

Policy Position

Austria's Action for Annulment The Messy Aftermath of the EU Nature Restoration Law Vote

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[#NatureRestorationLaw](#)

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Austrian politics are in turmoil – a minister went rogue to save the Nature Restoration Law in the EU Council of Ministers. As a consequence, some members of the Austrian government are planning on bringing an action for annulment before the Court of Justice of the European Union. Could the anger of an Austrian coalition partner lead to a key piece of EU environmental legislation being struck down? Probably not. Austria's action for annulment against the Nature Restoration Law is unlikely to succeed, given that the underlying conflict is predominantly national. Seeking recourse to the CJEU seems inappropriate in such a case.

On 17 June, Austrian Minister for Climate Action and Environment Leonore Gewessler voted in favor of the [Nature Restoration Law](#) in the EU Council of Ministers. Although a seemingly unspectacular thing for a minister to do, this set off a political scandal and constitutional dispute in Austria. Its repercussions reverberated at EU level as fears arose that the new law, a key piece of recent EU environmental legislation, could be quashed as a result.

The Nature Restoration Law is intended to restore 20 percent of the EU's land and sea by 2030. It had been adopted by a narrow majority in [Parliament in February](#) and had since got stuck in the Council where it failed to gain the necessary qualified majority of votes as several Member States, including Italy, Poland and Sweden, firmly opposed it. That is until Gewessler, a Green, decided to [go rogue](#), or go with her [conscience](#) as she argued. Defying a uniform opinion among Austria's provincial governments and against the explicit wishes of her conservative coalition partners, Gewessler cast her vote in favor of the law, enabling it to reach the [necessary majority by the slimmest of margins](#). Immediately after the vote, Minister Gewessler's coalition partner, the Austrian People's Party (ÖVP) announced that – alongside other political and legal steps – they would bring an action for annulment before the Court of

Justice of the European Union (CJEU), arguing that Gewessler had no authority to cast a positive vote and indeed was acting illegally.

This policy position examines whether one of the most ambitious pieces of EU environmental legislation could be struck down by the Austrian federalist system and an angry coalition partner within it. It argues that, given that this is essentially an internal national dispute, an action for annulment before the CJEU does not appear to be the appropriate legal remedy and is unlikely to succeed.

Background: A Minister following her Conscience

How did we get here? Like Germany, Austria is a federal state. Legislation is divided between the federal government and the provinces, with nature conservation falling under the authority of the provinces. Accordingly, the provinces have certain rights when an EU legal act interferes with their sphere of influence, and in particular, the possibility to issue a uniform opinion. The nine Austrian provinces adopted such a binding *uniform opinion* on the draft Nature Restoration Law in November 2022 and updated it again in May 2023, following drafting changes. On both occasions, the provinces rejected the draft. Minister Gewessler therefore abstained from voting in the Council, despite being strongly in its favor.

In recent weeks, however, the united front of the Austrian provinces against the Nature Restoration Law began to crack. On 11 June, the Viennese provincial government decided to support the law and submitted a revised draft statement to its fellow provinces. On 16 June, Gewessler announced at a [press conference](#) that she would now vote for the bill in the Council. Austrian Chancellor Karl Nehammer sought to head her off by [sending a letter](#) to the Belgian Council Presidency, claiming that Gewessler was not authorized to commit Austria in favor. But the letter failed to have the intended effect: the law was approved in the Council on 17 June thanks to the Austrian vote. Subsequently, the chancellery confirmed its intention to bring an action for annulment before the CJEU. Gewessler [responded with a letter](#) of her own to the Belgian Council presidency on the day of the vote, insisting that Nehammer's letter misrepresented Austria's legal situation.

Gewessler's vote also has a political background: The legislative period of the Austrian Parliament is almost over. The date for the next election has been set for 29 September, and the Greens are expected to lose around one third of their previous votes. As environmental protection is one of their core policy issues, voters expect them to deliver on this matter – with more than 80 percent of the Austrian electorate supporting the Nature Restoration Law, according to a [study](#). As it is far from certain that Gewessler will be part of Austria's next government, she had little to lose and a lot to gain.

A violation of the Austrian Constitution?

There is a heated debate in Austria as to whether Gewessler was authorized to vote in favor of the law in the Council – or not. One argument asserting the unconstitutionality of Gewessler's actions is the above-mentioned Nehammer letter stating that Gewessler had no such mandate. However, Austria's Federal Chancellor, unlike his German counterpart, has no authority to issue directives to ministers. His letter was thus not binding. According to the [Federal Ministries Act](#), Minister Gewessler is responsible for the environment and hence entitled to vote in the Council.

Beyond Nehammer's letter, Article [23d para 2](#) of the Austrian Constitution is at the center of the ongoing debate. This provision allows the Austrian provinces to issue a *uniform opinion* on a subject that falls under their jurisdiction (devolved matter). Such a resolution by the

provinces is generally binding on federal ministers, but as mentioned above, Vienna recently changed its mind and decided to support the Nature Restoration Law. Is the uniform opinion still uniform if one or two provinces change their position? Crucially, uniformity within the meaning of Article 23d para 2 does not mean unanimity. A uniform opinion is reached if at least five of the nine provinces agree and no province objects. Nevertheless, a legal act can only be formally amended in the same way it was created. As there has been no new vote and new uniform opinion, Vienna's U-turn did not alter the opinion's binding nature.

