

AARHUS PARTICIPATION ACT 2018

(AARHUS-BETEILIGUNGSGESETZ 2018)

AMENDMENT TO THE WASTE MANAGEMENT ACT (AWG), THE AIR POLLUTION CONTROL ACT (IG-L) AND THE WATER PROTECTION ACT (WRG)

Critical analysis of the amendment to the Waste Management Act (AWG), the Water Protection Act (WRG) and the Air Pollution Control Act (IG-L); November 2018

Facts and details regarding the amendments adopted by the Austrian National Council on 25 October 2018 and the Federal Council on 8 November 2018 amending the Austrian Waste Management Act 2002 (Abfallwirtschaftsgesetz 2002 – AWG), the Air Pollution Control Act – Air (Immissionsschutzgesetz-Luft – IG-L) and the Water Protection Act 1959 (Wasserrechtsgesetz 1959 – WRG) - Aarhus Participation Act 2018 (Aarhus-Beteiligungsgesetz 2018)

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1. Circumstances of the amendment

The present legislative initiative on the implementation of the Aarhus Convention¹ intends to enshrine the third pillar – access to justice – in Austrian law. The Aarhus Participation Act aims at granting the public the right to challenge decisions in environmental matters as well as legal certainty for project applicants. Nevertheless, there is room for improvement in some areas to ensure full compliance with the Aarhus Convention.²

This implies, inter alia:

- Implementation in other areas of environmental law, apart from air pollution control, water and waste legislation
- Legal standing (party status) for environmental organisations – irrespective of whether significant effects are to be expected
- Equality of environmental organisations and other parties to proceedings before the law
- Well-calculated transitional provisions in water law
- No inadmissible exclusion of suspensive effect of remedies
- More practicable legal solution for participation in environmental proceedings in the long term

2. Omission to cover all environmental areas

The Aarhus Participation Act amends the Austrian **Waste Management Act (AWG)**, the **Water Act (WRG)** and the **Immission Control Act – Air (IG-L)**. The amendments in these three areas of environmental law strongly influenced by Union law, are an important step in the right direction. However, the **full implementation of EU legislation and international law** requires further amendments **in these as well as other areas of law**.

In the explanatory remarks to the amendment³, the obligation to transpose is primarily attributed to aspects of Union law. In this regard, it should be pointed out that not only the European Union but also Austria itself is a party to the Aarhus Convention. Accordingly, following the principle of *pacta sunt servanda*, Austria is bound to transpose the Convention into national law, **irrespective of infringement proceedings under Union law and of Union law principles**. It is therefore not sufficient to grant access to administrative authorities and courts only in areas of environmental law determined by EU law, such as air protection, waste or water legislation. Hereto, we refer to the implementation in Germany and the requirements of the last Conference of the Parties to the Aarhus Convention addressed to Austria in autumn 2017.⁴

In its decision on the *Protect* case⁵, the ECJ stated that, according to the Aarhus Convention, environmental protection organisations are **in any case** entitled to **legal protection in the entire EU environmental law**. In the interests of legal certainty, this ruling suggests that, considering

¹ Convention on access to information, public participation in decision-making and access to justice in environmental matters.

² For further details, see ÖKOBÜRO's statement on the draft law (in German), http://www.oekobuero.at/images/doku/oekobuero_stellungnahme_aarhus_beteiligungsg_fin.pdf (19 November 2018).

³ German version available online at https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00270/fname_710398.pdf (19 November 2018).

⁴ https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance_by_Austria_VI-8b.pdf (19 November 2018).

⁵ ECJ 20 December 2017, Case C-664/15.

the EU legal system, it should be re-examined which legal areas could be concerned apart from the AWG, WRG and IG-L as well as the nature conservation acts of the federal states ("Länder").

On the basis of this assessment, **legal protection for environmental organisations** should be **extended to other legal areas** before further legal uncertainty and procedural delays arise as a result of legal actions against the refusal to grant access to justice. An example of potentially covered EU environmental law could be chemicals including procedures for the approval of pesticides.

