



ICLG

The International Comparative Legal Guide to:

Environment & Climate Change Law 2017

14th Edition

A practical cross-border insight into environment and climate change law

Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer LLP, with contributions from:

August Debouzy
Bär & Karrer Ltd.
Bazarbek & Partners LLP
Blake, Cassels & Graydon LLP
bpv Hügel Rechtsanwälte GmbH
CMS Cameron McKenna
Del Pozo & De la Cuadra
Ferraiuoli LLC
Freshfields Bruckhaus Deringer LLP
GANADO Advocates
GESSEL
Guevara & Gutiérrez S.C. Servicios Legales
Guyer & Regules

lindenpartners
Machado Meyer Advogados
Macías Gómez & Asociados Abogados S.A.S
Maddocks
Makarim & Taira S.
McCann FitzGerald
PSA
Romulo Mabanta Buenaventura Sayoc & de los Angeles
Smith Ndlovu and Summers Attorneys
Snell & Wilmer
TMI Associates
Wistrand Law Firm

Austria

bpv Hügel Rechtsanwälte GmbH

Priv.-Doz. DDr. Christian F. Schneider



Mag. Anna Walbert-Satek



1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in your jurisdiction and which agencies/bodies administer and enforce environmental law?

In Austria, environmental policy is a diverse matter, which can hardly be boiled down to a uniform policy. Austrian legislation on environmental issues has developed over time in relation to specific matters. Thus, there is no consolidated act or centrally competent authority in charge of a broad “Environmental Law” matter.

In 2013, the Austrian legislator enacted a constitutional law concerning “sustainability, animal protection, comprehensive environmental protection, the securing of water and food supplies and research” (“*Nachhaltigkeits-BVG*”). Even though this act is only of declaratory nature, it is paving the way for an environment friendly future. The act takes an anthropocentric approach as its main target is the preservation of natural resources for human beings.

Apart from that, much of Austrian legislation on environmental matters is comprised of laws implementing EU regulations and directives in that respect.

Given that Austria is organised as a federal state, the Austrian legislative and administrative landscape is multi-layered and thus complex. Legislative and administrative competencies are divided among the central government, federal states and municipalities.

In summary, environmental law in Austria is a fragmented legal field both as regards legislature and administration.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

Law enforcement by the competent authorities is based on the fundamental principle of legality. As a result thereof, authorities will only take action if, to the extent and in the manner provided for in applicable laws.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

The (federal and state) Acts on Environmental Information Law, implementing EU directive 2003/4/EC, provide for a right for

every natural or legal person to free and unrestricted access to “environmental information”. Such information includes, e.g. the state of environment elements such as air and atmosphere or other environment-related factors, such as substances, energy, noise, radiation or waste. There is no central authority or agency competent to provide such information. The authority or agency designated to provide such information is thus determined in the laws and regulations applicable to the relevant subject matter.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Generally speaking, an environmental permit is required where the legislator expects a material impact of a measure or act on the environment. Significant permit requirements for business operations are governed by the Austrian Industrial Code (in relation to business installations), the Water Management Code (in relation to water use or to activities with impact on water), the Forest Act (in relation to forest use), the Waste Management Act (in relation to waste treatment) or in the various laws on nature protection. It should also be noted that the concept of business installations subject to a permit under the Austrian Industrial Code is very broad, with the result that almost all business installations require such permit.

Environmental permits are generally attached to the relevant objects subject to regulation, such as business installations or plants. Therefore, it is generally not possible to transfer solely an environmental permit from one person to another. Yet it is in many cases possible to transfer the object together with the relevant permit attached to it.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Subject to the specific laws applicable to a particular matter, a party generally has the right to file an appeal against most decisions of an environmental regulator or authority. Such appeal is to be addressed either to the Federal Administrative Court or to the competent State Administration Court. An Administration Court’s decision can be appealed before the Supreme Administrative Court or the Constitutional Court.

