

Aarhus Convention Secretariat

c/o Fiona Marshall
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In Copy:

Federal Ministry for Sustainability and Tourism

c/o Dr. Anna Muner-Bretter
(anna.muner-bretter@bmnt.gv.at)

Vienna, 27 September 2018

Regarding: Decision VI/8b on compliance by Austria with its obligations under the Aarhus Convention, progress report on behalf of Austria; BMNT-UW.1.4.1/0025-I/1/2018

Dear Ms. Marshall,

We would like to express our thanks for the opportunity to give our remarks on the 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.

OEKOBÜERO is the alliance of the Austrian Environmental Movement. It consists of 16 Austrian organizations engaged in environmental, nature and animal protection like GLOBAL 2000 (Friends of the Earth Austria), FOUR PAWS, Greenpeace CEE, and WWF Austria. OEKOBÜERO works on the political and legal level for the environmental movement.

In the report, the Federal Ministry discusses the implementation of the so called "third pillar" of the Aarhus Convention¹ (access to justice) within the legislative proposals for an Aarhus Participation Act 2018 ("Aarhus-Beteiligungsgesetz 2018")² as well as a recast of the National Air Emissions Act 2018 (Emissionsgesetz-Luft 2018)³. OEKOBÜERO appreciates in this respect the legislative initiative to

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

² German version available online at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00270/fname_710395.pdf (If needed, an inofficial English translation may be submitted on request.)

³ German version available online at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00271/fname_710461.pdf (If needed, an inofficial English translation may be submitted on request.)

implement the Aarhus Convention in Austria, thus strengthening the right of the public participation and access to justice in certain environmental procedures as well as fostering legal certainty for project applicants.

The present legislative proposal of an Aarhus Participation Act 2018 shall amend the Waste Management Act 2002 (Abfallwirtschaftsgesetz 2002 – AWG), the Water Rights Act 1959 (Wasserrechtsgesetz 1959 – WRG) and the Air Pollution Control Act (Immissionsschutzgesetz – Luft – IG-L). Even though these legislative steps in three important legal areas largely influenced by European Union law are welcome, they are not capable of leading to a full implementation of the Aarhus Convention in all respective legal areas regulating environmental matters. As stated in paragraphe 3. (a) of Decision VI/8b⁴ the requirement of Art. 9 (3) of the Aarhus Convention cannot be met through the implementation of Aarhus requirements in Water, Waste and Air Protection legislation alone. Other Federal environmental legislation, e.g. the Chemicals Act⁵ or the Federal Forestry Act⁶, has not yet been adapted according to Aarhus requirements.

As a matter of fact, even in the legal areas affected by the Aarhus Participation Act 2018, Art. 9 (3) Aarhus Convention is not implemented accordingly. To give an example, § 42 (3) AWG of the legislative proposal limits access to justice for members of the public to violations of EU law. This limitation is not in line with the requirements of Art. 9 (3) of the Aarhus Convention granting access to justice in any environmental matter. Furthermore, according to the draft proposal, the legal standing of member of the public to challenge decisions widely depends on the question whether significant environmental effects as stated in Art. 6 of the Aarhus Convention are to be expected. In water procedures, the right to appeal is limited to projects regulated by § 104a WRG (projects with a significant deterioration of the water status). The pre-evaluation of impacts falls within the competence of the respective authority without any possibility for public participation in the decision-making process. This regulation is in conflict with Art. 9 (3) of the Aarhus Convention granting members of the public access to justice regardless of the classification of impacts.⁷

Following the ruling of the ECJ⁸, members of the public shall be granted standing to challenge inactions of public authorities regarding plans and programmes. This ruling shall now be implemented in the field of

⁴ https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance_by_Austria_VI-8b.pdf (24.09.2018).

⁵ Chemikaliengesetz 1996, BGBl. I No. 53/1997, last amended by BGBl. I No. 44/2018; available online at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10011071>

⁶ Forstgesetz 1975, BGBl. I No. 440/1975, last amended by BGBl. I No. 56/2016, available online at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010371>

⁷ For further concerns on the Aarhus Participation act see the enclosed official statement of OEKOBÜERO in german, also available online at:

http://www.oekobuero.at/images/doku/oekobuero_stellungnahme_aarhus_beteiligungsg_fin.pdf.

⁸ ECJ: 20 December 2017, C-664/15 (*Protect*).

air protection.⁹ In other environmental areas such as water, waste or nature conservation, however, such omissions to issue plans or programmes are still not challengeable by the concerned public.

