

Österreichischer Rechtsanwaltskammertag

Beitrag ÖRAK Rechtstaatlich- keitsbericht 2025

Anlässlich der öffentlichen Konsultationen der Europäischen Kommission

INHALTSVERZEICHNIS

1. **Konsultation der Europäischen Kommission zum Rechtstaatlichkeitsbericht 2025**.....F
ehler! Textmarke nicht definiert.
2. **Gezielte Konsultation der Interessenvertreter durch die Europäischen Kommission zu „single market dimension“**.....7

1. Konsultation der Europäischen Kommission zum Rechtstaatlichkeitsbericht 2025

Justice System

Please provide information on measures taken to follow-up on the recommendations of the European Commission received in the 2024 Report regarding the justice system.

No improvement in the area of court fees (access to justice), see below for more details. There is still a need for action with regard to the new regulation of the seizure of data/data carriers and their analysis, which was introduced with the Strafprozessrechtsänderungsgesetz 2024, as the requirements of the Constitutional Court were not sufficiently taken into account by the reform. In particular, a clear separation in terms of personnel and organisation between the processing and evaluation of the seized data is required.

The process for preparing and enacting laws

Framework, policy and use of impact assessments and evidence based policy-making, stakeholders'[1]/public consultations (including rules and practices on the transparent participation of civil society to policy development and decision-making processes), and transparency and quality of the legislative process both in the preparatory and the parliamentary phase

The quality of legislation needs improvement. If law makers were respecting minimum standards (e.g. sufficient review periods, "Begutachtungsfristen"), this could sustainably improve the quality of laws and increase public acceptance.

In addition, laws should be regularly evaluated a few years after their introduction to review the consequences of their implementation.

Unfortunately, during the last legislative period, for the first time more laws were passed on the basis of motions proposed by members of Parliament than on the basis of government bills. This has resulted in a reduction in consultation time, a lack of information and a lack of opportunities to evaluate laws.

(See also here: <https://www.wahrnehmungsbericht.at/beitrag/mindeststandards-fuer-gesetzgebungsverfahren> and here: <https://www.parlament.gv.at/fachinfos/rlw/Wie-haben-sich-Gesetzesinitiativen-in-der-XXVII.-GPveraendert>)

Independence

Significant developments in your country in 2024, if any, related to appointment and selection of judges, prosecutors and court presidents (incl. judicial review).
(The reference to 'judges' concerns judges at all level and types of courts as well as judges at constitutional courts.)

The Austrian Bar calls for a reform of the job profile of administrative judges, taking into account the greatest possible permeability between the legal professions and the administrative courts with the aim of harmonising administrative courts with ordinary courts in this regard. Lawyers must continue to have access to the profession of judges at administrative courts.

In addition, measures must be taken to avoid the impression that appointments could be based on mere political considerations in order to increase confidence in the rule of law.

Independence of the Bar (chamber/association of lawyers) and of lawyers

Specific legal provisions and policies in your country (draft or adopted) which could negatively influence the independence of the Bar and lawyers (as regards self-regulation, disciplinary procedures, etc.) in 2024.

Defending the independence of bars and lawyers is an ongoing mission for the Austrian Bar.

The Austrian Bar sees its position on the role of lawyers as cornerstone for the rule of law confirmed by the recent judgement by the ECJ in the preliminary proceedings C-295/23, Halmer. The Austrian Bar would like to repeat that there is sufficient case law and common legal tradition in the Member States on the role of lawyers to support infringement procedures in case that this was necessary.

Concerning upcoming European legislative proposals, the Austrian Bar underlines the need to protect fundamental rights in the area of justice. Especially the issues of retention and access to data, including encrypted information, will pose a direct threat to the confidentiality of lawyer-client-communication in Austria.

Quality of justice

Significant developments in your country in 2024, if any, related to accessibility of courts (e.g. court/legal fees, legal aid, language)

Court fees have become a real barrier to access to justice. Many citizens can no longer afford to go to court due to the high fees, and commercial disputes are increasingly being

dealt with in neighbouring countries (e.g. in Germany, in Bavaria). Austria is the only European country whose income from court fees exceeds the actual costs of the courts.

