

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
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Vienna, 30 October 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; additional comments on the implementation

Dear Ms. Marshall,

Once again, OEKOBÜERO appreciates the opportunity to comment on the implementation of decision V/8b of the Meeting of the Parties on compliance with its obligations under the Aarhus Convention.

Due to recent developments within the Austrian Federal legislative OEKOBÜERO would like to add the following remarks to its comments submitted to the Aarhus Convention Secretariat on 27 September 2018:

1. Environmental Impact Assessment Act

The amendment of the Austrian Environmental Impact Assessment Act (UVP-G) has been approved by the Austrian National Council (Nationalrat) on October 25th and will become law within the next few weeks. Any calls for stopping the amendment regarding environmental NGOs were left unheard. After a long public review procedure, one crucial point thereof has been added in the very last possible moment on request of a member of the Austrian Peoples Party (ÖVP), which also holds the majority in the Federal Government.

According to the current draft version¹, the right to participate and challenge decisions in environmental procedures will be limited to environmental organisations accounting for a minimum of 100 legal members. Applications to be recognized as entitled environmental organization must provide adequate prove for their number of members.

Given the current Austrian legislative system, § 19 UVP-G is the central provision regulation requirements for NGOs to obtain participatory rights in environmental procedures. Hence the present amendment would affect the standing of environmental organisations to challenge decisions according to Article 9 (3) of the Aarhus Convention, but also the right for public participation in environmental procedures according to Articles 6 and 9 (2) of the Convention.

As various environmental acts granting NGOs the right to participate in administrative procedures and challenge environmental decisions in Austria refer to the respective regulation of § 19 UVP-G, the amendment would not only affect Environmental Impact Assessment (EIA) procedures, but many others as well. Just to name examples: Seveso and IPPC permitting procedures including those according to the Industrial Code (Gewerbeordnung 1994)², **as well was the Water Protection Act ("Wasserrechtsgesetz – WRG")**, **the Clean Air Act ("Immissionsschutzgesetz-Luft – IG-L")**, **the Waste Management Act ("Abfallwirtschaftsgesetz – AWG")** and **all other upcoming changes to, for example, Nature Protection Acts, the Animal Protection Act, Fishery- and Hunting Acts, National Park Management Acts, and so on.**³ This of course includes environmental procedures on both federal and provincial level in the areas of nature or soil conservation⁴.

In Austria, there are currently 57 environmental NGOs registered according to § 19 (7) UVP-G, only 30 of which can be effective in the entire Republic of Austria (the scope of action of the others is limited to certain regions). Presuming that the planned legal amendment will enter into force, a large number of these NGOs would lose their official recognition to participate in environmental procedures. According to

¹ German version available online at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00282/fname_712825.pdf (19 October 2018).

² BGBl Nr 194/1994, last amended by BGBl I Nr 45/2018, available online at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10007517> (19 October 2018).

³ Draft version available online at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00279/fname_712834.pdf (19 October 2018).

⁴ Upper Austrian Land Parceling Act (*Oö. Flurverfassungs-Landesgesetz 1979*), LGBl Nr 73/1979, last amended by LGBl Nr LGBl.Nr. 40/2018; Land Parceling Act of Burgenland (*Burgenländisches Flurverfassungs-Landesgesetz*), LGBl Nr 40/1970, last amended by LGBl Nr 1/2014; Carinthian Nature Conservation Act (*Kärntner Naturschutzgesetz 2002*), LGBl Nr 79/2002, last amended by LGBl Nr 57/2017; Lower Austrian Environmental Liability Act (*NÖ Umwelthaftungsgesetz*), LGBl Nr 6200-0, last amended by LGBl Nr 23/2018; Styrian Environmental Liability Act (*Steiermärkisches Umwelthaftungsgesetz – StUHG*), LGBl Nr 10/2010, last amended by LGBl Nr 71/2017; Styrian Genetic Engineering Precautionary Measures Act (*Steiermärkisches Gentechnik-Vorsorgegesetz – StGTVG*), LGBl Nr 97/2006, last amended by LGBl Nr 63/2018; Viennese Genetic Engineering Precautionary Measures Act (*Wiener Gentechnik-Vorsorgegesetz*), LGBl Nr 53/2005, last amended by LGBl Nr 19/2016; etc.

information of the Austrian Federal Ministry for Environment, NGOs challenge decisions in EIA procedures only twice a year.⁵

Whereas the wording of Article 2 (5) of the Aarhus Convention does not define any conditions on *"requirements under national law"* concerning NGOs, such requirements are to be decided and applied *"with the objective of giving the public concerned wide access to justice"*.⁶ Parties *"may not interpret these criteria in a way that significantly narrows standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention"*.⁷

