

Aarhus Convention Secretariat

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In Copy:

Federal Ministry for Climate Action

c/o Dr. Anna Muner-Bretter
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Vienna, 30 October 2020

Regarding: Decision VI/8b on compliance by Austria with its obligations under the Aarhus Convention, comments on the third progress report on behalf of Austria

Dear Ms. Marshall,

We highly appreciate the opportunity to give our remarks on the second progress report on behalf of Austria regarding the implementation of decision V/8b of the Meeting of the Parties on compliance with its obligations under the Aarhus Convention.

ÖKOBÜRO is the alliance of the Austrian Environmental Movement. It consists of 19 Austrian organizations engaged in environmental, nature and animal protection like GLOBAL 2000 (Friends of the Earth Austria), FOUR PAWS, Greenpeace CEE, BirdLife and WWF Austria. ÖKOBÜRO works on the political and legal level for the environmental movement.

We welcome the steps taken and reported by Austria to implement article 9 (3) of the Convention. However, the implementation gaps already mentioned in our comments of the previous years as well as in our oral statement at the Meeting of the Compliance Committee on 11 March 2020 remain. This applies to federal as well as provincial legislation.

I. Federal environmental legislation

There have not been any additional legal amendments on Federal level after the entering into force of the **Aarhus Participation Act 2018**, neither taking back the restricted recognition criteria for NGOs according to the EIA Act nor regarding access to justice in area specific legislation such as water or waste law.

All remarks presented in our previous comments and taken note of by the Committee in its progress review of February 2020 remain fully valid. In this regard we note that Austria has confirmed shortcomings regarding the implementation of article 9 (3) in the Waste Management, covering only areas regulated by EU law. Also in the Water Right Act, access to justice is limited to the scope of article 4 para 7 of the Water Framework Directive and thus limited to issues determined by EU law.

The situation regarding the recognition criteria for NGOs according to the **Environmental Impact Assessment Act** has not changed since the last amendment. Legislative initiatives to revoke the additional requirements have not yet been made public in Austria.

As Austria confirms on page 5 of the report, the recognition of ten environmental organisations has been withdrawn as they could not manage to meet the newly introduced requirements. As a result they are no longer entitled to any access to justice rights as stipulated in article 9 (3) Aarhus Convention. This is even a larger number than originally expected by ÖKOBÜRO, due to interviews and written information, at time of the previous progress report. Additionally, one organisation meeting all relevant criteria but the minimum of 100 members is still seeking legal review of the recognition withdrawal. Considering that currently only 53 organisations in total are recognized – in all Austria or in specific Federal Provinces – this means a severe cutback of public environmental engagement. There is no reasoning why such a cutback should have been necessary or indicated from an administrative or legal perspective.

Nor has Austria presented a reason why it should be relevant that NGOs provide prove of the recognition criteria every three years *and* at any time upon request be the Federal Ministry. If at all, one of these two review options should be more than sufficient.

Complaints before the Supreme Administrative Court generally do not have suspensive effect. However, according to article 30 (2) **Supreme Administrative Court Act** (*Verwaltungsgerichtshofgesetz – VwGG*),¹

Upon request by the complainant, however, the Administrative Court, until the final complaint is submitted, or the Supreme Administrative Court, after the final complaint is submitted, is to grant the suspensive effect by order unless this is contrary to mandatory public interest and if, after having considered the affected public interests and the interests of other parties, the implementation of the contested decision or the exercise of the authorization granted by the contested decision resulted in an unreasonable disadvantage for the complainant. Reasons for the grant of the suspensive effect need only be stated if interests of other parties are thereby affected. After any considerable change in the circumstances relevant for the decision in favour of the suspensive effect of the final complaint, the matter has to be decided anew ex officio or upon request by a party.

However, according to recent case-law, the Supreme Administrative Court in practice usually refuses requests to grant suspensive request. This can be demonstrated by the case of *Wiener Außenringschnellstraße S1*² or *Nordbahn A5*³, but also recent cases such as *Snow-Making Facility Pitztal*⁴ or *Hydropowerplant Tumpen/Habichen*.⁵ We are not aware of any recent environmental case in which suspensive effect has been granted by the Supreme Administrative Court.

Finally we would like to note that Austria to date has not taken any steps to provide for legal review of NGOs in procedures according to other environmental Acts, such as the Forestry Act, the Mining Act, the **Wildlife Trade Act** (*Artenhandelsgesetz*) and the **Animal Protection Act** (*Tierschutzgesetz*).