3. Legal standing depends on the possibility of significant effects

Legal protection for environmental organisations differs, depending on whether significant effects are to be expected. As a result, party status in water procedures is only granted in proceedings with expected significant effects, while in others, legal standing is limited to the right of re-examination.

However, it is **certainly not trivial to define whether the expected environmental impacts are significant**. If this distinction is to be made in practice, screening procedures are required. In these screening procedures, environmental protection organisations would have to be given party status in any case. Moreover, in practice it is often difficult and time-consuming to distinguish potentially serious cases from others, which can considerably increase the length of proceedings.

Legal standing for environmental organisations to challenge decisions in **Environmental Impact Assessment (EIA) procedures** has led to an **average of only two appeals per year**. Hence, for the purpose of legal certainty, procedural efficiency and not at least the arbitrating effect of public participation, it seems better to include it in all proceedings, irrespective of the expected degree of environmental significance.

3.1 Restrictions in the Water Protection Act (WRG)

Under Austrian water law, the right to lodge complaints is bound to procedures according to § 104a WRG ("projects with impacts on the status of water bodies"). However, **access to justice**, i.e. the right to lodge a complaint, **must also be provided in proceedings concerning projects that are not likely to have a significant impact**. This obligation results from Article 9 (3) of the Aarhus Convention and is therefore an obligation according to international law.

Furthermore, at the level of EU legislation, the restriction does not appear to be in conformity with EU law. There must not be a restriction regarding "considerable negative effects". The ECJ recently stated in its *Protect* ruling that the member states are, in conjunction with Article 47 of the Charter of Fundamental Rights, required to "ensure effective judicial protection of the rights conferred by EU law"⁶.

The Water Framework Directive (WFD)⁷ provides for more comprehensive protection than § 104a WRG. The obligation under EU law to protect water quality under the WFD is also reflected in § 105 WRG. In these procedures, however, no participation or legal protection is granted according to the present legislative amendment.

⁶ ECJ 20 December 2017, Case C-664/15, para. 45.

⁷ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

Thus, in addition to insufficient compliance with the Aarhus Convention, the amendment of the Water Protection Act fails to meet the minimum requirements of EU law.

3.2 Discrimination of environmental organisations as participants

While persons with procedural rights defined by national provisions are granted party status in proceedings under the WRG, **environmental organisations will only have the status of participants** pursuant to § 102 (2) WRG if significant environmental impacts cannot be excluded. Participants in the Austrian legal sense are granted only limited rights in the proceedings. In particular, they are not entitled to raise objections, file applications or reject expert opinions. Thus, considering the Austrian legal system, they have no right to appeal. Such a remedy is only possible through the special construction of a subsequent right of appeal, which breaks through the classification system of the Austrian General Administrative Procedure Act (AVG). Although the parties involved may participate in "establishing and ascertaining the facts", this is not a genuine effective participation as defined by the Aarhus Convention.

It is questionable whether the present solution complies with the requirements of a "fair trial". Also, according to the principle of equivalence⁸, the protection of rights granted under EU law must not be less favourable than the protection of national rights.

4. Insufficient right to appeal

For the establishment of legal certainty in environmental administrative procedures, the present draft does not appear to be far-reaching enough, as it falls short of what the ECJ has set out. This concerns the already discussed question of what is to be considered EU environmental law. Furthermore, the violation of the principle of equivalence as well as the principle of effectiveness in the case of a **discriminating position of environmental organisations as participants** compared to parties to the proceedings has already been mentioned. Furthermore, there are **neither legal means to challenge plans, programmes nor legal remedies against omissions** apart from air quality management according to the Air Pollution Control Act (IG-L).

4.1 Regional programmes and water management plans

The Water Framework Directive imposes an obligation on the Member States to draw up management plans (Article 13) or programmes to monitor the protection of surface waters (Article 8). The Aarhus Participation Act 2018 does not provide for access to courts to review these plans and programmes. However, for framework plans, regional programmes and water management plans, **participation and legal protection against these plans and programmes would have to be granted** on the basis of the Aarhus Convention and the current case-law⁹.

