As for these proceedings, the standing of eNGOs is limited to the compliance with environmental protection regulations. It is unsure whether this would be admissible in case a state aid decision is evoked in any of these procedures.

b. State aid granted through legislative act

Whenever state aid is granted by or based on a potentially unconstitutional/unlawful legislative act (law or ordinance), a complaint can be filed with the Austrian Constitutional Court. However, the current jurisprudence by the Constitutional Court dictates that unlawful acts do not infringe subjective rights of eNGOs (even if (EU) environmental law is breached), and therefore cannot file admissible complaints with the Court.

c. Further thoughts

¹⁴ Legal information system of the federal government, Federal Law on Environmental Impact Assessment, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010767>.

¹⁵ Legal information system of the federal government, 73rd Federal Act amending the Waste Management Act 2002, the Air Pollution Control Act and the Water Act 1959 (Aarhus Participation Act 2018), available at: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2018_I_73/BGBLA_2018_I_73.pdfsig.

On a potential interesting side note, eNGOs are mentioned in the Federal Procurement Act (*Bundesvergabegesetz*), regulating the awarding of public contracts by the government¹⁶. § 108 regulates that prove of a quality mark can be required by the contracting authority when procuring a service with specific characteristics. When establishing these quality marks, administrative authorities, consumers, social partners, manufacturers, distributors **and non-governmental organisations** have the right to participate in the procedure. This however does not correspond to legal standing in an administrative/ civil procedure as discussed above.

Has any national court granted legal standing in practice to a party whose competitive position was not affected by a state aid? If yes, how would you categorize this party? An NGO? Another type of member of the public (individuals, citizens initiatives, and other non-incorporated groups)? In what position was this party accepted by the court: plaintiff or amicus curiae (on either side)?

We are not aware of any cases documenting the admission of a party whose competitive position was not affected by a state aid.

Presuming a national court would grant standing to an NGO to challenge a state aid decision, what criteria would this NGO need to meet in order to be recognized? Are

¹⁶ Legal information system of the federal government, Act on the awarding of public contracts in Austria, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010295>

there different criteria for becoming a party vs. an amicus curiae?

Specific criteria for eNGOs that need to be fulfilled in order to grant legal standing can be found in the EIA Act (which by reference is also the case for other environmental legislation, see above). According to the relevant § 19 para 7 EIA Act, an environmental organization is an association or foundation,

- a. which has the protection of the environment as its primary purpose according to the statutes of the association or the declaration of foundation,
- b. which pursues non-profit/charitable objectives
- c. which has existed for at least 3 years with this purpose before filing an application under the EIA Act.

The association must consist of at least one hundred members. An association must comprise at least 5 member associations which meet the criteria a. to c., and which together reach the number of members required for 5 recognized environmental organizations.

Has an eNGO ever filed a lawsuit against a state aid measure in your Member State? Has an eNGO ever been admitted into a case as amicus curiae? If yes, what was the outcome of the case? What was the contribution of the eNGO to the outcome of the case? Please address both admissibility (standing/scope) and merits.

One case that could fall under “state aid” in the broadest sense would be the Austrian climate lawsuit. This case dealt with the Austrian policy of (non-)taxation concerning kerosene (§ 4 (1) 1 *Mineralölsteuergesetz*) and international flights (§ 6 (1) 1 lit 3d *Umsatzsteuergesetz*). *Greenpeace* filed the application before the Austrian Constitutional Court as a collective complaint in 2020. The Constitutional Court rejected the lawsuit due to the alleged lack of effect

on the applicants, but did not reject the idea of individuals not being able to challenge certain parts of the tax code outright.¹⁷

Can an applicant claim a state aid measure or scheme violated EU or national law relating to the environment? If yes, please provide details, specific examples where this was done, etc. You can quote here cases that were not initiated by eNGOs or members of the public, too.

Considering the legal standing requirements in administrative as well as civil procedures, it is unlikely that the violation of EU or national law relating to the environment by a state aid measure could be argued as grounds for the infringement of individual rights in Austria.

What sort of remedies is available in a judicial procedure started against a state aid measure?

a. remedies in administrative court proceedings

There are no specific remedies for State aid decisions, thus, the general remedies provided by the Austrian Administrative Court Procedure Act would apply. According to § 28, administrative courts can **dismiss** or **discontinue** the proceedings, but are also competent to **decide on the appeal itself**, if

- the relevant facts have been established, or
- the determination of the relevant facts by the administrative court itself is in the interest of speed or involves a considerable saving of costs. In this case, the administrative court can continue the proceedings and gather new evidence.

The court can also **confirm** the decision of the relevant authority. If the authority has omitted to investigate the facts of the case, the administrative court may **annul** the contested decision and

¹⁷ Austrian Constitutional Court, G 144-145/2020, V 332/2020; available at: https://www.vfgh.gv.at/downloads/VfGH_Beschluss_G_144_2020_vom_30_September_2020.pdf

refer the matter back to the authority to issue a new decision. In this case, the authority shall be bound by the legal assessment on which the administrative court based its decision.

b. remedies in civil court proceedings

A court may award one or more of the following remedies to a litigant:

Specific Performances (*Leistungsurteil*) is a type of remedy whereby a court issues an order requiring a party to perform as contractually agreed between the parties. Notably, even if the debtor refuses to perform, the creditor can be authorized by the court to have the performance rendered by the third party at the expense of the debtor. For damages (*Schadenersatz*), the court can award monetary compensation to a party who has suffered damages as a result of another party's actions or breach of contract.

