The Legal 500 Country Comparative Guides

Austria: Environment

This country-specific Q&A provides an overview of environment laws and regulations applicable in Austria.

For a full list of jurisdictional Q&As visit here

Contributing Firm
Haslinger/Nagele & Partner Rechtsanwälte GmbH

Authors
Wolfgang Berger
wolfgang.berger@haslinger-nagele.com

Wilhelm Bergthaler
wilhelm.bergthaler@haslinger-nagele.com
1. **What is the environmental framework and the key pieces of environmental legislation in your jurisdiction?**

   The Austrian legal system is characterised by its federal structure. Therefore, environmental laws fall either within the legislative power of the National Legislator or one of the parliaments of the federal states and are administered by either central or regional authorities. Accordingly, there is no uniform environmental act but a broad spectrum of laws and regulations issued both on a federal and on a regional level.

   Due to Austria being a member of the European Union, most Austrian environmental legislation contains implementations of European Union Directives and amendments may be owed to findings of the European Court of Justice ('ECJ').

   Among the main environmental acts passed by the National Legislator ('Nationalrat') are the Environmental Impact Assessment Act ('UVP-G'), the Trade, Commerce and Industry Regulation Act ('GewO') the Water Rights Act ('WRG'), the Waste Management Act ('AWG') and the Forest Act ('ForstG'). As the protection of the nature falls within the legislative power of the federal states, each of the nine Austrian provinces has its own Nature Conservation Act, in which the EU Habitats Directive 92/43/EEC is implemented.

2. **Who are the primary environmental regulatory authorities in your jurisdiction? To what extent do they enforce environmental requirements?**

   In general, each environmental law includes provisions regarding the competent environmental regulatory authorities for the respective matter; as there is not one ‘Environmental Code’, but multiple environmental acts passed by different legislators, there are various competent administrative authorities, hence creating a complex and fragmented system:

   A lot of responsibilities fall within the competence of the district administrative authorities ('Bezirksverwaltungsbehörde') or one of the nine state governors or one of the Austrian federal ministers.

   The legal consequences of breaches of environmental stipulations are regulated in the respective environmental acts and the respective penalties are imposed by administrative authorities. However, the Criminal Code also contains a subsection regarding criminal acts against the environment. Therefore, in more severe cases of environmental offences, not only administrative penalties, but also prison sentences can be imposed.

3. **What is the framework for the environmental permitting regime in your jurisdiction?**

   Permits are generally required for facilities and/or activities that could potentially impact the
environment. They are regulated in various environmental laws. Accordingly, several proceedings may be necessary to obtain all necessary permits, although some laws (especially the UVP-G) include regulations to concentrate some of the required proceedings.

4. **Can environmental permits be transferred between entities in your jurisdiction? If so, what is the process for transferring?**

As far as permits require individual qualification (such as an evidence of competence), they cannot be transferred onto another person.

However, permits in rem are transferred with the facility or site they are relating to. E.g. permits for industrial sites are adhered to the facility they are related to. Sometimes such an in rem effect is explicitly stipulated, i.e. regarding water utilizations rights.

Usually the authorities have to be informed in case of change of ownership of a facility of site, provisions may contain an obligation to notify the competent authority of a transfer. For example, according to the Trade, Commerce and Industry Regulation Act, such a notification is necessary in case of change of ownership of a production plant.

5. **What rights of appeal are there against regulators with regards to decisions to grant environmental permits?**

Permits are either granted or denied by administrative decision, which may be challenged by way of complaint in the competent administrative court (‘Verwaltungsgericht’). Complaints are decided by administrative judges (in most cases after a court hearing), who either decide on the matter itself or refer it back to the administrative authority.

Whether third parties have a right to appeal and on which grounds they may appeal is regulated individually in each environmental law. Recently, several environmental laws have been amended to comply with the provisions of the Aarhus Convention and respective ECJ rulings, granting participation rights to the public affected and especially to non-governmental environmental organisations.

6. **Are environmental impact assessments (EIAs) for certain projects required in your jurisdiction? If so, what are the main elements of EIAs and to what extent can EIAs be challenged?**

Projects which are likely to have effects on the environment require a comprehensive environmental impact assessment as set out in the Environmental Impact Assessment Act (‘UVP-G’) which has implemented the European Union’s EIA Directive (85/337/EEC, 2011/92/EU, 2014/52/EU).