National requirements should be *"seen in the context of the important role of the Convention with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide 'appropriate recognition' for NGOs"*.⁸ Parties should, moreover, ensure that national requirements *"are not overly burdensome"*. *"[A]ny requirements should be consistent with the Convention's principles, such as nondiscrimination and the avoidance of technical and financial barriers. Within these limits parties may impose requirements based on objective criteria that are not unnecessarily exclusionary."*⁹

The requirement of 100 members can be seen at itself discriminatory as smaller environmental NGOs who might still have the same expertise are entirely excluded from participatory rights. Furthermore, it may be unnecessarily exclusionary as there is no objective reason to differ between NGOs with 100 and NGOs with less than 100 members. The report of the Environmental Committee of the Austrian National Council does not include any remarks explaining the necessity of this additional requirement.¹⁰

Art 3 (4) of the Convention states that each *"Party shall provide for appropriate recognition of and support to associations [...] promoting environmental protection and ensure that its national legal systems consistent with this obligation."* Although this provision is meant to acknowledge the importance of environmental NGOs more generally, it has a special link with the Articles 2 (5), 9 (2), and 9 (5).¹¹

According to an early case of Turkmenistan, the combination of a prohibition of participation activities with difficult registration procedures and requirements relating to, *inter alia*, number of members can be

⁵ Information of the former Federal Minister for Environment of 2 June 2016, https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_08498/imfname_536883.pdf (18 October 2018).

⁶ ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para 33; ACCC/C/2010 (Czech Republic), ECE/MP.PP/C.1/2012/11, para 75; see also *Compilation of findings of the Aarhus Convention Compliance Committee*, 8 September 2017, para 71, http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_08.09.2017_new_compressed.pdf (19 October 2018).

⁷ ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para 81; ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/1, para 75; ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, para 61.

⁸ *The Aarhus Conventions: An Implementation Guide*, 2nd Ed., 2014, p 58, https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf (19 October 2018).

⁹ Ibidem.

¹⁰ German version online available at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00282/fname_712824.pdf (19 October 2018).

¹¹ Ibidem, p 66.

a violation of Art 3 (4) of the Convention.¹² Whereas in this case, the required minimum number of member was 500, there is a significant similarity to the present case.

Where a national requirement according to Article 2 (5) of the Convention is unreasonable or illegitimate in itself or as applied, and this leads to a denial of standing, a state infringes Article 9 (2).¹³ As mentioned above, there is no clear reason justifying the denial of standing for NGOs not fulfilling the requirement of 100 members. A direct correlation between number of members and professional expertise is not evident.

Although Article 9 (3) of the Convention accords parties greater flexibility in the formulation and interpretation of criteria for legal standing than in the case of Article 9 (2) access to justice, the criteria cannot be so strict as to deny standing to almost all environmental organisation.¹⁴ Rather, access should be the presumption.¹⁵ Therefore, the consideration outlined above concerning access to justice according to Article 9 (2) apply in the context of Article 9 (3), likewise as a large number of Austrian environmental NGOs would no longer be granted standing to challenge decisions.

Furthermore, Article 9 (5) of the Convention requires that parties *"consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice"*. Limitations on standing and difficulty in obtaining legal counsel are both potential barriers.¹⁶ The condition of 100 members can thus be seen as a barrier according to Article 9 (5).

The Austrian Federal Government argues that this new regulation is in line with the provisions of the Aarhus Convention as Sweden has a similar system. In this respect, however, the ACCC has stated that limitations are only eligible if excluded NGOs are still entitled standing to challenge environmental decisions according to Article 9 (2).¹⁷ Furthermore has been referred to the fact that environmental NGOs with less than 100 members were granted rights to access if they could prove their **"support from the public"** and had been active at least three years.¹⁸ In Sweden, this regulation is applied broadly, e.g. for NGOs with less than 100 members organising exhibitions with 500 visitors.¹⁹ Alternatively, support may also be proven otherwise and in practice is usually accepted by authorities.²⁰ Such alternative forms of legitimation are not foreseen in the present amendment of the Austrian UVP-G.

¹² ACCC/C/2004/05 (Turkmenistan), ECE/MP.PP/C.1/2005/2/Add.5, para 21.

¹³ ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para 70-73.

¹⁴ ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para 19.

¹⁵ ACCC/C/2011/58 (Bulgaria), para 65.

¹⁶ *The Aarhus Conventions: An Implementation Guide*, 2nd Ed., 2014, p. 205.

¹⁷ ACCC/C/2013/81 (Sweden), ECE/MP.PP/C.1/2017/4, para 81-82.