In general, an appeal may be lodged by the party affected by the decision (e.g. the plant operator and the neighbours to the installation). In some special cases, in particular under the EIA Act, rights of appeal may also be granted to the municipality of the site, the environmental ombudsman, civic action groups and environmental organisations.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

It is necessary to carry out an environmental impact assessment ("EIA") if a project potentially has a major impact on the environment. The Austrian EIA Act implements the EIA Directive 2011/92/EU into Austrian law.

Apart from that, operators of business installations and other facilities (e.g. waste treatment facilities) have to conduct periodical audits whether the respective facility complies with the permits granted.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Authorities generally have the power to issue administrative penalties, primarily fines and only as a substitute a (short) prison sentence in case a fine should remain unpaid. In addition, where specifically provided for in applicable laws, authorities can have the power to order a party to restore the lawful state as required by applicable laws or, at last resort, even to order the closure of a business.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The Waste Management Act provides for a definition of the term "waste", which includes movable objects the owner of which is willing to discard, which have already been discarded, or which need to be collected, stored, transported and treated as waste, to avoid any detriment to the public interest. Materials that have coalesced with soil in a way that might have negative effects on the environment is also considered as waste.

The Waste Management Act defines several different categories of waste depending on their type, origin and their hazardous potential; to each of these categories, (slightly) different laws apply. Yet the most important differentiation has to be made between non-hazardous waste and hazardous waste, which is defined in the Waste Classification Ordinance. Hazardous waste is subject to stricter regulations, for instance, requiring stricter documentation, reporting and notification obligations and permit requirements.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Depending on the specific classification of waste, it has to be properly managed or recycled in accordance with the Waste Management Act. Storage, disposal and processing of waste may require a permit.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

The Waste Management Act provides only for documentation and disclosure obligations in relation to treatment and storage of waste, but there is no residual liability arising from administrative law.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The Waste Management Act provides for several take-back or recovery obligations: producers of waste such as old electrical goods; old batteries; or packaging materials must either accept their return or participate in an authorised collection and recovery system. Dispensing of oil filters is only permitted subject to a take-back obligation.

The Chemicals Act defines toxic chemicals and substances as waste and provides for a take-back obligation in respect thereof.

Furthermore, several ordinances provide for take-back obligations in relation to used products, by-products or waste such as end-of-life vehicles, waste batteries, mud and waste water from processing carcasses, waste water from manufacturing gelatine or glue from animal by-products or tannery and leather production.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Breaches of environmental laws are primarily sanctioned as an administrative offence according to the respective administrative laws. Typical sanctions include the obligation to stop the breach and to restore the state of affairs required by the relevant law at one's own expense.

Only severe breaches qualify as criminal offences in terms of the Austrian Penal Code. Such severe breaches include, e.g. intentionally or negligently causing a conflagration, danger through ionising radiation or exploders, or intentionally or negligently harming the environment (water, soil or air) in a way that severely endangers a large number of human beings, biodiversity, impairs water, soil or air for a long period of time or causes damages exceeding EUR 50,000. Likewise, criminal offences in terms of the Austrian Penal Code include intentionally or negligently harming the environment, biodiversity or habitats, for instance, by an unlawful treatment and shipment of waste or by unlawfully operating manufacturing facilities.

In addition, breaches of environmental laws may give rise to liability for damages resulting from a breach under Austrian tort law.

Potential defences are drawn from the laws and regulations relating to a particular matter. For instance, a common defence brought forward against penalties for breaches of the Austrian Industrial Code is that operation of a business installation is within the limits of the individual permit.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Subject to the requirements of Austrian tort law being fulfilled, liability from damages might arise even if the polluting activity is operated within permit limits. However, it is not possible to prohibit operation within permit limits or to file an action for injunction against this operation.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Under Austrian penal and tort law, direct personal liability of directors and officers towards third parties can arise when a wrongdoing can be attributed to them in person. However, directors and officers might become liable towards their employer for breach of their duty of care. These liabilities have to be distinguished from liabilities potentially arising from administrative law. According to the Administrative Criminal Act: (i) individuals representing a company; or (ii) certain individuals that have been declared responsible for particular areas of an undertaking towards competent authorities (e.g. manufacturing operations) are responsible for fulfilling the legal requirements and/or permit limits applicable for the respective legal entity and/or business operation.