A permanent injunction/cease and desist (*Unterlassung*) is a final order of the to prohibit a party from engaging in certain actions permanently or take certain actions until completed. Permanent injunctions are mostly ordered by the court to force a party to cease an infringement of a right. Creation/alteration of legal status (*Rechtsgestaltungsurteil*) is a judgment that creates or alters the legal status of an entity.

Declaratory judgement (*Feststellungsurteil*) is a court's judgment declaring the rights of parties without awarding monetary compensation or specific performance. Declaratory relief will be granted by a court on existence/ absence of a right, legal relationship, recognition/non-recognition of the authenticity of a document only if a party has a legal interest in it.

Assuming eNGOs and other members of the public have standing to challenge state aid measures, what potential costs would they face? Would these costs be different if these eNGOs and members of the public are only acting as amicus curiae?

Depending on the type of act granting state aid, costs differ in administrative and civil court proceedings.

For administrative procedures there is a cost category for every motion. The fee for filing an appeal with the Administrative Courts is relatively low (EUR 30 for the Federal and Regional Administrative Courts¹⁸). The fee for submissions to the Supreme Administrative Court or the Constitutional Court is EUR 240¹⁹.

In administrative proceedings, each party will bear its own costs. In civil cases, each party bears their own costs. In the case a party loses the case, they pay the whole costs of the litigation (court costs, lawyer fees, evidence expenses), also for the prevailing party. Costs are proportionally split, if only one party prevails. The Austrian Lawyers' Fees Act (*Rechtsanwaltstarifgesetz*)²⁰ and the Court Fees Act (*Gerichtsgebührengesetz*)²¹ regulate the costs that can be expected by the claimant.

Legal assistance is required in certain civil procedures (when the value of the disputed claim exceeds EUR 5,000 or if a regional court (*Landesgericht*) or an even higher court is competent) as well as in proceedings before the Supreme Administrative and Constitutional Court. Costs for both legal assistance and (private) expert opinions can become quite extensive.

Legal aid (*Verfahrenshilfe*) is a service available to individuals and companies who are unable to afford the expenses associated with litigation. To qualify for legal aid, the case must have a reasonable chance of success. If approved, legal aid covers the costs of court fees and provides an attorney if needed.

There is no provision admitting eNGOs acting as *amicus curiae* in State Aid cases. Therefore, there is no difference in the costs to be expected in that case.

¹⁸ Austrian Ordinance of the Federal Minister of Finance on the Fee for Submissions to the Federal Administrative Court and the Regional Administrative Courts (*Verordnung des Bundesministers für Finanzen betreffend die Gebühr für Eingaben beim Bundesverwaltungsgericht sowie bei den Landesverwaltungsgerichten*), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009065>.

¹⁹ Legal information system of the federal government, Supreme Administrative Court Act 1985, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000795>; Legal information system of the federal government, Constitutional Court Act 1953, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000245>.

²⁰ Legal information system of the federal government, Lawyers' Fees Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002143>.

²¹ Legal information system of the federal government, Court Fees Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002667>.

How can eNGOs and other members of the public have access to information about any possible planned state aid or an actually granted state aid? Specifically, are there national registers? Please answer not only as to general information “out there”, but specifically indicate whether, in your view, this register is fit for the purposes of mounting a timely legal challenge of any such aid.

The Austrian Transparency Portal²² is a public sector information service that provides an overview of funding. The transparency portal can be used to search through all state aid opportunities of the federal government and the provinces according to uniform criteria (such as target group, region, or topical category of the state aid (e.g. forestry, traffic etc.). Depending on the individual state aid, more information on the grant and its legal basis is available or not. However, a timely legal challenge of the granted state aid appears difficult, as the legal act authorizing the awarding public authority already is in force and the individually granted state aids (probably through private law contract (*Förderungsvertrag*), see above) appear not to be published.

Furthermore, Austrian government ministries, such as the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation, and Technology, and the Federal Ministry for Agriculture, Forestry, Regions, and Water Management, may provide punctual information on state aid measures on their respective websites. This can include details about planned aid programs, guidelines, application procedures, and updates on granted aid.²³ Again, specific information on granted aids and/or their legal basis for a timely legal challenge appears to be difficult to obtain.

²² Available at: <https://transparenzportal.gv.at/tdb/tp/startpage>.

²³ See e.g. for the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation, and Technology: https://www.bmk.gv.at/themen/klima_umwelt/nachhaltigkeit/lokale_agenda21/oe_netzwerk/foerderung.html, https://www.bmk.gv.at/themen/mobilitaet/alternative_verkehrskonzepte/mikroev/foerderprogramm.html. For the Federal Ministry for Agriculture, Forestry, Regions, and Water Management, see e.g. <https://info.bml.gv.at/service/foerderungen.html>, <https://info.bml.gv.at/service/foerderungen/publizitaetsmassnahmen/allgem-foerderung.html>, <https://info.bml.gv.at/themen/wasser/foerderungen.html>.

The Austrian Environmental Information Act (*Umweltinformationsgesetz*)²⁴ and equivalent provisions at provincial level, implement the public's right to access environmental information held by public authorities pursuant to the Aarhus Convention. However, this probably could not be actioned against State aid decisions, as they might not qualify as environmental information; and requests for information could possibly be refused on the basis of protection of personal data and/or protection of business or trade secrets.

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²⁴ Legal information system of the federal government, Environmental Information Act, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010766>.