The following measures are therefore recommended:

- reform of the court fee structure in Austria, the judiciary shall no more be managed like a large company,
- levelling the curve of the progressive tariff for court fees,
- capping of court fees for high amounts in disputes, reduction of court fees for each settlement,
- reduction of the flat fee in appeal proceedings in the event of a rejection of the appeal by the Supreme Court,
- reduction of the flat fee in the event of withdrawal of an action even after service on the opponent and also in the event of a perpetual suspension of the proceedings,
- exemption from fees with regard to a general settlement clause in a settlement.

The Austrian Bar continues to call for the abolition of legal transaction fees without replacement. They place an excessive burden on citizens and companies and have a negative impact on legal certainty.

It cannot be in the interests of a state governed by the rule of law that written agreements are not made simply because citizens are anxious to avoid high legal transaction fees.

Examples:

Entrepreneurs who rent commercial space to set up a business and sign an 18-year lease must pay 1% of 18 times the annual value. So if renting a commercial space costs € 7,000 per month, this results in a fee of € 15,120.

Legal transaction fees also have a negative impact on the competitiveness of companies and Austria as a business location. If a dispute is settled out of court and a written agreement is concluded for evidence purposes, a 2% settlement fee is charged.

Spouses who wish to settle any divorce consequences by means of a prenuptial agreement must pay 1% of the value of the assets for the prenuptial agreement - those who do not conclude such an agreement are very often confronted with several court proceedings in the event of divorce, for which they have to pay high court fees.

Significant developments in your country in 2024, if any, related to digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, procedural rules, access to judgments online.

All final-instance decisions of the regional and higher regional courts as appellate courts, insofar as a referral to the Supreme Court is no longer permissible or is permitted, should be published in anonymised form in the federal legal information system ("RIS") in order to make them accessible to legal scholars and legal practitioners.

In addition to decisions of the Supreme Court, decisions of the higher regional courts, the regional courts and the district courts are also available in the federal legal information system (RIS). However, research by the ÖRAK has shown that the option of anonymised publication is very rarely used. The ÖRAK took this as an opportunity to draw up a corresponding resolution on the publication of final-instance decisions in the RIS, which was unanimously adopted by the Austrian Bar's assembly of representatives.

With the Strafprozessrechtsänderungsgesetz 2024 passed by parliament on 11 December 2024, a first step in the right direction has now been taken. Accordingly (§ 48a GOG new), § 15 para. 1 no. 1, paras. 2 to 4 and 6, § 15a para. 1 OGHG are now to be applied mutatis mutandis to decisions of the Higher Regional Courts that have become final, unless they have been amended by a decision of the Supreme Court. This means that since 1 January 2025, all final decisions of the Higher Regional Courts must be published in the RIS. This new regulation is to be welcomed as a first step, but does not go far enough. Apart from the fact that there are restrictions in criminal investigation proceedings, the law in particular does not provide for an obligation to provide the decisions to be published including the so-called "Rechtssätze". The publication obligation also does not include other courts of first and second instance. The provisions of Section 48a (1) GOG now apply to the latter if they are of general interest that goes beyond the individual case. This assessment is the responsibility of the court. However, it is precisely the provincial courts that act as courts of last instance in many matters (e.g. actions for interference with possession); in the area of claims for parttime employment, even the labour and social courts are courts of last instance pursuant to Section 15k (6) MSchG and Section 8c (6) VKG.

The publication of all final-instance decisions is of crucial importance in order to ensure uniform case law throughout Austria, to make legal representation and legal advice more efficient and comprehensible for the general public and to make such final-instance decisions more accessible than before for critical analysis by academics. The aim is to make case law even more transparent and more widely accepted by the public.

This should also render the provision of Section 48a (5) GOG obsolete, according to which parties to proceedings are entitled to receive a pseudonymised copy or a pseudonymised printout of the unpublished final decision referred to by a court or public prosecutor's office free of charge.

In principle, a court should not have access to an unpublished final judgement and should not base its decision on it. Only when all final decisions are published in the RIS will it be ensured that all persons involved in ongoing or future (related or unrelated) proceedings - parties, party representatives, judges, public prosecutors - have the same access to knowledge and information and meet on an equal footing.

The Austrian Bar is of the opinion, that all citizens and legal persons have a right to decision-making by a human judge.

