

Avosetta Questionnaire:

Climate Litigation

Austria

Cork, 28-29 May 2021

Although it is never easy, please keep your answers succinct – 2 pages max, excluding the questions.

[1] State of play at national level:

In your particular Member State, have cases been decided by the national courts, and / or are there cases pending before the courts, that aim to deliver better climate protection?

Are there “horizontal” cases between private parties and / or “vertical” ones between private parties and public authorities – or both? If yes, briefly characterise them.

Actions challenging public authorities could be aimed: (1) at high level target setting for greenhouse gas emission (GHG) reduction; or (2) at the taking of more concrete measures reducing emissions (such as emissions limits for automobiles); or (3) at projects causing emissions as a side effect (such as a new runway or highway).

Briefly indicate who are the claimants; what are the standing requirements; what is the objective of the action, and what is the reasoning on the substance of the case.

To date, two cases which have been decided by Austrian courts fall within a broad understanding of climate change litigation. Both cases can be characterised as vertical ones, as they were initiated by private individuals against a public decision and a statutory law respectively.

Vienna airport

In the first case, climate change was raised as an issue in relation to the extension of Vienna airport when several citizens’ initiatives and individuals appealed the EIA permit for that project in 2012. In its 2017 judgment 2017,¹ the competent court (BVwG) found this EIA permit to be unlawful. In the view of the court, the EIA authority had not considered all public interests involved for the relevant balancing exercise required by the Austrian Aviation Act, most importantly ‘not all public interests opposing the project such as the public interest in climate protection’.² The BVwG then performed its own balancing exercise and concluded that the public interest in reducing CO2 emissions in Austria and complying

¹ BVwG, Judgment of 2 February 2017, W109 2000179-1/291E.

² BVwG, Judgment of 2 February 2017, W109 2000179-1/291E, at s 4.5.2.

with EU and international climate law obligations would outweigh the other public benefits of the project. Consequently, the BVwG rejected the application for the third runway project and denied an EIA permit.

However, subsequently, the BVwG's decision, i.e. the EIA permit, was annulled by the Austrian Constitutional Court (VfGH).³ The VfGH arrived at this conclusion by arguing that the BVwG had comprehensively misjudged the applicable law when it had performed its (new) balancing exercise. Public interests to consider in that exercise could only be those which are reflected in the relating law; the Austrian Aviation Act, in this case. These public interests must indeed be interpreted in light of § 3 of the Austrian Federal Constitutional Act on Sustainability⁴, which requires 'the prevention of harmful effects on the natural environment as the basic resource of the human being'. Yet, such an interpretation could not lead to considering public interests not already reflected in the Act, including 'climate protection'.

Tax exemptions for the aviation industry

In 2020, 8,063 individuals filed a request with the Austrian Constitutional Court (VfGH) to invalidate several provisions of Austrian tax law. The applicants argued that these provisions, the value-added tax exemption on cross-border flights and the kerosene tax exemption on national flights would make flying less expensive than taking the train and, in this way, contribute to climate change. Following from this contribution, the tax law provisions would infringe on the rights of the applicants, specifically Article 2 and Article 8 of the European Convention on Human Rights, which are part of Austrian constitutional law, Article 2 and Article 7 of the Charter of Fundamental Rights, and the Austrian constitutional principle of equality before the law.

The very same year, the Austrian Constitutional Court dismissed the case as inadmissible. It argued that the applicants, all railcard holders or railway passengers, are not directly and immediately concerned by the tax law provisions in question. The individuals are thus not having standing before the VfGH to challenge these provisions.

[2] Interconnections between developments at national and supranational level:

Where relevant, please connect the national experience to date with developments in climate litigation at the supranational level (e.g. proceedings before the CJEU and the ECtHR).

³ VfGH, Judgment of 29 June 2017, E 875/2017, E 886/2017.

⁴ Austrian Federal Constitutional Act on sustainability, animal protection, comprehensive environmental protection, on water and food security as well as research (BVG Nachhaltigkeit), Federal Law Gazette I 11/2013.