Due to such risk exposure, it has become common standard in Austria that potentially affected directors take out D&O-insurance coverage. Standard insurance policies include coverage for proceedings related to administrative penalties.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

A share sale does not generally affect (environmental) rights and obligations or liabilities, which generally attach to the target company, respectively to its assets. Environmental laws generally do not provide for change of control provisions triggered in case of a change of shareholders in the target company. In case a business is transferred by way of an asset deal, Austrian law provides for the buyer's liability for seller's liabilities. Permits and licences attached to an object (such as facilities operation permits; see question 2.1 above) transfer to the buyer along with the respective asset. However, permits and licences attached to the seller *in personam* will generally not transfer to the buyer in an asset purchase transaction.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Lenders might become liable for environmental wrongdoing or remediation costs under extraordinary circumstances only. For instance, Austrian courts have accepted liability in case a lender manages the affairs of the debtor to an extent that the lender acts as its factual manager.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Primarily it is the polluter who is liable for contamination of water and soil. The polluter is also responsible for the clean-up measures ordered by the competent authorities.

The Waste Management Act and the Water Management Act provide for a subsidiary liability for the landowner, according to which the landowner may assume liability if he has agreed to or tolerated storage or deposition of waste, dangerous activities or facilities causing pollution and refrained from reasonable counter-measures. Furthermore, legal successors of the landowner may be held liable for contaminations, if they knew or should have known about storage or deposition of waste, dangerous activities, or polluting facilities.

However, a landowner may only become liable for a storage or deposition of waste that occurred prior to 1st July 1990, if he explicitly approved it and if he received a countervailing benefit. The landowner's liability in such case is generally limited to the benefit exceeding adequate remuneration for use of the soil. If it is not possible to hold the landowner liable, in general, the competent authority has to remove and manage unlawfully stored or deposited waste at the expense of state funds.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Under well-established court practice, all polluters are held jointly and severally liable where more than one person is responsible for contamination.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator, can the regulator come back and require additional works or can a third party challenge the agreement?

The Austrian Federal Environmental Liability Act sets out obligations to prevent and remediate environmental damage. If environmental damages have occurred, the operator as defined in the Federal Environmental Liability Act has to: i) report all relevant facts to the competent authority; ii) immediately take any measure to control, clear and fix the contaminants or damaging factors to prevent threats to human health, water and soil; and iii) take all necessary remedial measures.

If the measures taken by an operator are not sufficient or not taken in time, the competent authority may oblige the operator to take the necessary precautions or measures, or, in the case of imminent danger, may directly impose precautions or measures.

The Austrian Federal Environmental Liability Act further provides that natural and legal persons that may be affected by environmental damages have the right to lodge an "environmental complaint" in which they can suggest to the competent authority to oblige an operator to take certain precautions or measures. Persons that have lodged such a complaint and persons that have declared their intent of becoming party within two weeks after the announcement of a proceeding concerning an operator's obligation to take precautions or remedial measures, are entitled to participate in such proceedings and to appeal against the administrative decision rendered in it.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

A buyer of contaminated land can seek contribution or compensation from a previous owner or occupier thereof only if such right of recourse is expressly provided for in the respective purchase agreement or in case of violation of pre-contractual disclosure obligations.

