



European Commission  
Directorate-General for Environment  
Environmental Enforcement (ENV.E.3)  
to the attention of Klaus Malacek

**Subject: CHAP(2013)00399, CHAP(2015)02489 and CHAP(2017)02148**

Vienna, 12 June 2019

Dear Mr. Malacek,  
to whom it may concern,

with reference to a telephone call concerning the status of EU complaints we have submitted, we would like to inform you about the following recent developments in Austria in this matter:

### **1. CHAP(2013)00399 respectively 4731/13/ENVI: access to justice for NGOs**

By a complaint dated 6 February 2013, ÖKOBÜRO and Justice & Environment pointed out the lack of implementation of Article 9 para 3 Aarhus Convention and the resulting gaps in legal protection for NGOs in environmental matters in Austria. Subsequently, an EU-pilot-procedure was initiated and a letter of formal notice was sent to the Republic of Austria on 11 July 2014. In addition to the introduction of an administrative court of first instance on 1 January 2014, which was already indicated in the complaint, first steps towards the implementation of Article 9 para 3 of the Aarhus Convention were also taken, however, these are far from sufficient and do not fulfil the requirements of EU law for broad access to justice in environmental matters. In detail, implementation deficits still exist in the following areas:

#### **FEDERAL LAW:**

- **Water law**

The new right of appeal granted to NGOs in water law proceedings by the amendment of the Water Act (Wasserrechtsgesetz – WRG) limits their right to appeal to proceedings in which deterioration of the water status (§ 104a WRG) is to be expected.<sup>1</sup> This means that NGOs can

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<sup>1</sup> § 102 para 5 WRG: *An environmental organisation recognised pursuant to § 19 para. 7 of the Environmental Impact Assessment Act 2000 shall, in its geographical scope of recognition, be entitled to file a complaint to the Administrative Court against official notices that were adopted on the basis of this Federal Act or of other federal acts pursuant to which provisions of water law are applied, to allege a possible infringement of the obligation set out in § 104a.*

only lodge a complaint in proceedings with significant environmental impacts, i.e. proceedings in which they are also to be involved. Apart from these § 104a procedures, there is still no legal standing for NGOs in decision-making procedures under water law.<sup>2</sup> While only very few § 104a procedures are conducted each year, there are countless other procedures under water law which also serve to fulfil the objectives of the Water Framework Directive.

In addition, the retroactive effect of the right to appeal in § 104a proceedings was limited to one year.<sup>3</sup> It follows from this that, on the basis of the present provision in the WRG, Austria's implementation period under Union law is unjustly extended by approximately 12 years with only one year retroactive effect, since Austria has the obligation to implement at the latest since the ratification of the Aarhus Convention by the European Union in February 2005 or by Austria itself in January 2005. The Austrian legislator should already have been aware of the deficient implementation of the Aarhus Convention due to the decisions<sup>4</sup> by the Aarhus Convention Compliance Committee (ACCC) in 2011 and 2013, which established that Austria had violated Article 9 para 3 of the Aarhus Convention. These findings of the ACCC were also confirmed by the Conference of the Parties to the Aarhus Convention in

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§ 104a para 1 WRG: *Projects in which*

1. *by changes in the hydromorphological properties of a surface water body or by changes in the water level of groundwater bodies*

(a) *failure to achieve good groundwater status, good ecological status or, where appropriate, good ecological potential; or*

(b) *deterioration in the status of a body of surface water or groundwater is to be expected,*

2. *a deterioration from a very good to a good status of a surface water body as a result of a new sustainable development activity is to be expected as a result of pollutant inputs,*

*are in any case projects which are expected to have an impact on public considerations (§ 104 para 1 and § 106).*

<sup>2</sup> Examples from decision-making practice which prove the lack of legal protection in water law can be provided at any time if required.

