

10 September 2013

**Response of the Party concerned
concerning the follow-up on communication ACCC/C/2010/48**

As follow up to the findings and recommendations in case ACCC/C/2010/48 the ACCC requested the Party concerned in its letter of 15 July 2013 to submit information on progress by Austria with regard to their implementation. The Party concerned would like to submit the following information.

First of all, the Party concerned would like to point out that whilst expecting the formal approval of the findings and recommendations at the next MOP in 2014 the Party concerned undertook numerous steps in order to inform all affected stakeholders about the findings and recommendations and to involve them. The Party concerned also underlined that their implementation needs to start before their formal approval at the MOP.

Overview of steps undertaken and foreseen in relation to the Findings/Recommendations in case ACCC/C/2010/48:

- March 2012: Information on and provision of the findings to the affected Ministries, the Federal Provinces and other stakeholders concerned.
- March 2012: An internal meeting with concerned technical units of the Ministry of Agriculture and Forestry, Environment and Water Management to discuss the findings took place on March 16.
- April 2012: A meeting with all stakeholders concerned (including Ministries and Federal Provinces) to inform about and discuss possible consequences of the findings took place within the Ministry of Agriculture and Forestry, Environment and Water Management on April 25.
- September 2012: Information on the findings and on recent relevant judgments of the EU Court of Justice in relation the Aarhus Convention was submitted to judges of Courts of first instance and the Administrative Court on September 18.
- November 2012: Presentation of the findings to representatives/ civil servants of the Province of Carinthia ("Klagenfurter Legistik-Gespräche") on November 9.
- November 2012: Meeting between the Ministry of Agriculture and Forestry, Environment and Water Management and the Federal Provinces to discuss possible amendments of the Environmental Information Act on November 13.

- November 2012: Participation in a meeting organized by the European Commission in relation to ongoing studies in the field of access to justice in the EU Member States and related plans by the EC to present a new Proposal for a Directive on access to justice in 2013.
- January 2013: Joint event by the Ministry of Agriculture and Forestry, Environment and Water Management and the Ökobüro with a large group of stakeholders (including Environmental Ombudsmen, Academia, other Ministries, Federal Provinces, Social Partners) concerning ongoing measures and further steps to be taken in case ACCC/C/2010/48 as well as information on the ongoing case ACCC/C/2011/63.
- April 2013: Nationwide Conference of Environmental Ombudsmen on 24/25 April: the agenda included discussion with regard to public participation possibilities in conformity with the Aarhus Convention. Joint efforts are currently being made together with NGOs to strengthen participatory rights in a mutually beneficial way. Many NGOs perceive the institution of the Environmental Ombudsman as a valuable resource in terms of expertise, manpower and influence, favouring a legislative solution which secures the co-existence of Ombudsmen and NGOs. The Environmental Ombudsmen find that the existing legal system needs to be adapted and expanded, i.a. by adjusting existing respective standing rights of NGOs and Environmental Ombudsmen in individual Federal and Provincial laws according to best possible standards and by providing legal standing for Environmental Ombudsmen and NGOs in the areas of water, forest management and the Industrial Code.
- April 2013: Follow-up meeting to the joint event of January (see above) between the Ministry (technical units of possibly concerned areas eg. water, forest, waste) and the Federal Provinces (competent for i.a. nature protection) to discuss possible further steps/measures in the areas concerned on April 25. Information was also given on a non-paper by the European Commission on access to justice and on a pilot case from the European Commission where Austria is asked to submit Information in the areas of nature protection and water regarding how the public concerned is being involved and if it has possibilities of appeal against decisions.
- Regular contacts between the Ministry of Agriculture and Forestry, Environment and Water Management and the Ökobüro (the communicant) to discuss and plan ongoing steps and steps to be taken in relation to case ACCC/C/2010/48.
- September 2013: General parliamentary elections; followed by the formation of new government in Austria.
- Further steps will follow but are not scheduled yet.