¹⁸ Ibidem, para 85.

¹⁹ Swedish Appeal Body in Environmental Matters „Mark- och miljööverdomstolen", MÖD 2015:17, "Den utåtriktade verksamheten fokuseras sedan år 1976 på en fortlöpande egenproducerad utställning för allmänheten som besöks av närmare 500 personer per år."

²⁰ Information of Oscar Ahlrik, Environmental Lawyer of the Swedish Environmental Organisation „Naturskyddsföreningen".

Although a meeting between representatives of different Austrian environmental NGOs and the responsible Federal Minister for Sustainability and Tourism has taken place, the Federal Government is not willing to review the present Amendment of the EIA Act regarding its compliance with Aarhus requirements.

2. Aarhus Participation Act 2018

In the progress report on behalf of Austria of October 1st,²¹ the Federal Ministry for Sustainability and Tourism referred to the former draft version of the Aarhus Implementation Act 2018 (Aarhus-Beteiligungsgesetz 2018)²². This draft has been approved upon by the Austrian National Council on October 25th with a crucial adaption added to the draft legislation the same day.

According to the latest version which will become law within the next few weeks, appeals submitted by environmental organisations in water and waste procedures shall not be granted suspensive effect by default, as it is the general rule with all appeals. Upon request of the appealing environmental organisation, the responsible authority may grant the appeal suspensive effect, if, according to a balancing of interests, the exercise of the rights granted by the challenged decision would lead to a “disproportionate environmental risk”.²³

The Austrian General Administrative Procedure Act 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG)²⁴ provides in its § 64 that appeals *„that have been filed in due time and are permissible have a suspensive effect. [...] The authority may exclude the suspensive effect by an administrative decision if, after having considered the affected public interests and the interests of other parties, the early enforcement of the contested administrative decision or the exercise of the authorisation granted by the contested administrative decision is urgently required because of imminent danger. It is recommendable to include a statement to this effect already in the administrative decision given on the main issue.”*

There is no explanation for the fact that this general rule is to be excluded in environmental procedures such as water and waste procedures, not only under the light of European Court of Justice (ECJ) ruling stressing that especially in procedures relating to the environment, the granting of temporary relief has great relevance, as environmental harm is difficult to reverse, if once produced.²⁵

According to Article 9 (4) of the Aarhus Convention, procedures must *“provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively*

²¹ BMNT-UW.1.4.1/0025-I/1/2018.

²² German version available online at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00279/fname_712834.pdf.

²³ See enclosed amendment of the Aarhus Implementation Act, § 78c (2) of the Waste Management Act (Abfallwirtschaftsgesetz 2002) and § 145 (16) Water Protection Act (Wasserrechtsgesetz 1959).

²⁴ BGBl. Nr. 51/1991, last amended by BGBl. I Nr. 58/2018; official English translation available online at: https://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf.

²⁵ See ECJ, 15 January 2013, C-416/10 (Križan).

expensive". Access to justice must be "provided when it is effectively possible to challenge the decision permitting the activity in question".²⁶

Hereafter, a suspensive effect of appeals will be the exception, granted only upon request of the appealing environmental organisation and shifting the burden of proof before the appeal proceeding even starts. The latter will be required to prove within this request the disproportionate environmental risk caused by the exercise of the rights granted by the challenged decision. The suspensive effect of an **appeal "affects the effectiveness of judicial procedures"**.²⁷ With a general exclusion of the suspensive effect, the rule of law as well as the safety of the environment are at threat. The decision on whether to grant suspension as preventive matter should rather be issued before the exercise of the right granted in the challenged decision can be exercised, i.e. within the original decision or permit granting this right.²⁸

As the exclusion of the suspensive effects of appeals has been added to the draft legislation at the very last moment, the public has not had any opportunity to comment on the new draft before it was approved by the National Council. Lastly, the Aarhus Participation Act is considered an example for the implementation for the federal states' **laws like** nature protection laws. Thus it is likely that this restriction will be copied into further laws as well.

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

With best regards,



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

Enclosed:

- Amendment of the Austrian EIA Act, as decided on 4 October 2018 (available in German only)
- Report of the Environmental Committee of the Austrian National Council, 4 October 2018 (available in German only)
- Proposal for an amendment of the Aarhus Implementation Act 2018, 25 October 2018 (available in German only)

²⁶ ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para 112.

²⁷ ACCC/C/2008/31 (Germany)M ECE/MP.PP/C.1/2014/8, para 83.

²⁸ See *The Aarhus Conventions: An Implementation Guide*, 2nd Ed., 2014, p 203 referring to ACCC/C/2008/24 (Spain).