

Aarhus Convention Secretariat

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In Copy:

Federal Ministry for Sustainability and Tourism

c/o Dr. Anna Muner-Bretter
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Vienna, 28 October 2019

Regarding: Decision VI/8b on compliance by Austria with its obligations under the Aarhus Convention, comments on the second progress report on behalf of Austria

Dear Ms. Marshall,

We highly appreciate the opportunity to give our remarks on the second 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 17 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.

Although there have been further steps to implement the Article 9 (3) on provincial level since the last report has been submitted in 2018, significant implementation gaps remain. These concern the Aarhus Participation Act 2018, which has not been amended since the Committee was lastly updated on measures to implement decision VI/8b, the implementation measures on provincial level as well as the requirements for environmental organisation set out in the Environmental Impact Assessment Act 2000 (EIA Act).

I. Aarhus Participation Act 2018

As regards the referral to the Aarhus Participation Act 2018, OEKOBÜERO would like to recall our reservations already been brought up in our statement of 27 September 2019. As the Aarhus Participation Act 2018 is equal to the draft version we commented on, the following key issues remain:

1. Implementation only in environmental areas of waste, water and air protection is insufficient:

In various environmental areas regulated by federal law, such as industrial and trade law, forestry, mining, animal protection, pesticides and chemicals, Article 9 (3) of the Convention is yet to be implemented. In its first progress review, the Committee took note of the necessity to review the Austrian national law "to identify the outstanding areas of law 'relating to the environment' that requires adaptation in order to comply with the requirements of paragraph 3(a) and (b) of decision VI/8b."¹ Austria has neither submitted a list of areas identified as requiring to be adapted nor provided details of the proposed legislative measures necessary to address implementation gaps, including time-frame.

2. Restricted access to justice in waste law:

In § 42 para 3 Waste Management Act 2000, the restriction for challenging environmental decisions to violations of environmental protection provisions set under Union law remains.² Although the Committee noted that it "fails to see why Austria would limit the right to appeal challenges under the Waste Management Act to violations of the European Union law only"³, Austria did not provide any further explanations on that matter.

3. Access to justice depending on the likelihood of major impacts:

Other than laid down in of the Water Act 1959, Article 9 (3) of the Convention is applicable regardless of the extent to which adverse impacts can be expected.⁴ Although this issue was already brought up one year ago, Austria has not commented on these shortcomings. At the moment, access to justice in water protection is currently almost limited to projects with potentially significant adverse effects on water quality and therefore more of a matter regarding Article 6 (1)(b) and Article 9 (2) of the Aarhus Convention.

4. No possibility to challenge omissions or plans and programmes apart from air protection legislation:

¹ First progress review of the implementation of decision VI/8b on compliance by Austria with its obligations under the Convention, para 32.

² See Aarhus Participation Act 2019 submitted to the Committee via e-mail on 21 December 2018.

³ First progress review of the implementation of decision VI/8b on compliance by Austria with its obligations under the Convention, para 30.

⁴ See §§ 104 and 104s Water Act 1959.

Although clearly required by Article 9 (3) of the Convention, air protection remains the only area where a right to challenge omissions or plans and programmes relating to the environment has been introduced in Austria. OEKOBÜERO calls upon Austria to comment on the fact that in waste and water law as well as all other environmental acts which are not yet providing for any legal remedies for members of environmental organizations or other members of the public a right to challenge omissions, plans and programmes has still not been implemented.

For further remarks OEKOBÜERO would like to refer to the issues already raised, especially the comments submitted to the Committee on 27 September 2018.

II. Implementation on provincial level

By now, many Provinces have published or already adopted measures to implement the Convention within nature protection, national park management, hunting and fishing law. Although OEKOBÜERO welcomes these measures as significant steps in the right direction, the amendments all suffer from different shortcomings. Rather than commenting on each Province individually, OEKOBÜERO will provide a summary to show the similarities and similar shortcomings of these implementations. If the Committee requires a more detailed version, including the critique of each provincial implementation separately, OEKOBÜERO will be happy to provide such an input.

1. Implementations in areas determined by EU law is insufficient:

The implementing measures of the Austrian Provinces are all restricted to nature protection legislation as regulated by EU law. Legal remedies must, however, be granted in other areas related to the environment as well. As it stands, most implementations focus on assessments regarding Article 6 (3) of the Habitats Directive⁵, which of course are rather a matter of public participation according to Article 6 (1)(b) of the Convention and thus access to justice according to Article 9 (2). In some provinces, additionally there are provisions to challenge some decisions regarding species protection, as long as these species are protected by EU law, namely the habitats directive.

2. No possibility to challenge omissions or plans and programmes relating to the environment:

Relatedly to the issue raised under I.4., members of the public are not granted a right to apply for a review of insufficient plans and programmes. Likewise, there is no possibility to proceed against omissions in the area of nature protection. E.g., members of the public are not granted a right to initiate a determination procedure on the question whether a nature impact assessment needs to be conducted. This also leads to the issue that, if a "screening" is conducted, a negative screening

⁵ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7.

decision can be challenged. However, if no screening procedure is conducted altogether, there is no option to challenge it, thus opening up a gap in legal protection.

3. Inadequate preclusion regulations:

Some Provinces determined that members of the public should be excluded from legal remedies if they have not participated in the previous procedure.