<sup>3</sup> § 145 para 15 sentence 3 and 4 WRG: *Official notices which have become res iudicata within one year before the day of the announcement of federal act Federal Law Gazette I 73/2018 and which are generally accessible in the collection of documents of the Water Register ("Wasserbuch") may, within a period of six weeks after the day following the announcement of the said federal act, be challenged by an environmental organisation recognised pursuant to § 19 para. 7 of the Environmental Impact Assessment Act 2000. Where such official notices are not generally accessible in the collection of documents of the Water Register they can be requested by a recognised environmental organisation pursuant to § 19 para. 7 of the Environmental Impact Assessment Act 2000 within six weeks after the day following the announcement of federal act Federal Law Gazette I No 73/2018; [...]*

<sup>4</sup> ACCC 16 December 2011, ACCC/C/2010/48 (available at: [https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-48/Findings/C48\\_FindingsAdvUnedCopy.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-48/Findings/C48_FindingsAdvUnedCopy.pdf)); ACCC 27 September 2013, ACCC/C/2011/63 (available at: <http://www.unece.org/?id=28540>).

2014.<sup>5</sup> However, at the very latest when the European Commission initiated infringement proceedings<sup>6</sup> against Austria in this matter in 2014, the Austrian legislator could no longer assume that the Austrian legal situation in water law, among others, was in conformity with EU law and Aarhus. In addition, the ECJ has already repeatedly emphasised in 2015 that the Member States may not gain any advantage by not implementing Union law.<sup>7</sup>

- **Waste law**

The transitional provisions of the Waste Management Act (Abfallwirtschaftsgesetz – AWG)<sup>8</sup> also restrict the retroactive effect of the power to appeal to one year. In order to avoid repetitions, reference is made to the remarks on water law. In addition, the current amendment to the AWG will mean that further permits for waste facilities will no longer be subject to the regime of the AWG but will solely to the Trade Regulation Act (Gewerbeordnung – GewO) or the Mineral Raw Materials Act (Mineralrohstoffgesetz – MinRoG). There, however, the Aarhus Convention and the associated legal protection have not yet been implemented except in proceedings concerning IPPC plants. The effective duration in which the affected public therefore had rights in these proceedings would thus only be six months (Aarhus Participation Act in autumn 2018 until the AWG amendment in spring 2019). In this context, it should also be emphasised that a notification by the Republic of Austria that Article 9 para 3 Aarhus Convention was implemented in the AWG is misleading, as it can undoubtedly be assumed that a planned further postponement of projects to other laws was not mentioned.

Furthermore, the AWG restricts the power of NGOs to challenge the law to the extent that only the violation of environmental protection regulations under Union law can be asserted.<sup>9</sup>

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<sup>5</sup> Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, ECE/MP.PP/2014/2/Add.1, Decision V/9b (available at: [http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post\\_session\\_docs/ece\\_mp.pp\\_2014\\_2\\_add.1\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp.pp_2014_2_add.1_eng.pdf))

<sup>6</sup> Infringement proceeding No 2014/4111 concerning public access to the environment (Article 9 para 3 of the Aarhus Convention) within the scope of the Habitats Directive 92/43/EEC, the Water Framework Directive 2000/60/EC, the Air Quality Directive 2008/50/EC and the Waste Framework Directive 2008/98/EC.

<sup>7</sup> ECJ 15 October 2015, C-137/14 (*Commission v Germany*) paragraph 98: *In addition, the fact that the Federal Republic of Germany, after having adopted Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ L 156, p. 17), which amended Directive 85/337 on public participation and access to justice, codified by Directive 2011/92, transposed it belatedly into national law and limited the temporal applicability of the national provisions transposing that directive, would allow Germany to grant itself a new period for transposition (cf. in accordance with Commission v Portugal, C 277/13, EU:2014:2208, paragraph 45).*

<sup>8</sup> § 78c AWG.

<sup>9</sup> § 42 para 3 AWG: *environmental organisations recognised pursuant to § 19 para. 7 of the Environmental Impact Assessment Act 2000 shall, in their respective geographical area of recognition, have the right to resort to a remedy because of illegality due to violation of environmental protection provisions set under Union law.*

Such a restriction, however, is not compatible with Article 9 para 3 of the Aarhus Convention.

- **Air quality law**

As a result of the amendment to the Air Pollution Control Act (Immissionschutzgesetz-Luft – IG-L), NGOs have now been granted the right to contest plans and programmes.<sup>10</sup> Within this framework, however, only the review or arrangement of measures already provided for in these plans and programmes can be sought. There is no provision for the adoption of new measures based on the appeal of NGOs and the courts will interpret this as well (cf. Salzburg Regional Administrative Court, 24 April 2019, 405-4/1892/1/18-2019, can be transmitted if necessary). This does not comply with the requirements for effective legal protection and broad access to justice within the meaning of Article 9 para 3 of the Aarhus Convention.