To the extent permitted from a public policy point of view, the polluter can transfer his risk to a purchaser, e.g. by including a hold-harmless obligation of the buyer to that effect in the purchase agreement.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

There is no case law on whether aesthetic harms to public assets are to be qualified as damages in terms of environmental laws. However, it cannot be ruled out that aesthetic harm could also be qualified as damages in terms thereof.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

In case of a well-founded suspicion of any violation of environmental laws or if otherwise provided by applicable law, authorities have to take up investigations *ex officio*. The purpose of the preliminary investigations is to establish the facts of the case. Investigation measures to be taken by the competent authorities include production of documents, taking of samples, conducting site inspections and interviewing employees. In most cases, authorities can enforce investigation measures by coercive measures.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

According to the Austrian Federal Environmental Liability Act, all relevant facts have to be reported to the competent authority if pollution is found on a site, or discovered to be migrating off-site (see also question 5.3). If a third party is at risk of suffering damages as a result of off-site migration of pollution, such third party must be warned in order to mitigate potential damages.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

If suspicion or evidence indicate a need for further examinations.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

There is a general and mutual duty of parties to pre-contract negotiations to disclose information relevant to the other party's decision to enter into the envisaged agreement. There has been a tendency in Austrian court practice in recent years to apply stricter standards as to disclosure obligations.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

A perpetrator's direct liability arising from administrative law towards the competent authorities cannot be altered by agreement. While hold-harmless obligations in relation to environmental liabilities are permitted and common practice, the effect of such hold-harmless obligation is limited to the relationship between the relevant contract parties. However, the relationship towards competent authorities and penalties issued by them to any party involved is not affected thereby.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

It is generally not possible under Austrian accounting standards and rules to shelter environmental liabilities off balance sheet. Dissolution and liquidation of companies is subject to a formal procedure including public creditor convocation. Generally, liquidation of a company cannot be completed if liabilities remain outstanding. In practice, however, it cannot be ruled out that a claim for environmental liabilities is not made within the creditor convocation period, in which case liquidation of the company can be completed. However, in case the liquidated company was the primary polluter and authorities can no longer get hold of it due to the liquidation, subsidiary liability (e.g. of the previous landowner or the current landowner) may arise.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Generally, shareholders may not be held liable for breaches of law and/or pollution caused by a company. Direct liability of (direct or indirect) shareholders generally requires attribution of a wrongdoing to the respective shareholder according to the principles of tort law. The Austrian Supreme Court allowed piercing of the corporate veil to shareholders of a company only under extraordinary circumstances, such as material under-capitalisation of a company and factual management thereof by the shareholder.

8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

No; however, reporting of potential crimes or wrongdoings may be made on an anonymous basis.

8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

Although Austrian law does not provide for class actions, Austrian civil procedure rules permit consolidation of claims against a defendant in one court proceeding under certain circumstances. Similar claims by several parties affected by environmental damages caused by a perpetrator could potentially qualify for consolidation in one single proceeding. Austrian tort law is based on the principle of compensation of actual damages. Thus, exemplary or penal damages are not available under Austrian law.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

No, they do not.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in your jurisdiction and how is the emissions trading market developing there?

The Trading Scheme Directive 2003/87/EC concerning the greenhouse gas emission allowance trading scheme of the Community, last amended by Directive 2009/29/EC, is the basis of trading schemes in Austria and has been implemented in the Austrian Emission Certificate Act. The trading market for emissions certificates has not developed according to plan because there are too many certificates on the market. Therefore, the EU is planning to amend the Directive and make it stricter.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

No, there is not.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The overall policy approach is to do everything necessary to effectively mitigate and prevent climate change without hindering economic development and growth. This approach requires a balancing of the different public interests involved.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos litigation primarily involves the protection of workers

and workers’ compensations for health injuries. Court practice hinges on the basic principle that employees and workers shall not be exposed to asbestos at work; otherwise, the employer has to compensate them for incurred health injuries.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The use of asbestos has been prohibited in Austria since the 1990s. Until then it was a popular construction material and therefore still can be found in many buildings and electrical appliances. Importing asbestos to Austria for the purpose of its disposal is not permitted.