However, Gewessler is relying on a different argument as shown in her [statement to the Council](#): She focused on the provinces' reservations against earlier drafts of the Nature Restoration Law, which were the basis for their negative uniform opinion. She explained why these concerns, particularly regarding the involvement of landowners and farmers as well as food security, had been addressed in the current version. She seems to invoke a [constitutional provision](#) that states that a uniform opinion loses its effect if the legislative proposal it is referring to changes. Since the provinces had issued their last uniform opinion against the Nature Restoration Law back in May 2023, the draft legislation had been amended substantially, which the provinces did not formally oppose again. It can thus be argued that the uniform opinion simply does not apply to the draft Gewessler voted for but to an older one or that at least the provinces' reservations had now been addressed. It seems a convincing argument to say that uniform opinions should be interpreted in light of the most recent draft and must therefore be renewed if they are to remain binding.

Thus, it is likely that the uniform opinion was no longer binding and Gewessler has acted within her mandate, without violating the Austrian Constitution. But even if she had, would it matter at a European level?

The Nature Restoration Law at risk? Austria's action for annulment

Under [Article 263](#) of the Treaty on the Functioning of the European Union (TFEU), Member States can challenge the legality of EU acts before the CJEU. The article provides several grounds for review. These are principles and requirements that must be adhered to in the contents of a piece of legislation and in the legislative process shaping the content of an act, for example, initiating consultation processes or ensuring the proportionality of a measure. In the present case, the argument by the ÖVP on behalf of Austria seems to be that Gewessler's vote constituted an infringement of the Treaties, namely Article 16 para 2 TEU as indicated in [Nehammer's letter](#). It reads: *"The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote."*

The decisive question then is whether or not Gewessler had the "authority to commit" the Austrian government. Here, a distinction should be drawn between the formal and the substantive level. From a formal point of view, one has to be a representative at the ministerial level who can act in a binding manner for the Member State government. Austria is represented by the competent federal minister pursuant to [Article 73 para 2 of the Austrian Constitution](#). No further special authorization is required. The competences are regulated by the aforementioned Federal Ministries Act, leaving no doubt that Leonore Gewessler was Austria's competent representative in the field of environmental law.

From a substantive perspective, Council members may be bound by additional national guidelines in fulfilling their role. The ÖVP claims that this was the case here and a specific national guideline was breached. However, a common [interpretation](#) is that votes that are passed in breach of such a substantive requirement of a Member State are nevertheless

valid.¹ That is because conditions at national level are not part of the requirements set out under Article 16 para 2 TEU. A breach can therefore only have consequences under national law. In a case at the European level, such as the action for annulment, the CJEU is limited to interpreting the relevant Treaty provisions, here the formal requirements under Article 16 para 2 TEU - which Gewessler met. So even if an Austrian court found that she had acted in violation of Austrian constitutional law, this would not affect her “authority to commit” under Article 16 para 2 TEU. The same reasoning applies to any arguments relating to an alleged lack of competence or infringement of an essential procedural requirement - Gewessler’s authority under European law was and is unaffected by Austria’s internal dispute.

One other line of reasoning could be pursued in this case: The fact that the letter sent by Nehammer to the Belgian Council presidency was ignored. One could argue that this violated the general principle of sincere cooperation between EU bodies and Member States under Article 4 para 3 TEU. It reads: *“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”* This is a foundational principle of EU law and has often been invoked by the Court in different contexts. In this case, it might be claimed that holding the vote despite concerns voiced by the Austrian head of government violated this principle. However, this argument is not very convincing. The Council presidency could rely on the fact that Gewessler was the [officially registered](#) representative of Austria. The general sincere cooperation principle cannot be interpreted to overrule the clear wording of Article 16 para 2 TEU. In addition, it is difficult to see how a specific legal obligation for the Belgian presidency to have acted differently in this situation could be derived from such a general principle.

Overall, it is unlikely that the CJEU will want to set a precedent by opening the door to governments challenging votes or seeking to reverse them after unwelcome decisions.

Conclusion

Infighting is not unusual in a coalition government. Taking such disputes to the CJEU, however, is an unusual course of action. Austria’s action for annulment against the Nature Restoration Law is unlikely to succeed. Given that the underlying conflict is predominantly national, seeking recourse to the CJEU seems inappropriate. The crux of the challenge hinges on Minister Gewessler’s authority under national law. Not only are there good arguments that she acted within her constitutional mandate, but it is also unlikely that a potential breach would influence the CJEU’s decision, as its role is to ensure compliance with EU treaties, not national constitutional requirements. In the end, it appears that the Belgian chair presiding over the talks, Brussels environment minister Alain [Maron’s assessment](#) of the situation was accurate: The vote takes place at the EU table and the rest is an internal controversy in Austria.

¹ See for example Egger in Jaeger/Stöger (Hrsg), EUV/AEUV Art 16 EUV, Rz 35 (Retrieved 1 July 2023, rdb.at)

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