The projects which require an EIA prior to their development consent are listed in the Annex
of the UVP-G. In case of most of these projects the environmental impact assessments are integrated in a concentrated proceeding according to the second section of the UVP-G, meaning that all relevant administrative provisions regarding the project are incorporated and considered in one procedure for obtaining all necessary development consents. Only for federal highways and high capacity rail sections (third section of the UVP-G) separate development consents have to be issued in separate proceedings by the competent federal and regional authorities. However, also in this case the EIA itself is integrated in the proceeding with the Federal Minister, who also has to consolidate the relevant proceedings.

The UVP-G provides thresholds and criteria to determine when projects need to undergo an EIA from the outset and when a case-by-case examination is required to determine if an EIA is necessary. There is also the possibility to of a voluntary scoping proceeding to determine the scope of the environmental impact assessment.

If, following a case-by-case examination, the authorities find that no EIA has to be carried out, said decision can be appealed by members of the affected public (including NGOs).

7. **What is the framework for determining and allocating liability for contamination of soil and groundwater in your jurisdiction, and what are the applicable regulatory regimes?**

Old landfills, abandoned industrial sites and soil and groundwater which have been contaminated by these landfills and sites are considered as ‘contaminated sites’ according to the Act on the Remediation of Contaminated Sites (‘Altlastensanierungsgesetz’) if they cause considerable hazards to either human health or the environment.

To detect contaminated sites, suspected contaminated sites are identified, assessed and evaluated by the authorities. The acquired data and knowledge is fed into a register of potentially contaminated sites by the Environmental Agency. Everyone is entitled to request information regarding whether a site is registered.

Sites that require securing and remediation according to a risk assessment are confirmed as contaminated sites and are also registered accordingly.

In case of a site having been registered as a ‘contaminated site’, the state governor is the competent authority for decisions concerning the necessary measures to secure and remediate the site according to the Water Rights Act, the Trade, Commerce and Industry Regulation Act and the Waste Management Act. Necessary measures have to be tolerated by the land owner or other right owners, even if they have not caused the contamination.

According to para 18, the Republic of Austria will implement the necessary measures if no one can be obligated to do so.
If someone has caused a contaminated site by his activities or if the land owner has agreed to or tolerated the deposit that caused the contamination, these persons can be held responsible for the decontamination or securing of the contaminated site. The obligation of reimbursement may be funded (or partially funded) by state subsidies and in some cases be abated or reduced if the damage was caused by minor oversight, if equity requires.

8. **Under what circumstances is there a positive obligation to investigate land for potential soil and groundwater contamination? Is there a positive obligation to provide any investigative reports to regulatory authorities?**

The European Union Directive on Industrial Emissions (Integrated Pollution Prevention and Control), 2010/75/EU was i.a. implemented in para 134a of the Water Rights Act regarding initial state reports: under certain circumstances, operators of industrial plants are obligated to submit a report regarding the initial state of the site in relation to a potential groundwater contamination.

Furthermore, the Directive 2010/75/EU stipulates that the Member States set up a system of environmental inspections of IPPC installations. Accordingly, environmental inspections, whose results are summarised in a report, have to be carried out regularly according to provisions in the Waste Management Act, the Trade, Commerce and Industry Regulation Act and the Mineral Raw Materials Act (‘MinroG’).

The state governors are obliged to report suspected contaminated sites to the Federal Minister for Climate Action, Environment, Energy, Mobility, Innovation and Technology. The Federal Minister has to coordinate the detection, assessment and evaluation of such sites together with other ministers and order additional examinations by the respective state governor if necessary. The acquired data and knowledge is utilised by the Environmental Agency and fed into a register of potentially contaminated sites (cf 4.1).

Land owners and other right holders regarding the property are to tolerate entering of their property for sampling purposes. They are, however, not obligated to actively investigate or report contaminations.

9. **If land is found to be contaminated, or pollutants are discovered to be migrating to neighbouring land, is there a duty to report this contamination to relevant authorities?**

If someone has caused a contamination of water including groundwater, he is obliged to inform the authorities (para 31 of the Water Rights Act).