4. Restricted access to justice regarding protected species:

Most provincial implementations restrict the possibility to appeal permits affecting protected species to species protected according to UE law.⁶ This solution cannot be capable of meeting the Convention's requirements.

5. Lack of injunctive relief:

Some Provinces excluded injunctive relief of remedies raised by members of the public. OEKOBÜRO clearly opposes such solutions largely restricting the effectiveness and fairness of legal remedies.

6. Insufficient retroactive effect:

Most Provinces restrict the retroactive effect of the right to appeal to one year, one and a half years at maximum.⁷ On the basis of the present provisions in the nature protection acts, Austria's implementation period under Union law is unjustly extended by approximately 12 years, since Austria has the obligation to implement Article 9 (3) the latest since the ratification of the Aarhus Convention

⁶ E.g. Lower Austrian Nature Protection Act, § 27c para 1:
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.

⁷ E.g. Lower Austrian Nature Protection Act, § 38 para 10:
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.

Lower Austrian Hunting Act, § 142 para 11:

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.

by the European Union in February 2005. It also extends the implementation to 20 years since the Aarhus Convention was signed.

OEKOBÜERO have submitted statements on each of the amendments,⁸ which, however, do not seem to have been considered. In this regard, OEKOBÜERO regret that Austria did not submit any translated version of the provincial amendments.

The Province of Burgenland published a draft Aarhus Participation Act on the website of the Province in July 2019 without contacting stakeholder as usually done. Statements could be submitted from 6 to 30 July 2019, hence for a period of less than four weeks. Regarding previous environmental legislative amendments, Burgenland used to inform OEKOBÜERO directly via email. This led to the fact that OEKOBÜERO missed the deadline to submit a statement on the legislative draft. The Province made clear not to accept any statement submitted at a late point, i.e. within a week after the period to submit statements had been expired.

To date, the Province of Vienna is the last one not to have published a draft amendment to implement the Aarhus Convention. The Viennese approach to implement Article 9 (3) of the Convention thus still cannot be assessed but is expected to be the same as most provinces.

Lastly, OEKOBÜERO would like to add, that even though the provinces and the federal ministry were trying to find common ground, we now have the fact, that there are several differences in the implementation acts. Thus, we have different time limits, limits to the overall access to justice and different platforms for all notifications. This leads to practical problems in applying the law to gain access to justice.

III. Requirements regarding environmental organisations according to the EIA Act

Regarding the criteria for environmental organisations to participate in procedures or seek legal remedies, federal and provincial acts implementing Article 9 (3) all refer to § 19 of the Environmental Impact Assessment Act 2000.

⁸ All the statements are in German:

Burgenland: https://www.oekobuero.at/files/329/ub_5_2019_stellungnahme_aarhus_bgld.pdf

Carinthia: https://www.oekobuero.at/files/300/ub_5_stellungnahme_ktn_aarhus-umsetzung_2019_07_11.pdf

Lower Austria: https://www.oekobuero.at/files/17/stellungnahme_noe_aarhus-novelle_2019.pdf

Salzburg: https://www.oekobuero.at/files/330/stellungnahme_sazlbzrg.pdf

Styria: https://www.oekobuero.at/files/339/stellungnahme_stesug_novelle_website.pdf

Tyrol: https://www.oekobuero.at/files/331/oekobuero_i-e_stellungnahme_tirol_aarhus.pdf

Upper Austria: https://www.oekobuero.at/files/19/stellungnahme_oeo_aarhus-novelle_2018.pdf

Vorarlberg: https://www.oekobuero.at/files/337/stellungnahme_vb_aarhusbeteiligungsg_06_05_2019.pdf

As Austria has laid down in its second progress report, a recent amendment of § 19 EIA Act introduced additional criteria for environmental organisations to be recognised by the Federal Ministry for Sustainability and Tourism. Environmental organisations⁹ now must have at least 100 members to obtain recognition and federations of environmental organisations must comprise of at least five member associations which together reach the minimum number required for five recognised environmental organisations.¹⁰

Organisations and federations which already obtained recognition according to the former § 19 EIA Act, must, until 1 December 2019, provide proof to meet the additional criteria in order to retain it.

In practice, the EIA amendment places a significant burden on environmental organisations. For many organisations, the collection of proof and creation of relevant documentation bound timely resources up to 10 workdays. As the Federal Ministry for does not accept affidavits by executive boards of associations, notarial certifications or confirmations by statutory auditors are necessary. This leads to additional costs for associations.

At least five of the currently 57 recognised environmental organisations are thus considering not to apply for further recognition, thus relinquishing their right to participation and access to justice.

Due to the issues mentioned above, OEKOBÜRO calls upon the Committee to take note that essential legislative measures to fully implement decision VI/8b are yet to be taken and the recent amendment to the EIA Act interfering with the Convention's requirements must be revoked at any cause.

Sincerely,



Thomas MÖRDINGER

Deputy Managing Director,
OEKOBÜRO – Alliance of the Austrian Environmental Movement

⁹ This concerns associations („Vereine“), the amendment does not affect foundations as they legally do not have members.

¹⁰ For further details see additional comments on the implementation of decision VI/8b submitted to the Committee on 30 October 2018.