Only companies with a permit and specialisation in asbestos abatement and reorganisation are permitted to carry out, for example, demolition works that set asbestos free. Asbestos may only be processed in accordance with strict regulations concerning notification and information obligations and the requirement to precisely inform workers and employees about the risks of asbestos. Works on hazardous asbestos objects have to comply with strict safety precautions.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in your jurisdiction?

Potential environmental risks in Austria include flooding, avalanches or mudslides in the mountains, minor earthquakes, hail and storm. For all those risks, insurance is available. However, environmental risk insurances are not often accepted.

11.2 What is the environmental insurance claims experience in your jurisdiction?

In recent times, no relevant cases have been reported in the public media.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in your jurisdiction.

Ten years ago, the Vienna Airport Company requested the approval for the construction of a third runway. After years of effort dedicated to convince the authority to grant the permit and to reach an agreement with abutting owners via mediation, the Federal Administrative Court dismissed the request on grounds of climate change concerns.

The official reasoning of this decision stressed the importance of balancing the different public interests involved and placed higher weight on climate protection according to the Charter of Fundamental Rights of the EU, the Austrian Federal Constitution and the Constitution of the State of Lower Austria. The Court explained that Austria, in line with these laws, internationally and nationally has been committed to reduce emissions from greenhouse gases and set out sectoral emission limits by 2020 in the Act on Climate Protection.

Following these considerations, the Court weighed public interest in the negative climate change effects, particularly higher CO₂ emissions, against more positive effects of constructing the third runway, such as location and labour market policy.

This landmark decision may potentially result in greater consideration of conflicting public interests towards environmental concerns. It remains to be seen whether this decision will be (successfully) appealed to the Higher Court of Administration and if other authorities will follow the considerations of this ruling also in other areas of law.



Priv.-Doz. DDr. Christian F. Schneider

bpv Hügel Rechtsanwälte GmbH
Donau-City-Straße 11
A-1220 Vienna
Austria

Tel: +43 1 260 50 0
Email: christian.schneider@bpv-huegel.com
URL: www.bpv-huegel.com

Christian is a partner at bpv Hügel attorneys at law and the head of the firm's Environmental, Public and Regulatory practice group. In the field of Environmental Law, he and his team work both for undertakings and public institutions, giving advice to them as well as representing them before court. Apart from Environmental Law, his main areas of practice are general Public and Constitutional Law, European Law (in particular Internal Market and State Aid), Energy Law, Telecommunication Law and Public Procurement Law. In 2013, after writing his second book on "Regulatory Law in the Network Industries", he was awarded the right to teach "Constitutional Law, Administrative Law and the related fields of European Law" by Vienna University ("*Habilitation*"). Christian also has a long list of publications and is a frequent speaker on seminars and conferences.



Mag. Anna Walbert-Satek

bpv Hügel Rechtsanwälte GmbH
Donau-City-Straße 11
A-1220 Vienna
Austria

Tel: +43 1 260 50 0
Email: anna.walbert-satek@bpv-huegel.com
URL: www.bpv-huegel.com

Anna has a wide range of experience due to her work in national and international law firms in which she has specialised, *inter alia*, in Public Law and Environmental Law since 2011. In 2016, after winning a scholarship for special achievements in the scope of Environmental Law, she wrote her doctoral thesis on Energy Efficiency Law. Since autumn 2016, Anna has been an independent attorney-at-law for bpv Hügel attorneys at law and specialises in Environmental Law, Constitutional Law, Administrative Law and Public Procurement Law. Anna is a frequent speaker on seminars and conferences.

bpv LEGAL

bpv Hügel attorneys at law is one of the leading Austrian business law firms. Consisting of 50+ lawyers, the firm's range of advice goes beyond the fields which are typically covered by business law firms such as corporate M&A, financial markets and competition, thus also including environmental, public and regulatory. Apart from offices in Vienna and in the Vienna region, the firm, as one of the very few Austrian firms, also has an office in Brussels. In 2006, bpv Hügel founded the bpv legal, an alliance consisting of independent law firms with offices in Prague, Bratislava, Budapest and Bucharest.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com