- **Forestry law, mineral resources law, trade regulation law, etc.**

Although environmental impacts can also be assumed in legal matters other than water, waste and air pollution, there has been no implementation of Article 9 para 3 of the Aarhus Convention outside these areas (which are strongly influenced by Union law). Therefore, there are no possibilities for NGOs to contest the provisions of the Forestry Act (Forstgesetz – ForstG), the Trade Regulation Act<sup>11</sup> (GewO) and the Mineral Resources Act (MinRoG) – all areas in which considerable environmental impacts can be expected.

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<sup>10</sup> § 9a para 1a IG-L: *Within a period of eight weeks following the announcement of the programme pursuant to paragraph 8, natural persons directly concerned by the exceedance of a limit value pursuant to paragraph 1 as well as environmental organisations recognised pursuant to § 19 para. 7 of the Environmental Impact Assessment Act 2000, Federal Law Gazette No 597/1993 as amended, within their relevant geographical scope of recognition, may file **a reasoned application for examination of the programme with respect to the appropriateness of the measures it sets out in their entirety, to ensure compliance with the limit values pursuant to paragraph 1 as soon as possible, with the Provincial Governor.** The Provincial Governor shall decide on this application by way of official notice.*

§ 9a para 11 IG-L: *Natural persons directly concerned by the exceedance of a limit value pursuant to paragraph 1 as well as environmental organisations recognised pursuant to § 19 para. 7 of the Environmental Impact Assessment Act 2000, in their respective geographical scope of recognition may file a reasoned application for the establishment of a programme pursuant to paragraph 1 or, if a programme has already been established, an application for its revision pursuant to paragraph 6 **or for an order of measures provided for on the basis of Section 4 pursuant to § 10, with the Provincial Governor.** If the requirements for the establishment or revision of the programme pursuant to paragraph 1 or paragraph 6 are met, the Provincial Governor shall start the establishment or revision without further delay. Measures pursuant to Section 4 shall be ordered by ordinance pursuant to § 10 or the Provincial Governor shall determine by way of official notice that the measures applied for are in particular with consideration of the principles for the achievement of the objectives of this Federal Act (§ 1 para. 1) pursuant to § 9b not necessary. If the requirements for the establishment or revision of the programme pursuant to paragraph 1 or paragraph 6 are not met, the Provincial Governor shall decide by way of an official notice stating that the legal requirements are not met.*

<sup>11</sup> In the GewO, legal protection for NGOs is currently only provided for IPPC installations.

In this context, it should again be pointed out that numerous waste treatment plants are not subject to licensing under the Waste Management Act (AWG), but only under the Trade Regulation Act (GewO) or Mineral Resources Act (MinRoG). This means that approval procedures for these plants are handled in accordance with material laws which still do not provide legal protection for NGOs. A current draft of an amendment to the Waste Management Act (AWG)<sup>12</sup> currently provides for this list to be extended to include other types of plants,<sup>13</sup> thus further undermining legal protection for NGOs.

### **STATE LAW:**

So far, only the state of Lower Austria has taken binding steps to implement Article 9 para 3 of the Aarhus Convention, namely in the areas of nature conservation and hunting – in fisheries law, implementation is still lacking. Furthermore, although the Lower Austrian Nature Conservation Act (NÖ NSchG) grants NGOs a subsequent right of appeal, the entitlement is limited to cases in which species protected under EU law are affected.<sup>14</sup> However, such a restriction is not compatible with the provisions of the Aarhus Convention. Moreover, the retroactive challenge is also limited to one year in the Lower Austrian Nature Conservation Act (NÖ NSchG) and the Lower Austrian Hunting Act (NÖ JagdG).<sup>15</sup>

The other drafts of the states of Styria, Upper Austria and Vorarlberg that have been submitted so far also fall short of the requirements of the Aarhus Convention. For details,

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<sup>12</sup> [https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME\\_00136/fname\\_747657.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00136/fname_747657.pdf).

<sup>13</sup> See *ibid* point 39 (amendment of § 37 para 2 AWG).