¹ Official English translation available at https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1985_10/ERV_1985_10.pdf (29 October 2020).

² Supreme Administrative Court 1 July 2008, AW 2008/06/0029.

³ Supreme Administrative Court 6 August 2010, AW 2010/06/0001.

⁴ Supreme Administrative Court 8 January 2020, Ra 2019/07/0116.

⁵ Supreme Administrative Court 11 August 2020, Ra 2020/10/0098 bis 0099-3.

II. Provincial environmental legislation

ÖKOBÜRO appreciates the translations submitted by Austria which provide for a better insight in the legislative changes.

Regarding the Styrian Law on Institutions for the Protection of the Environment we would like to clarify that the translation submitted by Austria was a former draft of the amendment and does not correspond to the version which entered into force in October 2019!

ÖKOBÜRO would like to refer to the comments on the first and second progress reports submitted in September 2018 and October 2019. For a better understanding, however, we would like to point out the following sections of the amendments in further elaboration of the allegations in our previous statement⁶ as well as para 58 of the second progress review:

- *Implementations only in areas determined by EU law*

As on federal level, this restriction of implementation measures applies also to provincial legislation. This can be demonstrated, e.g. by article 52b (1) Burgenland Nature Conservation and Countryside Protection Law,⁷ article 35c (1) Carinthian Fishing Act,⁸ article 54a (1) Carinthian Nature Conservation Act 2002,⁹ article 55a (4) Salzburg Nature Conservation Act 1999,¹⁰ article 49a (4) Salzburg Fishing Act 2002,¹¹ article 8 (3) Styrian Law on Institutions for the Protection of the Environment,¹² article 39b (4) Upper Austrian Nature and Landscape

⁶ https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8b_Austria/Correspondence_with_the_communicant/frComm_OEKOBUERO_28.10.2019.pdf, pp 3-5 (29 October 2020).

⁷ *“to allege possible infringements of the provisions of this law defined in implementation of the Habitats Directive and Birds Directive”.*

⁸ *“complaints with the Provincial Administrative Court against approvals pursuant to Article 35 para. 10 granting exemptions from the restrictions pursuant to Article 35 para. 8 and 9” (i.e. natural habitats according to annexes V and IVa of the EU Habitats Directive).*

⁹ *„alleging the violation of provisions of this law resolved in implementation of the Habitats Directive and the Birds Directive”.*

¹⁰ *“The reasons of complaint shall be limited to the violation of environmental provisions of Union law.”*

¹¹ *“The reasons of complaint shall be limited to the violation of environmental provisions of Union law.”*

¹² Note: Even though this requirement was originally not included in the draft amendment and therefore cannot be found in the translation submitted by Austria, it was added at a later point.

Conservation Act,¹³ article 46 (3) Upper Austrian Fishing Act 2020,¹⁴ and article 91a (3) Upper Austrian Hunting Act.¹⁵

- *Lack of possibility to challenge omissions or plans and programmes relating to the environment*
Due to a lack of legal remedy, specific legal provision cannot be cited here. Austria was also not able to cite any applicable provincial provisions in this respect in the third progress report.

In this respect it has also become increasingly critical that there is no access to justice regarding ordinances. Some Provinces such as Salzburg, Lower Austria or Carinthia, have now started to permit via ordinance (*Verordnung*). According to the species protection legislation, only permits can be subject to legal review before the Administrative Courts and NGOs do not have standing to allege noncompliance with environmental law the Constitutional Court as the only judiciary institution entitled to review ordinance.¹⁶ Therefore, environmental organisations have no option to challenge these decrees.

- *Inadequate preclusion regulations*

We agree with the Party concerned that the relevant provisions concern procedures according to article 9 (2) rather than 9 (3) of the Convention. E.g. the right to participate and file a complaint according to article 27b Lower Austrian Nature Conservation Act 2000 refers to article 10 (1) and (2), regulating the impact assessment regarding Natura 2000 sites. This is simply due to the fact that no participatory rights exist in the scope of article 9 (3) and thus preclusion is impossible. However, the principle of preclusion regarding remedies against decisions according to article 6 (1) of the Convention prove the short-sighted attitude of the federal provinces regarding the principle of access to justice of the Convention.

- *Restricted access to justice regarding protected species*

In this respect we would like to refer, for example, to article 27c (1) Lower Austrian Nature Conservation Act 2000,¹⁷ article 52b (1) Burgenland Nature Conservation and Countryside

¹³ "alleging the violation of provisions of this provincial law enacted in implementation of the Habitats Directive and Birds Directive."