In addition we refer to our response of 5 November 2012 in case ACCC/C/2011/63 where the Party concerned outlined a number of possible options/measures being discussed in this context. These options are to be understood as measures that may be implemented alternatively or in combination. Due to the Federal structure of Austria, some legislators may decide to go just for one of the measures, others may prefer a differentiated use in the relevant sectoral laws. It is up to the Federal and Provincial legislators to decide which options they may wish to implement.

We would like to reiterate that currently a large reform concerning the Administrative Court system in Austria is ongoing. In effect, the traditional administrative structure of reviews and remedies that were dealt with by “*administrative tribunals*” will be replaced by an administrative judiciary, i.e. Administrative Courts at Federal as well as at Provincial **level**. In the course of this reform many sectoral laws were being reviewed and amendments drafted, including the Industrial Code, Waste Management Act, Act on Combustion Plants as well as many sectoral laws within the competence of the nine Federal Provinces. In the course of drafting these amendments, extending the scope of NGOs participation was actively discussed. The reform will take effect as of January 2014 (*see further relevant information in the annex*).

Conclusions:

The Party concerned made numerous efforts to inform affected stakeholders on the findings and recommendations in case ACCC/C/2010/48 and to involve them. It expressed clearly the need to start action before the upcoming MOP 5 in order to be able to report on progress made. Several promising initiatives have started and are still ongoing, such as amendments to several laws expanding public participation, in 2012 and 2013 (see annex). As a matter of fact, however, Austria is preparing for general elections at the end of September which currently makes it difficult to start new legal initiatives outside the scope of the big administrative reform mentioned above. The EU Member States are also awaiting the announced Proposal of the European Commission on access to Justice which was supposed to be presented in 2013.¹

¹ A public consultation on this matter is currently online under http://ec.europa.eu/environment/consultations/access_justice_en.htm.

Annex

In addition to the measures outlined above, a number of legislative measures relevant for this case have been taken both at constitutional level as well as in several sectoral laws.

Austria has made significant progress in extending public participation in environmental proceedings, including legal standing for NGOs. Since the Findings and Recommendations of the Committee in Case ACCC/C/2010/48 were adopted on 16 December 2011, Austria has amended and enforced several laws expanding public participation, in 2012 and 2013. As per 1 January 2014, the new structure of administrative courts will be in place which will be competent for challenges against administrative decisions also concerning the environment.

In addition, the Constitutional Court has developed a line of jurisdiction, beginning in March 2012, which brings about a considerable extension of public participation by interpreting existing environmental laws.

The following outline summarizes the steps that have been taken so far and the developments that have been initiated.

1. Legislative and judicial areas in which actions have been taken

As the Compliance Committee pointed out in the Findings and Recommendations in case ACCC/C/2010/48, the Austrian legal system follows the impairment of right criterion to determine standing rights for individuals (para 62). While the Committee did not object to this criterion in principle, it nevertheless noted that in effect "*there is insufficient possibility for members of the public to challenge an act or omission of a public authority, if the procedure is not consolidated under the EIA or IPPC procedures, or if they cannot prove that they may be adversely affected*" (para 72). With regard to EIA- and IPPC-procedures, the Committee acknowledged that these provide for sufficient public participation, but criticized at the same time that these procedures are limited to "*the purposes of a large scale project*" which "*does not compensate*" for the lack of standings rights for NGOs in other cases concerning "*other acts and omissions*" (para 73).

The legislative measures have focused on two areas, respectively aspects:

- **adapting the constitutional framework** to enable legislators to implement rights to challenge environmental decisions beyond the "impaired rights" doctrine,

which allows for broader participation of NGOs and other members of the public (see under 2 below)

- **extending the scope of procedures with public participation**, in particular EIA- and IPPC-procedures, well beyond the scope of large projects, including a wide variety of (also) small scale installations and projects, respectively the procedures concerning acts and omissions related to such installations and projects (see under 3 below).