According to para 36 of the Emission protection law for boiler installations (‘Emissionsschutzgesetz für Kesselanlagen’), the plant operator has to report significant violations of emission threshold values and further specified instances of failure of waste gas
10. **Does the owner of land that is affected by historical contamination have a private right of action against a previous owner of the land when that previous owner caused the contamination?**

   In case of the purchase of contaminated land, such a contamination would generally be considered as a defect, meaning a deviation from a contractual agreement. The buyer of contaminated land could invoke warranty claims, unless the contract contains an exclusion of liability regarding the respective contamination.

   Claims may further be based on rescission on the grounds of mistake due to defects, laesio enormis (lesion beyond moiety) or compensation for damages. The statutory period of limitation (‘Verjährungsfrist’) also has to be taken into account (3 years from the date of knowledge of the damage according to the Austrian Civil Code).

11. **What are the key laws and controls governing the regulatory regime for waste in your jurisdiction?**

   The main federal law is the Waste Management Act (‘AWG’) which has implemented the European Union’s Directive on waste 2008/98/EC (‘Waste Framework Directive’) in Austria. The AWG also includes provisions implementing the European Union’s legislation on the Shipment of Waste (1013/2006/EC). Furthermore, there are several regulations such as the Landfill Ordinance or the Packaging Ordinance supplementing the Austrian Waste Management Act.

12. **Do producers of waste retain any liabilities in respect of the waste after having transferred it to another person for treatment or disposal off-site (e.g. if the other person goes bankrupt or does not properly handle or dispose of the waste)?**

   Yes, according to paragraph 15 (5a) of the Waste Management Act the waste holder is responsible for the waste’s transfer to a waste collector or a waste processor/waste treatment operator entitled to collect/treat the respective waste type. He is furthermore responsible for the explicit order of an environmentally appropriate waste recycling and disposal.

   If the waste holder fails to transfer waste according to paragraph 15 (5a) he may be held accountable until the environmentally appropriate recycling or disposal is completed.

13. **To what extent do producers of certain products (e.g. packaging/electronic devices) have obligations regarding the take-back of waste?**

   Take-back obligations are set out in several regulations, such as: the Ordinance on Waste Prevention, Collection and Treatment of Waste Electrical and Electronic Equipment (WEEE Ordinance, ‘ElektroaltgeräteVO’), the Batteries Ordinance (‘BatterienVO’), the Packaging
Ordinance (‘VerpackungsVO’) and the End-of-Life Vehicles Ordinance (‘AltfahrzeugeVO’).

Producers of electrical and electronic devices for private households are obligated to take back waste of electrical and electronic equipment from collection points, final distributors or final consumers at collection points or – in case of establishment of other return options – from final consumers at least free of charge.

Producers of such devices for commercial purposes are also obligated to take the devices back free of charge; if distributed before August 13th, 2005, only in case the devices are replaced with a new device according to the WEEE Ordinance.

A take-back obligation is further stipulated for producers of device and vehicle batteries who have to fulfil their obligation by participating in a collection and recycling system (see Batteries Ordinance).

Producers of commercial packaging are in general obliged to take them back free of charge after usage. While producers of commercial packaging have the possibility but not the obligation to fulfil their obligations by participating in a collection and recycling system (and could set up a system of their own), producers of household packaging are obliged to do so (Packaging Ordinance).

Furthermore, producers have to take back end-of-life-vehicles of the brand that they have distributed. For that purpose, they have to establish collection points, the return generally has to be free of charge and the producer can transfer the obligation to a collection and recycling system (End-of-Life Vehicles Ordinance).

14. **What are the duties of owners/occupiers of premises in relation to asbestos, or other deleterious materials, found on their land and in their buildings?**

The production and distribution of asbestos and products containing asbestos have been banned in Austria as of 1990. Further restrictions are stipulated in the Chemicals Prohibition Ordinance (‘Chemikalien-Verbotsverordnung’), the List of Waste Ordinance (‘Abfallverzeichnisverordnung’) and the European Union’s REACH Regulation 2006/1907/EC.