¹⁴ "to allege violations of the provisions of this provincial law enacted in implementation of the Habitats Directive".

¹⁵ "to allege violations of the provisions of this provincial law enacted in implementation of the Birds Directive or Habitats Directive".

¹⁶ According to article 139 of the Federal Constitutional Law (B-VG).

¹⁷ "if protected fauna and flora listed in
- Annex IV to the Habitats Directive or

Protection Law,¹⁸ article 54a (1) Carinthian Nature Conservation Act 2002,¹⁹ article 55a (1) Salzburg Nature Conservation Act 1999,²⁰ article 49a (4)(2) Salzburg Fishing Act 2002,²¹ and article 39b (4) Upper Austrian Nature and Landscape Conservation Act.²² The only federal provinces granting access to justice outside the scope of EU species protection legislation are Vorarlberg and Tyrol.

- *Lack of injunctive relief*

The most alarming provision can be found in article 43a (1) Upper Austrian Nature and Landscape Conservation Act, which was not subject to amendment:

(1) In the matters covered by this Provincial Act, appeals under article 130(1)(1) Federal Constitutional Law have no suspensive effect if the contested decision grants a right.

- *Insufficient retroactive effect*

As examples for the retroactive effect of one year only, article 142 (11) Lower Austrian Hunting Act 1974²³ can be cited. The same applies to the transitional provision in article 38 (10) Lower Austrian Nature Conservation Act 2000,²⁴ article 14a (1) Styrian Law on Institutions for the Protection of the Environment,²⁵ article 48 (12) Tyrol Nature Conservation Act 2005,²⁶ or article 73a Tyrolean Hunting Act 2004.²⁷

Vienna, the last province to introduce an amendment to nature and species protection legislation, has presented its draft in summer 2020. Similarly to other Federal provinces, the draft did not present a

- Annex I to the Birds Directive, or in
- Art. 4 para. 2 of the Birds Directive,
is affected."

¹⁸ "if protected fauna and flora that are listed in Annex IV to the Habitats Directive or wild bird species listed in Annex 1 to the Birds Directive are affected".

¹⁹ „if protected species listed in Annex IV to the Habitats Directive (Article 67a para. 3 lit. b) or in Annex I to the Birds Directive (Article 67a para. 3 lit. a) or referred to in Art. 4 para. 2 of the Birds Directive are affected".

²⁰ "provided that flora or fauna protected under a Directive are affected by the project".

²¹ "in cases where strictly protected flora or fauna listed in Annex IV lit. a to the Habitats Directive are affected".

²² "if protected flora and fauna listed in Annex IV to the Habitats Directive or covered by Art. 1 of the Birds Directive are affected."

²³ "against official notices issued up to one year before this provincial law as set forth in Provincial Law Gazette No 26/2019 entered into force".

²⁴ Note: This provision is cannot be found in the translation submitted by Austria.

²⁵ "that became effective within one year before this amendment entered into force".

²⁶ "that took legal effect between 28 March 2018 and the date on which this law Provincial Law Gazette No 163/2019 entered into force".

²⁷ "that took legal effect between 28 March 2018 and the date on which this law Provincial Law Gazette No 163/2019 entered into force".

full implementation of access to justice as required by the Convention. ÖKOBÜRO elaborated in its statement submitted to the Province of Vienna especially the following shortcomings:

1. The amendment referred only to issues determined by EU law.
2. It did not provide for a possibility to challenge ordinances/governmental decrees, plans or programmes.
3. Legal standing for members of the public does not amount to the usual standards determined by the general procedural provisions, i.e. rather than general party status only a specific right to participation or review are granted.
4. The draft did neither provide transitional provisions nor a retroactive effect. Even for pending procedures, the applicability of the new provisions on access to justice was excluded. This provision is not only in conflict with the jurisdiction of the European Court of Justice,²⁸ but also with the one of the Austrian Supreme Administrative Court.²⁹

The consultation on the Viennese draft ended in July 2020. It is not clear when the amendment will be passed and enter into force.

Due to the different issues pointed out above, OEKOBUERO concludes that essential legislative measures to fully implement decision VI/8b are yet to be taken.

Sincerely,



Thomas ALGE
Managing Director,
OEKOBUERO – Alliance of the Austrian Environmental Movement

²⁸ ECJ 7 November 2013, *Altrip*, C-72/12, ECLI:EU:C:2013:712 et al.

²⁹ See Judgment of 25 April 2019, Ra 2018/07/0410-9 and Ra 2018/07/0380 to 0382-9.