Recent jurisdiction¹⁰ requires granting access to justice not only regarding individual permits. Nevertheless, members of the public in Austria currently do not have a right to challenge generally applicable environmental administrative acts apart from plans and programmes concerning air pollution control. General regulations, such as nature protection ordinances or ordinances on river basin management plans¹¹ as well as programmes for the monitoring of water status¹² still cannot be challenged by members of the public.¹³

Although latest rulings of Austrian administrative courts¹⁴ confirm that national legislation must not be applied in cases where it contradicts EU environmental legislation regarding the legal standing of environmental NGOs, recent administrative procedures¹⁵ in Austria show that yet not all competent authorities are prepared to grant legal standing or the right to appeal. Previously, concerning environmental matters not regulated by the EU, the Supreme Administrative Court of Austria stated that Art. 3 (9) Aarhus Convention is not clear enough to be directly applicable.¹⁶ Uncertainties concerning the application of this regulation by public authorities thus remain.

In Austria, provisions on environmental protection are, in particular, to be found in the area of public-administration law which is regulated by Federal as well as Provincial authorities. While the present progress report covers actions taken on Federal level, a lack of implementation remains in the nine different Federal Provinces. The different Provincial laws on nature protection, hunting, fishing or other environmental matters still do not grant members of the public legal standing to challenge decisions, or to participate in matters with potentially significant impacts on the environment. Nor have the Federal Provinces submitted a plan of action, including timeline, on the implementation of access to justice for members of the public according to Art. 9 (3) Aarhus Convention.

Additionally, it should be noted that the Federal Ministry for Digital and Economic Affairs has released a legislative proposal for a Federal Law on the Development and Advancement of the Economic Location

⁹ See § 9a (11) IG-L of the Aarhus Participation Act 2018.

¹⁰ E.g. Supreme Administrative Court: 19 February 2018, 2015/07/0074; ECJ: 20 December 2017, C-664/15 (*Protect*).

¹¹ As provided by Art. 13 of the European Water Framework Directive Directive 2000/60/EC.

¹² As provided by Art. 8 of the European Water Framework Directive Directive 2000/60/EC.

¹³ For further details see: Schamschula/Kern, *The ECJ rules environmental NGOs must have access to justice in water law procedures*, ELNI Review 2018 (1), p. 7.10.

¹⁴ Supreme Administrative Court, 28 March 2018, 2015/07/0555; Administrative Court of Lower Austria: 9 April 2018, LVwG-AV-751/001-2017.

¹⁵ Proceeding of the Lower Austrian Provincial Government (Niederösterreichische Landesregierung), ZI. RU5-BE-1207/001-2016, population of otters; proceeding of the District Commission of Gmünden (Bezirkshauptmannschaft Gmünden), GDL2-J-1815/002, repulsion of wolves; proceeding of the Tyrolian Provincial Government (Tiroler Landesregierung), U-NSCH-6/7/46-2017, hydroelectric power plant Lesachbach.

¹⁶ Supreme Administrative Court : 27 April 2012, 2009/02/0239.

Austria ("Standort-Entwicklungsgesetz – StEntG")¹⁷. This law proposes, that certain projects requiring an environmental impact assessment under the EIA directive, are automatically given approval after 12 months' time, if the government deems them "relevant for economic growth". The competent authority then has no choice but to approve the project. Limiting access to justice to "legal questions of fundamental importance"¹⁸ and excluding any form of public participation in the previous decision-making process, this legislative proposal is a vast violation of different Aarhus requirements.¹⁹

For the abovementioned reasons, the legal structure in Austria in its current state does not implement the right of access to justice laid down in Art. (3) Aarhus Convention accordingly as it neither grants sufficient legal standing in the areas of water, air protection and waste law, nor ensures access to justice in further legal areas relating to environment. So while the steps taken were necessary and are indeed appreciated, as they stand now, they do not constitute sufficient implementation on federal level. This, together with a still lacking implementation on state level, mainly in nature protection, hunting and fishery laws leave huge gaps in the access to justice.

Despite the fact that most documents cited are currently available in German only, OEKOBUERO stands ready to submit any further documents and information needed.

OEKOBUERO appreciates the actions taken by the Federal Government in the field of capacity building. The planned trainings and the informative project "KOMM-Recht reloaded" are essential steps to foster awareness of public decision-makers regarding the Aarhus Convention and should be pursued in the upcoming years.

With best regards,



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

Enclosed:

- Statement of OEKOBUERO on the legislative proposal of the Aarhus implementation act; official German version, 24 July 2018
- Statement of OEKOBUERO on the legislative draft proposal for a Federal Law on the Development and Advancement of the Economic Location Austria infrastructure ("Standort-Entwicklungsgesetz – StEntG"); unofficial English version, 17 August 2018

¹⁷ "Standortentwicklungsgesetz", proposal in German available online at:
https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00067/fname_702573.pdf (26 September 2018).

¹⁸ See § 12 (2) of the draft proposal.

¹⁹ For further details see the official statement of OEKOBUERO, available online at:
http://www.oekobuero.at/images/doku/oekobuero_stellungnahme_standortentwicklungsgesetz_fin.pdf (English translation enclosed).