There is no specific provision in Austrian law requiring land owners to examine their property in order to assess whether the land or building contains asbestos or other deleterious materials or to report their discovery to the authorities.

However, employers have certain reporting duties regarding activities involving asbestos in accordance with the Limit Value Ordinance (‘Grenzwerteverordnung’) and the Health and Safety at Work Act (‘ArbeitnehmerInnenschutzgesetz’).
If the materials are qualified as waste, they fall within the scope of the Waste Management Act. The Waste Management Act distinguishes between hazardous and non-hazardous waste, asbestos waste falling in the first category. The regulations for hazardous waste are more stringent.

According to para 73 of the Waste Management Act, the administrative authorities may oblige the obligated party (primarily the perpetrator) to take the necessary measures or prohibit unlawful actions if waste is not collected, stored, transported, shipped or treated according to the regulations in an ordinances based on the Waste Management Act or if its safe treatment is required in order to avoid negative effects on public interests.

15. **To what extent are product regulations (e.g. REACH, CLP, TSCA and equivalent regimes) applicable in your jurisdiction? Provide a short, high-level summary of the relevant provisions.**

Product regulations are scattered over various laws and are heavily influenced by EU Regulations:

The European Union’s REACH Regulation 2006/1907/EC is applicable in Austria and regulates the registration, admission, restriction and evaluation of chemicals.

Another applicable regulation, the CLP Regulation 2008/1272/EC, sets out rules for the classification, labelling and packaging of materials and mixtures.

Furthermore, the EU’s Directive on the reduction of the impact of certain plastic products on the environment 2019/904/EU will have to be implemented in the following years (most provisions have to be implemented by July 3rd, 2021).

The Waste Management Act already contains a regulation that prohibits the distribution of plastic bags as of January 1st 2020 with certain exceptions.

The Plant Protection Products Regulation (2009/1107/EC) sets the legal framework for the placement of pesticides on the EU Single Market and approves active substances, whereas the authorisation of single plant protection products falls within the competence of the Member States. This system has become an issue regarding an Austrian state’s attempts to ban glyphosate.

Furthermore, products containing or consisting of genetically modified organisms may not be distributed without prior authorisation (para 54 (1) Genetic Engineering Act ‘Gentechnikgesetz’). The Federal Minister may limit or ban the distribution or usage of a product in case of the reasonable assumption that the product might be dangerous to human health.
16. **What provisions are there in your jurisdiction concerning energy efficiency (e.g. energy efficiency auditing requirements) in your jurisdiction?**

The EU’s Directive on Energy Efficiency 2012/27/EU has been implemented by the Federal Energy Efficiency Act (‘Bundes-Energieeffizienzgesetz’), aiming, i.a., at the cost-efficient improvement of energy use both by companies and households and at setting indicative targets regarding energy efficiency to contribute to the establishment of a cost-optimised, sustainable and secured energy supply.

The Act also contains regulations regarding energy audits and defines them as a systematic procedure to obtain sufficient information regarding the existing energy consumption profile of buildings and industrial plants as well as private or public services to identify and quantify the possibilities to reduce energy costs efficiently and to record the results in a report.

Companies of a certain size are obliged to either conduct audits on a regular basis (minimum every 4 years) or to implement a certified energy, environment or comparable management system.

Quality standards for the provision of energy audits are set out in the Energy Efficiency Act; in case of an energy audit of a company, the auditor is obliged to report an energy audit and its content to a Monitoring Agency (‘Monitoringstelle’).

The Energy Performance Certificate Act (‘Energieausweis-Vorlage-Gesetz’) further obliges sellers or lessors of buildings to provide the buyer or lessee with an energy performance certificate and specify certain indicators regarding the building’s or other object’s energy-efficiency.

17. **What are the key policies, principles, targets, and laws relating to the reduction of greenhouse gas emissions (e.g. emissions trading schemes) and the increase of the use of renewable energy (such as wind power) in your jurisdiction?**

The European Union’s 2020 Climate and Energy Package aims at reducing greenhouse gas emissions by 20 % (from 1990 levels). The share of renewable energy in energy consumption should amount to 20 % and energy efficiency should be improved by 20 %.