<sup>14</sup> § 27c Abs 1 NÖ NSchG: *Environmental organisations within the meaning of § 27b para 1 have the right to lodge a complaint with the state administrative court against decisions in accordance with § 20 para 4, provided that protected animal and plant species, which are listed in*

- Annex IV of the Habitats Directive, or
- Annex I of the Birds Directive or listed in
- Article 4 para 2 of the Birds Directive, are affected.

<sup>15</sup> § 38 para 10 NÖ NaSchG: *Environmental organisations within the meaning of § 27b para 1 are only permitted to lodge a complaint with the state administrative court against decisions in accordance with*

1. § 10 paras 1 and 2 and
2. § 20 para 4, provided that protected animal and plant species which are listed in
  - Annex IV of the Habitats Directive, or
  - Annex I of the Birds Directive, or
  - Article 4 para 2 of the Birds Directive, are affected,

**and provided that the decisions were issued up to one year before the entry into force of the NÖ NSchG in the version of State Law Gazette No. 26/2019.**

§ 142 para 11 NÖ JagdG: *Environmental organisations within the meaning of § 3 para 11 have the right to appeal to the state administrative court against decisions issued up to one year before the entry into force of the NÖ JagdG in the version of State Law Gazette No. 26/2019.*



please refer to our comments on this subject. (See Appendix 1, Statement on the Aarhus Amendment in Upper Austria; Appendix 2, Statement on the Aarhus Amendment in Styria; Appendix 3, Statement on the Aarhus Amendment in Vorarlberg).

ÖKOBÜRO have also contributed to the parliamentary process with regard to all legislative amendments already made to implement the Aarhus Convention and pointed out in all statements that the planned amendments were not sufficient for a legally compliant implementation of Article 9 para 3 of the Aarhus Convention. [See Appendix 4, Statement on the draft of a Federal Act amending the Waste Management Act, the Air Pollution Control Act and the Water Act 1959 (Aarhus Participation Act 2018); Appendix 5, Statement on the Aarhus Amendment in Lower Austria]. Unfortunately, all our submissions have been disregarded.

In this context, it should also be noted that in the same breath with the implementation of Aarhus at federal level, the Environmental Impact Assessment Act (Umweltverträglichkeitsprüfungsgesetz – UVP-G) was amended to the effect that the requirements for the recognition of environmental organisations were tightened. According to the new version of § 19 para 6 UVP-G<sup>16</sup>, associations must have at least 100 members and must comprise at least five member associations which together must have 500 members in order to be recognised as an environmental organisation and thus admitted as a party or participant in environmental proceedings. Other ways of demonstrating the competence and commitment of environmental organisations, such as in Sweden, are not provided for in the Environmental Impact Assessment Act (UVP-G). The procedure for being recognised as an environmental organisation in Austria has thus become even more complicated. As a result, many environmental organisations are no longer willing to accept this burden, as they can only participate in a few legal proceedings for resource reasons anyway.

It is also decisive that this restriction does not only exist in environmental impact assessment procedures, but also in countless other legal areas, since the relevant laws (e.g. WRG, AWG, IG-L, GewO, NÖ NSchG, etc.) all refer to the relevant provision of the UVP-G with regard to environmental organisations. This has not only reduced the number of recognised environmental organisations in Austria but has also created an additional obstacle to access to justice.

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<sup>16</sup> § 19 para 6 UVP-G: *An environmental organisation is an association or a foundation,*

- 1. of which the primary purpose is the protection of the environment in accordance with the statutes of the association or the declaration of the foundation,*
- 2. which pursues non-profit-making objectives within the meaning of §§ 35 and 36 BAO, Federal Law Gazette No. 194/1961, and*
- 3. which has existed for at least three years prior to the application pursuant to para 7 with the purpose stated under figure 1.*

***The association must consist of at least one hundred members. A union must comprise at least five member associations which fulfil the criteria of par 6 figure 1 to 3 and which together reach the number of members required for five recognised environmental organisations. The corresponding number must be made evident to the authority.***

Furthermore, current developments which indicate a negative trend with regard to suspensive legal protection should not be neglected. While the amendments to the Water Act (WRG) and the Waste Management Act (AWG) as well as the Lower Austrian Nature Protection Act (NÖ NSchG) and the Lower Austrian Hunting Act (NÖ JagdG) excluded the suspensive effect of complaints only for retroactive complaints,<sup>17</sup> the draft Aarhus amendment in Vorarlberg now provides for a general exclusion of the suspensive effect.<sup>18</sup> Similarly, the province of Upper Austria already provides for such a general exclusion of suspensive effect.<sup>19</sup> Although the complainants may apply for suspensive effect, in practice this is rarely granted by authorities and courts or not granted for incomprehensible reasons.