By these legislative measures alone, the number of projects and procedures, for which NGOs and other members of the public are granted legal standing, has – according to first estimates – at least doubled.

In addition, the **Constitutional Court has recently adopted a new line of interpretation** where members of the public may claim legal standing even though the relevant sectoral laws do not expressly provide for participation – simply because their rights may be affected by a project (see under 4). This has enabled persons to pursue their rights with regard to relatively small projects which – in the past – did not have to be submitted to public participation at all.

2. Adaptions of the Constitutional framework: Enabling participation in challenging procedures beyond the impairment of rights doctrine

In order to achieve these objectives, the Austrian legislators also amended related areas of law. Among these were the fundamental adaptions of the constitutional framework bringing about the establishment of the new administrative courts.

One of these adaptions is also relevant to environmental procedures: According to the new constitutional provisions, recourse to the new administrative courts is not limited to impaired rights of a party having *locus standi* before the administrative bodies of first instance. The constitutional provisions of Art 132 para 1 and 6 of the Austrian Constitution expressly empower the sectoral legislators to grant challenging rights to further parties. This provision, which has been implemented by Law Gazette (BGBl) I Nr 51/2012, reads:

"(1) The right to file a complaint against decisions of administrative bodies due to violations of the law [is granted to]

1. whoever claims to have been violated in their rights; [...]

(5) *The provincial or national laws shall provide who, in other cases than those referred to in para 1 [...], shall have the right to file a complaint against decisions of administrative bodies due to violations of the law."*

The possible extension of the right to file a complaint against decisions of first instance before the new administrative courts to further legal entities in para 6 enables legislators to effectively implement new challenging rights to NGOs, even if they have not had *locus standi* in the first instance.

An example of new challenging rights for NGOs has been enacted by an amendment to the EIA-Act by Law Gazette (BGBl I 2012/77), enabling NGOs to challenge screening decisions where projects are exempted from an EIA.

3. Extension of *locus standi* beyond EIA and IPPC

Austria has used the transposition of the new EU Industrial Emissions Directive to extend the scope of public participation, including standing rights for NGOs, to a wide variety of projects - far beyond the (formerly narrower) scope of the IPPC-regime.

This has been achieved by three legislative acts:

- Amendments to the Industrial Code, Law Gazette (BGBl I 2013/125
- Amendments to the Emission protection Act for Incineration plants, Law Gazette (BGBl I 2013/127
- Amendments to the Waste Management Act, Law Gazette (BGBl I 2013/103.

These acts extend the scope of public participation to an increased number of projects. In addition, thresholds for EIA-installations have been lowered with regard to a number of projects; at the same time exceptions have been eliminated, which again leads to an increase of EIA-procedures which provide for effective public participation and legal standing of NGOs.

4. New line of interpretation by the Constitutional Court extending public participation

In an important decision of 1 March 2012 (B606/11), the Constitutional Court has adopted a new line of interpretation where members of the public may claim legal standing even though the relevant sectoral laws do not expressly provide for participation. In the case decided by the court, the competent authorities argued that the project in question has no effect at all on the current emission level, thus not affecting the neighbours at all. Nevertheless, the Constitutional Court held that the

neighbors are entitled to participation (legal standing) insofar as this prerequisite (no additional emissions) has to be examined by authorities.

While this decision has been issued in a case concerning an individual neighbour potentially affected by a project, the implications of the court's reasoning also extend to NGOs²: They may argue that they have to be granted legal standing – as a result of their specific legal interest in protecting the environment (as acknowledged under the IE-, IPPC- and EIA-Acts) and in line with the Aarhus Convention – in all matters of (*roughly speaking*) environmental significance. Even if authorities claim that a specific matter does not have any environmental significance at all, NGOs may now argue – in line with the Constitutional Court – that they are entitled to participation (legal standing) insofar as this prerequisite (no environmental significance) has to be examined by authorities.

² A related case is currently pending before the Constitutional Court