Significant developments in your country in 2024, if any, related to geographical distribution and number of courts/jurisdictions ("judicial map") and their specialization, in particular specific courts or chambers within courts to deal with fraud and corruption cases

Another decisive factor in enabling citizens to utilise the services of the justice system is local proximity.

Although increasing mobility means that travelling further distances to the courts is reasonable, the hurdles for the population must not become too great. In addition, against the background of a climate impact assessment, good local accessibility to the courts of first instance seems important. The Austrian Bar demands as minimum threshold to keep one district court (Bezirksgericht) per district.

Other issues

Other issues and significant developments in your country in 2024 impacting access to justice

The Austrian Bar calls for the reintroduction of the former period without court proceedings ("verhandlungsfreie Zeit") in the sense of the regulation prior to the WGN 2002 and is also in favour of extending this to non-contentious proceedings (in particular to inheritance disputes).

Even several years after the abolition of this former practice, no savings effect is evident. On the contrary, hearings are repeatedly adjourned when they are scheduled during periods that used to be free of hearings.

Experience has shown that during the summer and Christmas holidays, both parties and witnesses, experts, lawyers and judges are on holidays. The former period without court proceedings, which was based on the school holidays until it was abolished, was (therefore) not associated with any delays. In contrast, its abolition led to delays in the handling of proceedings after the holiday period and the precautionary lodging of appeals. This actually increased the workload for all parties involved.

Numerous colleagues are struggling with massive problems due to the abolition of the period without court proceedings: for many lawyers in Austria, especially those who run their law firms alone (around two thirds of lawyers), holidays are hardly possible any more.

The existing compulsory obligations for lawyers to take on the representation of vulnerable adults must also be removed. The ÖRAK calls for the introduction of a nationwide functioning and binding 'traffic light system' to ensure appropriate and fair utilisation of individual lawyers. The current regime allows to surcharge lawyers with the representation of too many vulnerable adults. Such representation can involve just any parts of daily, non-legal activities such as organisation of medical appointments, transport, sometimes food and cash withdrawals for the daily needs of the adults. The representation usually only terminates with the death of the respective persons. Lawyers' services however must stay generally available for clients as well.

Questions on horizontal developments

Please provide any relevant information on horizontal developments here

The independence of bars and lawyers must be defended continuously.

Unfortunately, there were legislative initiatives even on the European level which contained elements which endanger the work of lawyers and bars. Regarding the Anti-Money Laundering Package after long discussions improvements were possible, but it was very concerning that a European Commission initiative initially foresaw elements that would have directly undermined the independence of bars from the state and infringed the fundamental right to confidential lawyer client communications.

Concerning upcoming European legislative proposals, the Austrian Bar underlines the need to protect fundamental rights in the area of justice. Especially the issues of retention and access to data, including encrypted information, will pose a direct threat to the confidentiality of lawyer-client-communication in Austria. The Austrian Bar sees its position on the role of lawyers as cornerstone for the rule of law confirmed by the recent judgement by the ECJ in the preliminary proceedings C-295/23, Halmer. The Austrian Bar would like

to repeat that there is sufficient case law and common legal tradition in the Member States on the role of lawyers to support infringement procedures in case that this was necessary.

Other institutional issues related to checks and balances

Any other developments related to the system of checks and balances - please specify

At national level, a trend is emerging whereby the unconstitutionality of some new laws appears to be accepted when political decisions are made. With this unconstitutional laws are accepted and/or it is expected that the assessment by the Constitutional Court will be made too late and thus irreversible facts will be created through the previous application of the laws. Measures should be taken to ensure that fundamental rights and constitutional conformity are structurally taken into account in the legislative process.

2. Gezielte Konsultation der Interessenvertreter durch die Europäischen Kommission zu „single market dimension“

Any other points you would like to raise related to the single market dimension in the context of the Rule of Law Report

The independence of lawyers is an important part for the trust of economic operators in a market. The independence of lawyers means their own individual independence, but also the independence of their bars from the state. The respect for confidential lawyer client communication constitutes another important part for the possibility for economic operators to receive meaningful advice to act in accordance with the laws (this dimension of lawyers' professional secrecy is also regularly underlined in ECJ and ECHR jurisprudence).