A solution in analogy to that in the amendment to the IG-L would be suitable and already phrased. The current solution without separate participation nor legal standing allows only direct application of EU law. If this legally relevant preliminary question arises in the course of proceedings using plans and programmes, it can only lead to procedural delays.

⁸ See ECJ 13 March 2007, C-432/05 *Unibet*; ECJ 1 December 1998, C-326/96, *Levez*; ECJ 16 April 2015, C-570/13 *Emrek/Sabranovicowi*.

⁹ E.g. VwGH 19 February 2018, Ra 2015/07/0074; ECJ 20 December 2017, C-664/15 *Protect*.

4.2 Participation in waste law

The Aarhus Participation Act 2018 provides for a graduated system of participation in the Austrian Waste Management Act (AWG). In permitting procedures for IPPC and Seveso plants, recognised environmental organisations are already granted party status within the framework of their local recognition according to § 42 (1) AWG. For plants that are not classified as IPPC or Seveso plants, § 40a AWG stipulates a participation procedure according to which the "essential contents" of permitting decisions are published on the website of the competent authority as well as on another named website. An environmental organisation providing evidence for its right to appeal must be granted six weeks to inspect the administrative act.

In accordance with § 42 (3) AWG, recognised environmental organisations claiming the violation of environmental protection regulations under EU law have the right to appeal against such decisions. In the case of projects within the meaning of Article 6 of the Aarhus Convention (i.e. **significant environmental impacts are not excluded**), this **right to review does not fulfil the requirements of effective participation** within the meaning of Article 9 (2) or Article 9 (4) of the Convention. Environmental organisations would have to be granted the right of party status in order to meet the requirements of the Aarhus Convention, i.e. effective participation or legal protection as well as the EU requirements of the principle of equivalence and the principle of effectiveness.¹⁰

The restriction in § 42 (3) AWG, according to which only the violation of environmental protection regulations under Union law may be challenged within the framework of an appeal, is not in line with the Aarhus Convention. By signing the Convention, Austria has committed itself under international law to transpose it into national law, which is why a **restriction to objections based on Union law is not permissible under international law**. In addition, the potentially incorrect classification of a procedure results in legal uncertainty because parties concerned may be bypassed. In the case of substantial changes that alter the potential environmental significance of a project, large parts of the administrative procedure would have to be repeated.

Finally, the draft law does not contain any provisions governing the challenge of waste management plans, which would in any case be necessary in view of the current case law, such as that of the Austrian Supreme Administrative Court (VwGH) on the Salzburg Air Pollution Control Plan¹¹ or the ECJ in the *Protect* case. A regulation as provided by amendment of the IG-L is also required for waste management plans.

5. Transitional provision in the WRG

The transitional period for implementation in the WRG refers to a period of six weeks and a **maximum retroactive effect of one year**. This retroactive effect is **clearly too short** in view of the case law of the ECJ, such as *City of Wiener Neustadt*¹² and *Commission against Germany*.¹³ In the opinion of the ECJ, a period of less than three years is illegitimate. In the *Protect* case, the Court deliberately did not note any retroactive effect period for this finding.

The ECJ has already emphasised that member states are not to gain an advantage by not implementing EU law. Austria is obliged to implement the Aarhus Convention in the same way as the European Union has been obliged to do since the Convention entered into force on 30 October 2001, at the latest since ratification by the European Union and Austria in spring 2005. The retroactive effect of only one year would wrongfully extend Austria's "implementation period" by more than a decade.

¹⁰ See ECJ judgements mentioned in fn. 4.

¹¹ VwGH 19 February 2018, Ra 2015/07/0074.

¹² ECJ 17 November 2016, C-348/15.

¹³ ECJ 15 October 2015, C-137/14.

6. Exclusion of suspensive effect in water and waste legislation

An adaption to the Aarhus Participation Act 2018 proposed at short notice at the National Council meeting provides that retroactive complaints by environmental organisations against decrees in water and waste procedures will not have a suspensive effect. At most, suspensive effect is to be granted on application by the environmental protection organisation lodging the complaint "if, after weighing the public interests and interests of other parties affected, the exercise of the right granted by the challenged decision would be disproportionately harmful to the environment".