Ambitious plans to reduce greenhouse gas emissions by 36% in comparison to 2005 until 2030 are laid out in the Austrian National Energy and Climate Plan (‘NEKP’).

The Green Electricity Act (‘Ökostromgesetz’) regulates i.a. investment grants for renewable energy sources such as photovoltaic, water or wind power systems.

18. **To what extent are environmental, social, and governance (ESG) issues a material
consideration in your jurisdiction? Is ESG due diligence for transactions and/or ESG public reporting becoming more common?

While environmental risk assessments are common in Austrian due diligences (see below), ESG due diligences and reports are not yet standard practice, but seem on the rise. A growing number of guidelines regarding sustainable investment are available.

19. **To what extent can the following persons be held liable for breaches of environmental law and/or pollution caused by a company: (a) the company itself; (b) the shareholders of the company; (c) the directors of the company; (d) a parent company; (e) entities (e.g. banks) that have lent money to the company; and (f) any other entities?**

The Federal Environmental Liability Act (‘Bundes-Umwelthaftungsgesetz’) covers the liability for environmental damages, which are defined as substantial impairment of surface water and ground water or soil which causes health risks. The regulation of liability for impairments of protected species and habitat falls within the competence of the nine Austrian states, however, and is hence not covered by the Federal Environmental Liability Act.

The Federal Environmental Liability Act addresses the person exercising the business activity or assigning it, hence the operator. However, according to this law, only the company may be liable for the impairment, not its director or employees personally. The land owner may be liable in the second degree.

Under private tort law in the first instance also the company itself is liable.

There is no statutory regulation stipulating a liability of either a parent company, entities that have lent money to the company or other entities, but have been established on a case-to-case basis by the courts.

The Criminal Code includes a section concerning criminal offences against the environment. In case of such an offence, any natural person – even in case that he has acted for a company – may be liable according to general criminal legal principles. Furthermore, the Association Responsibility Act (‘Verbandsverantwortlichkeitsgesetz’) enables the liability of companies for such criminal legal offences.

To avoid the directors’ liability for administrative penalties for less serious breaches of environmental law, the Administrative Penal Act (‘Verwaltungsstrafgesetz’) provides the possibility to nominate a responsible person in advance who would be liable for future breaches of environmental law.
20. **To what extent can: (a) a buyer assume any pre-acquisition environmental liabilities in an asset sale/share sale; and (b) a seller retain any environmental liabilities after an asset sale/share sale in your jurisdiction?**

Environmental liabilities remain with the company in case of a share deal, however, the buyer may be entitled to warranty claims depending on the details of the purchase agreement.

In case of an asset deal, the buyer assumes the pre-existing legal relationships referring to the company with all rights and obligations according to paragraph 38 of the Commercial Code (‘Unternehmensgesetzbuch’) and is liable for obligations even if the legal relationship they refer to is not assumed by a buyer. A valid deviation from this regulation requires that a respective agreement between the seller and the buyer obtains a certain publicity.

According to para 39 of the Commercial Code, the seller further remains liable regarding claims that are due within five years after the agreement.

Para 1409 of the Civil Code (‘Allgemeines Bürgerliches Gesetzbuch’) further stipulates that the buyer of a company shall be liable regarding obligations he knew of or had to know about. The amount of the liability is limited to the company’s worth.

21. **What duties to disclose environmental information does a seller have in a transaction? Is environmental due diligence commonplace in your jurisdiction?**

In general, the potential buyer must be informed of circumstances which significantly influence a purchase decision and about which, according to the principles of fair dealing, disclosure is to be expected. If environmental due diligence is performed, information regarding circumstances that are not evident from the documents provided must be made available. The non-disclosure of environmental law issues may result in claims for compensation by the buyer.

