

Answers to Questionnaire for EUFJE Helsinki 2019

AUSTRIA

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1a: Austrian courts have no own scientific or technical staff. They are obliged to appoint experts to draw up expertises in the fields needed (e.g. air pollution, limnology, waste treatment, noise...). These experts draw up expert statements concerning the objections raised by the partys who complained against the administrative decision.

These can be experts who work with the authority that issued the challenged decision or experts from the free market known as having expertise and experience. The administrative courts are not obliged to choose among experts being named in a close expert list.

1b: Every scientific or technical question has to be answered by a so appointed expert. All references to documents representing the state of the art – as regulatory trends, papers of regulatory or other international organizations, praxis in other states – has to be included in the expert statement.

1c: Under certain circumstances the higher court could settle the case itself and decide in merito; only in these cases the higher court would appoint own experts. In fact it does so very rarely, usually they cancel the decision without scientific expertise, when it is not understandable or comprehensible or when the lower court has not investigated all relevant facts.

1d: Also the evidence from GIS technologies are integrated in the expert statements. In some fields of jurisdiction, e.g. direct payments for farmers, judges use GIS based evidence directly, also in the adjudicatory hearing itself.

2: It is the task of the judge to point out the matters of fact that result from the legal basis (e. g. licence requirements) and to pose only those questions to the expert that are relevant from the legal point of view. Gathering scientific or technical evidence is mandatory where facts are not general knowledge which is absolutely common in environmental matters. Ex officio we can investigate only if the parties involved would have the right to bring in the question (e.g. NGOs with the right of appeal on grounds of protection of objective law, concerned neighbours cannot bring in questions of nature conservation).

3a: There exists a list of experts issued by the ordinary courts, but the administrative courts are not bound by this list. In most of the cases they appoint experts who work with the authority that issued the challenged decision or experts from the free market known as having expertise and experience. Of course they must be impartial and independent from the party.

3b: The party has to submit evidence that the expert is not independent or not able to deal with the relevant questions.

3c: It is the task of the judge to point out the matters of fact that result from the legal basis (e. g. licence requirements) and to pose only those questions to the expert that are relevant from the legal point of view. In this respect the judge has to cooperate with the expert from the beginning in order to „pose the right questions“ and to ensure a smooth procedure before the court.

4: It depends on the legal basis. If human health is concerned, proof beyond reasonable doubt is required, in other fields (e.g. nature conservation or screening decisions whether an EIA has to be carried out or not) preponderance of the evidence is the preferred standard of proof.

5a: We choose the one which is more comprehensible and coherent.

5b and c: Very often we take these documents into consideration by means of the individual expertise of an expert appointed by the court. This expert explains to the court if or in which way the scientific assessment of the authority can be followed in the specific case.

6a: Yes, the scientific fact-finding is crucial and a defining challenge in environmental adjudication. Very often we discuss minor effects of a problem very intensively whereas really serious problems remain untouched, because no party is interested or has the financial means to introduce the problem to the procedure. On the other hand, it also often happens that there is scientific evidence of the harmfulness of an effect, but this fact cannot be taken into consideration in the decision because there would be needed an overall policy change in certain fields which cannot be reached in judicial procedure concerning a certain case.

6b: Sometimes it would be great if the court itself would employ a certain staff of experts in order to have access also to informal scientific or technical knowledge.

6c: Yes.

6d: Yes, I would improve the technical and scientific knowledge of judges in certain fields.

7a: At the beginning we would assess to what extent the expertise used by the authority is complete and understandable. We would have to read the objections raised during the licensing procedure before the authority and to identify how thoroughly the expert statements and the decision reflect the discussed problems. We would have to check if the conclusions drawn by the experts appointed by the authority are complete. Then we would have to study the complaints/appeals and the decision in order to identify possible weaknesses of the expertise or the decision. After having given the project proponent the opportunity to comment on the appeals, we should have then enough material to identify the needs of expertise for our procedure. In case only minor points need clarification, we could appoint the same expert as the authority, which has the advantage that this person (or institution!) knows the case and the project. In case it seems that

- the appeals challenge the expertise in a certain field as a whole or

- the expertise seems to have major mistakes or ambiguities,

we would appoint a „new“ expert in which we have confidence that he/she is independent and has the full knowledge in the field.

Especially in key matters we tend to use „new“ experts not involved in the procedure before the authority. In the example presented here that would be hydrology and nature conservation – wetland flora.

The new or completed expert statements would be challenged and fully discussed in an adjudicatory hearing with the experts present.