This **exclusion of the suspensive effect of legal remedies by environmental organisations in waste and water law** leads to **concerns regarding not only constitutional, but also law and Union and international law.**

The ECJ has dealt several times with the question of provisional legal protection in environmental law.¹⁴ For example, in the case of pending preliminary ruling proceedings, such protection must be granted irrespective of whether there is a threat of disproportionate harm to the environment.¹⁵ The requirement of the suspensive effect of an appeal results from the right to effective legal protection¹⁶ enshrined in Articles 6 and 13 ECHR¹⁷ and Article 47 CFREU¹⁸. In the *Križan* case, the ECJ emphasised in particular the importance of provisional legal protection in environmental law to avoid irreversible environmental damage. Since both the AWG and the WRG contain implementation provisions for EU requirements, the reference to EU law is at any rate given.

The amendment is also questionable with regard to Article 9 (4) of the Aarhus Convention, which states that the environmental procedure must ensure "adequate and *effective legal protection* and, where appropriate, *provisional legal protection*". **Access to justice** must be granted **at a point in time at which a decision to authorise an activity in question can still be effectively contested**.¹⁹ The ACCC has already stated that suspensive effect is a suitable instrument for ensuring effective legal protection.²⁰ If, however, at the time of decision on the appeal an environmental damage resulting from the permitting decision has already occurred, there can no longer be any claim of effective legal protection. Rather, it should be certain latest at the time of the permitting decision - i.e. before the right granted can be exercised - whether the preventive measure of suspensive effect exists.²¹

¹⁴ ECJ 19 June 1990, C-123/89 (*Factortame*); ECJ 11 January 2001, C-1/99 (*Kofisa Italia*); ECJ 11 January 2001, C-226/99 (*Siples*); ECJ 13 March 2007, C-432/05 (*Unibet*); ECJ 15 January 2013, C-416/10 (*Križan*).

¹⁵ ECJ 19 June 1990, C-123/89 (*Factortame*), para. 22.

¹⁶ See ECJ 11 January 2001, C-1/99 (*Kofisa Italia*), para. 46; ECJ 11 January 2001, C-226/99 (*Siples*), para. 17.

¹⁷ European Convention on Human Rights.

¹⁸ Charter of Fundamental Rights of the European Union.

¹⁹ ACCC/C/2008/24 (*Spain*), ECE/MP.PP/C.1/2009/8/Add.1, para. 112.

²⁰ ACCC/C/2008/31 (*Germany*), ECE/MP.PP/C.1/2014/8, para. 83.

²¹ See *The Aarhus Convention: An Implementation Guide*², 2014, p. 203; with reference to ACCC/C/2008/24 (*Spain*).

7. More practical legal solution to implement the Aarhus Convention

The presented Aarhus Participation Act 2018 to amend the Austrian AWG, WRG and IG-L is a first step towards closing the implementation gaps of the Aarhus Convention in Austria. However, **implementing the Aarhus Convention separately in the individual legal areas, is not very practicable.** In the medium term, **a separate law that regulates participation and legal protection for environmental organisations in an integrative manner** should therefore replace this decentralised implementation. Germany has recently chosen this form of implementation of the Aarhus Convention with its Environmental Remedies Act ("Umweltrechtsbehelfgesetz"). The benefits of such a law are evident: more transparency and thus less room for misunderstandings, which cause reasons for challenging decisions, as well as the promotion of a consistent judicial approach on participation and legal protection.

In this regard, OEKOBÜRO refers to its policy paper "Implementation of the Aarhus Convention"²² and the more detailed position paper "Legal protection in environmental law"²³.

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²³ ÖKOBÜRO, 2018: „Rechtsschutz im Umweltrecht. Umsetzung von Art 9 Abs 3 der Aarhus-Konvention“, http://www.oekobuero.at/images/doku/oekobuero_positionspapier_aarhus_2018.pdf (16 November 2018).