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<sup>17</sup> § 145 para 16 WRG: *Complaints pursuant to the third or fourth sentence of paragraph 15 shall not have suspensive effect. However, the authority shall, upon application by the complaining environmental organisation, grant the suspensive effect by official notice if, after consideration of the public interests and the interests of any other parties affected, performance of the permission granted by the official notice contested would disproportionately affect the environment, in particular the status of water bodies. The complaint against an official notice by means of which the suspensive effect has been granted has no suspensive effect.*

§ 87c para 2 AWG: *Environmental organisations which are recognised in accordance with § 19 para 7 UVP-G are entitled, within the scope of their local recognition, to appeal against decisions in accordance with para 1 above on the grounds of illegality on account of violation of environmental protection regulations under EU law. Complaints against decisions pursuant to para 1 figure 1 do not have suspensory effect. However, at the request of the environmental organisation lodging the complaint, the authority shall grant the suspensive effect with an administrative decision if, after weighing up the public interests and interests of other parties affected, the exercise of the right granted by the contested administrative decision would entail a disproportionate disadvantage for the environment. The appeal against a decision granting suspensive effect does not have suspensive effect.*

<sup>18</sup> Cf. draft § 15 para 6 Nature and Landscape Development Act of Vorarlberg (GNL): *With regard to the prevention of serious damage in crops or animal husbandry or serious risks to the health or life of humans from large predators in the sense of the Hunting Act, an exemption permit under species protection law (para. 5) is permissible without further procedure in the event of imminent danger. **Complaints against such exceptions before the state administrative court have no suspensory effect.***

or draft § 27 Abs 4 Hunting Act of Vorarlberg: *With regard to the prevention of serious damage in cultures or in animal husbandry or serious risks to the health or life of humans from large predators (§ 4 para 1 letter a), an exemption permit under species protection law (para 3) is permissible without further procedure in the case of imminent danger. **Complaints against such exceptions before the state administrative court have no suspensory effect.***

Complete draft of the Vorarlberger Aarhus Beteiligungsgesetz available at:  
[https://vorarlberg.at/documents/21336/396634/Begutachtungsentwurf\\_Aarhus-Beteiligungsgesetz/08d2e50d-e267-4218-b748-3029f0b89575](https://vorarlberg.at/documents/21336/396634/Begutachtungsentwurf_Aarhus-Beteiligungsgesetz/08d2e50d-e267-4218-b748-3029f0b89575)

<sup>19</sup> § 43a para 1 and para 2 of the Upper Austrian Nature and Landscape Act (OÖ NSchG): *In the matters covered by this Provincial Law, complaints pursuant to Article 130 para 1 figure 1 B-VG do not have suspensory effect if the contested decision grants an entitlement.*

*However the public authority shall grant the suspensive effect by means of a decision at the request of the party lodging the complaint if there are no overriding public interests and if, after weighing the public interests and interests of other parties affected, the exercise of the right granted through the contested decision would be disproportionately detrimental to the party lodging the complaint.*



Furthermore, especially in environmental proceedings, the authorities increasingly make use of the possibility to exclude the suspensive effect in individual cases in the notice of approval.<sup>20</sup> This is not compatible with the requirements for efficient legal protection, and in environmental matters in particular, suspensive legal protection is of the utmost importance: With regard to highly sensitive ecosystems or threatened species and habitats, situations that are difficult to reverse or even cause irreparable damage can otherwise be created before the decision becomes legally binding

For the sake of completeness, it should also be noted that NGOs and the affected public in Austria generally still do not have adequate and efficient legal remedies available to have ordinances (in this legal form plans and programmes are usually issued) or omissions reviewed by the courts.

## **2. CHAP(2015)02489: Tyrolian Nature Protection Act**

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<sup>20</sup> Examples from decision-making practice which prove exclusion of the suspensive effect in individual cases can be provided at any time if required.