Environmental due diligence is common practice in Austria. Especially in areas particularly affected by possible environmental risks, environmental due diligence is of great importance and has major influence on the content of the purchase agreement (e.g. representations and warranties) and the purchase price in terms of risk management. In the case of real estate purchases, for example, the previous inspection of the freely accessible national Atlas of Contaminated Sites and the Register of Suspected Contaminated Sites (‘Altlastenatlas und Verdachtsflächenkataster’) is performed by default. In certain cases, environmental audits are used to provide the potential buyer with evidence that no risks from environmental contamination are to be expected.
22. **What environmental risks can be covered by insurance in your jurisdiction, and what types of environmental insurance policy are commonly available? Is environmental insurance regularly obtained in practice?**

   Environmental liability insurances are available in Austria and usually obtained as an extension to general business liability insurances. The insurance may cover material damage, but usually not personal injuries (which are covered by business liability insurances), if an environmental nuisance regarding the condition of air, soil or water through immissions is caused by a single, sudden, unforeseeable incident, which deviates from the orderly and undisturbed operations.

   While the environmental liability insurance only covers third party damages, an environmental cleanup costs insurance also covers restoration costs regarding the insured party’s property.

23. **To what extent are there public registers of environmental information kept by public authorities in your jurisdiction? If so, what is the process by which parties can access this information?**

   Several registers containing environmental information are publicly available and may be accessed online and free of charge, i.e. the Atlas of Contaminated Sites and the Register of Suspected Contaminated Sites (‘Altlastenatlas und Verdachtsflächenkataster’) according to the Act on the Remediation of Contaminated Sites, or the Water Register (‘Wasserbuch’), a public register of water utilization rights according to the Water Rights Act. Waste collectors and waste treatment operators are registered in accordance with the Waste Management Act.

   Environmental information that is not publicly available may be requested according to the Environmental Information Act (see below).

24. **To what extent is there a requirement on public bodies in your jurisdiction to disclose environmental information to parties that request it?**

   In light of general administrative legal principles, only parties of proceedings are in principle entitled to access and inspect all related files. Certain documents may be excluded in case the inspection would damage legitimate interests of a party or third party, endanger the authority’s tasks or compromise the proceeding’s purpose.

   However, para 4 of the Environmental Information Act (‘Umweltinformationsgesetz’) stipulates the right to free access to environmental information present at authorities required to provide information. The right may be invoked by natural persons as well as legal entities without having to produce evidence of a legal claim or legal interest. Environmental information are further defined in para 4 of the Environmental Information Act, para 6.
contains restrictions of the right.

25. **Have there been any significant updates in environmental law in your jurisdiction in the past three years? Are there any material proposals for significant updates or reforms in the near future?**

One of the most discussed and complex matters in Austrian environmental law in recent years was caused by the ECJ’s ‘Protect’ decision regarding the status of party for NGOs in environmental proceedings (20th December 2017, C-664/15). The Court decided that an environmental organisation (Protect) has the right to participate in a proceeding with the status of party if the permit could breach the prohibition to deteriorate the qualifying water bodies. In its appeal against the denial of status of party, Protect based its claims on the Aarhus Convention.

The Supreme Administrative Court (‘Verwaltungsgerichtshof’) decided to stay proceedings and to refer several questions to the ECJ. The ECJ ruled that Art 9(3) of the Aarhus Convention in conjunction with Art 47 of the Charter of Fundamental Rights requires that a duly constituted environmental organisation must be able to contest before a court a decision granting a permit for a project that might be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in the Water Framework Directive.

The ECJ also proclaimed that national procedural rules that, in a in situations such as that in question, deprive environmental organisations of the right to participate in the permit procedure as a party and only grant the right to contest decisions regarding such a permit procedure to persons who had the status of party in the permit procedure, must be interpreted as precluded.

As the Aarhus Convention relates not only to water but environmental laws in general, due to the Protect decision, several environmental laws have been amended to extend environmental organisation’s rights (Water Rights Act, Waste Management Act, laws regarding air protection and the protection of nature), although the discussion as to the sufficiency of the extent of these rights is ongoing. The issue of whether the decision has any retroactive effects on final and enforceable permits and decisions is also not yet resolved.

Another widely debated update was last year’s introduction of the Site Development Act (‘Standortentwicklungsgesetz’). The law stipulates several measures to expedite permitting proceedings regarding projects that are of extraordinary importance to the (further) development to Austria as a business location.

As of January 2020, the Green Party is part of the Federal government for the first time in Austrian history and the government programme i.a. contains long-term plans to promote renewable energy sources and to reach climate neutrality.