



OEKOBÜERO
Neustiftgasse 36/3a
1070 Vienna, Austria

Aarhus Convention Secretariat
c/o Ms. Fiona Marshall
Palais des Nations
8-14 avenue de la Paix
1211 Geneva 10
Switzerland

Vienna, March 9, 2018

Re: Written Statement from Communicants concerning developments relevant to Decision VI/8b

Dear Ms. Marshall,

Thank you very much indeed for this opportunity to provide the ACCC with a brief statement concerning developments in Austria relevant to Decision VI/8b. As indicated, Mr. Thomas Alge, OEKOBÜERO's director, will also discuss recent developments via audio conference during the open session devoted to the review of this decision.

Our statement concerns specifically paragraph 3(a) and (b) of this decision. In our view, developments since our last report to the ACCC¹ have been both negative and positive. Yet in sum it is clear that para. 3(a) and (b) of decision VI/8b have not yet been implemented.

The negative developments follow on the heels of the Constitution Court decision in the joined cases of WWF against the Water Management Master Plans, Tyrolian Oberland und Forchtenstein from December 12, 2016 (2016 V 87/2014-11, and V134/2015)² in which NGOs were denied the right to challenge regulations under environmental law, and are as follows:

¹ Submitted on 19.01.2017; available under https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9b_Austria/frCommV9b_19.01.2017_comments_on_third_progress_report.pdf

² See the report cited in the footnote directly above at p. 2

- The Highest Administrative Court denied the right of NGOs to either participate or have judicial review with regards to nature protection procedures, despite the claimants' extensive arguments, which were brought forth on the basis of both article 9(2) and 9(3) of the Convention (VwGH 23.5.2017 Ra 2017/10/0058, 0059-4);
- The Provincial Administrative Court of Tyrol suspended the procedure concerning the question of party standing in appropriate assessment procedures on the grounds that it wanted to wait to see what the CJEU had to say in the preliminary reference procedure in case C-664/15 ("Protect"),³ although the *Protect* case concerns water law and this procedure at issue concerned nature protection. (8.6.2017 LVwG-2017/35/1131-2). To date we have heard nothing, despite our request asking for a decision on this matter considering that the *Protect* judgment has since been issued;
- The Provincial Government of Lower Austria denied legal standing to the recognized environmental NGOs WWF and ÖKOBÜRO in a case regarding the permission to catch/shoot otters. Again these NGOs tried to use article 9 paras. 2 and 3 of the Aarhus Convention but were still denied standing. The NGOs challenged this decision in June of 2017 and as of this date still are awaiting a decision by the Provincial Administrative Court. (case RU5-BE-1207/001-2016);
- The Regional Administrative Authority Gmünd (as a first instance) refused on October 25, 2017 per a formal administrative decision the application of the recognized environmental organization WWF to become a party to a nature protection procedure. Again, such recognition would be necessary to secure access to justice rights under the national framework;
- The Provincial Government of Styria refused standing – and thus concomitant access to justice rights – in a case concerning the permitting for the "Schwarze Sulm" hydropower plant (GZ: ABT13-32.00M-27/2002-254). Of significance also is that this happened on February 15, 2018, namely well after the CJEU decision in *Protect*. Furthermore, this same body issued an earlier decision from 2016 (GZ: ABT13-32.00-297/2012-207), which also rejected our claims, yet suggested that if the CJEU decided in *Protect* in a certain way (which it did) and if we then brought forth an intervention in a particular fashion (which we did), then we should be granted standing. Yet this was denied.

Notwithstanding the above, we fully acknowledge **the positive developments** that have taken place as well. Thus, since the CJEU decision in *Protect* was issued on December 20, 2017:

- WWF was granted party standing orally by the lower court in the case that had led to C-663/15, which had been joined to the *Protect* case but had been withdrawn from the preliminary review procedure because the underlying decision had been suddenly quashed on formal grounds;⁴

³ The CJEU ultimately determined that recognized NGOs must have access to justice in certain procedures implementing the Water Framework Directive and that, where the national rules make the possibility of judicial review dependent on having rights as a participant in the administrative procedure, then such rights must be given.

⁴ For the sake of completeness and clarity we note that this case concerns the same hydropower plant in Tyrol („Tumpen“) as mentioned above with regard to the nature protection procedure in the second bullet under negative developments. The water law procedure is separate from the nature protection procedure. We have now been granted standing orally in the former, but are still awaiting a decision on the latter.

- OEKOBÜERO and WWF's request for party standing was granted by the Regional Administrative Court of Tyrol in the case of the hydropower plant Haslach am Kaiserbach (21.2.2018 LVwG-2018/44/0055-6).

Moreover, it does seem that Austria recognizes the need to implement the *Protect* decision in some legislative fashion. However, we have reason to fear that implementation of the *Protect* decision will be confined to certain aspects of water law, and not at all address the full scope of article 9 obligations.

Considering all of these developments as a whole, we would suggest the following:

Yes, Austria has made progress. We warmly welcome the positive developments.

However, we regret that any such progress appears provoked by or attributable to the CJEU decision in *Protect* and even there, there have been and are sure to be future shortcomings and challenges in terms of implementation. Thus the full scope of decision VI/8b – particularly any aspects falling outside of the scope of EU law – will not be implemented and Austria will continue to ignore important obligations that stem from international law.

We hope the above comments will be of assistance to the Committee in its evaluation of progress made to date in implementing this decision and again would like to express our appreciation for having been given this opportunity.

Kind regards,

Mag. Thomas Alge, Director
OEKOBÜERO

