

Decision VI/8b on compliance by Austria with its obligations under the Aarhus Convention
third progress report on behalf of Austria

By decision VI/8b the Meeting of the Parties (MoP) reaffirmed its decision V/9b on compliance by Austria with its obligations under the Convention. In accordance with paragraph 3 (e) of decision VI/8b Austria is requested to provide the Aarhus Convention Compliance Committee by 1 October 2020 with the third and final progress report on the measures that have been taken and results achieved to implement the recommendations set out in paragraphs 3 (a) - (d) of decision VI/8b.

The Aarhus Convention Compliance Committee submitted its second progress review of the implementation of decision VI/8b on compliance by Austria ahead of the 66th ACCC meeting (9 until 11 March 2020). Austria attended the Committee's open session via audioconference when reviewing decision VI/8b and submitted further information in writing thereafter.

With its first and second progress report Austria has already informed about national processes on the implementation of the so called "third pillar" of the Aarhus Convention with a focus on ongoing legislative procedures. With the final progress report Austria provides the Committee with detailed information as requested by the Committee in the different sections of its second progress review:

The Aarhus Participation Act 2018

With reference to paragraph 3 (a) of decision VI/8b and the implementation at federal level by the "*Aarhus-Beteiligungsgesetz 2018*" (Aarhus Participation Act 2018) the Committee invites Austria to respond to specific questions concerning access to justice for environmental organisations (para. 36 and 37):

With regard to the concerns set out in paragraphs 29 (b) and 37 of the second progress review Austria confirms that the current text under section 42(3) of the Waste Management Act (*Abfallwirtschaftsgesetz 2000*) limits the right to appeal to alleged violations of European Union environmental law. However, discussions on withdrawing the limitation to alleged violations of European Union environmental law are ongoing.

In the area of water protection, access to justice for environmental organisations is granted not solely in relation to projects with potentially significant adverse effects on water quality. The right to appeal includes other specific cases taking into account the implications of the judgement of the European Court of Justice in case C-664/15 „Protect“.

By this judgement a distinction has been made between

- projects with a significant effect on the environment within the meaning of Article 6 (1) (b) of the Aarhus Convention, particularly with regard to the status of water. In these cases environmental organisations are able to allege a potential infringement of Article 4 of the EU Water Framework Directive 2000/60/EC combined with the right to participate in the administrative stage of the permit procedure, and
- the right of environmental organisations to appeal in cases where the threshold of a significant effect on the status of water has not been reached in accordance with Article 9 (3) of the Aarhus Convention.

Subsequently with the amendment of the Water Right Act (*Wasserrechtsgesetz 1959*) by the Aarhus Participation Act 2018, environmental organisations are entitled to file a complaint to the relevant Administrative Court against official notices (authorisations) that were adopted on the basis of the Water Right Act in order to allege a possible infringement of the obligation set out in Article 104a Water Right Act (implemented in Article 102 para. 5 of the Water Right Act¹). These provisions include projects with significant adverse effects on water quality and projects underneath the materiality threshold value but causing adverse effects on the status of water bodies like deteriorations of surface water bodies and groundwater bodies or projects which could prevent the achievement of the target status.

With regard to the Air Pollution Control Act (*Immissionsschutzgesetz-Luft*) and as outlined in para. 27 of the second progress review environmental organisations are entitled to take action against air quality plans. Apart from these plans environmental organisations may also challenge omissions regarding the National Air Pollution Control Programme (NAPCP) adopted by the Federal Government in accordance with the National Air Emissions Act 2018 (*Emissionsgesetz-Luft 2018*). The first NAPCP was adopted in July 2019 and is currently subject to a challenge by an environmental organisation based on the provisions on access to justice introduced into the National Air Emissions Act 2018 claiming insufficient measures regarding the reduction of ammonia emissions in the agricultural sector. A revision of the NAPCP which will lead to enforced ammonia control measures is currently being negotiated at federal level.

¹ Article 102 para. 5 of the Water Right Act as amended by the Aarhus Participation Act 2018 reads as follows: "An environmental organisation recognized 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."

In the framework of the law on environmental liability, the Federal Environmental Liability Act² has been amended due to a judgement of the European Court of Justice (case C-529/15 “Folk”). The Act provides for an environmental complaint if the public authority fails to take action in the event of an environmental damage. Natural or legal persons, including environmental organisations, are entitled to lodge a complaint if they are concerned in their rights or – as introduced with the amendment – are affected or have sufficient interest in rehabilitation measures. By reference to Article 19 (1) of the EIA Act it is made clear that all persons listed in the provision on legal standing (“*Parteistellung*”) have sufficient interest in the meaning of Article 11 (3) subparagraph 3 of the Federal Environmental Liability Act. In general, the Provinces (*Bundesländer*) adapted in the following their corresponding legislation as well.

Standing criteria for environmental non-governmental organisations

On para. 54 of the second progress review of the Committee and the standing criteria for environmental organisations, Austria provides the following information with regard to Article 19 of the EIA Act:

In its second progress report Austria has already outlined the background of the amendment of the EIA Act. In the final phase of the parliamentary deliberations in late autumn of 2018 the amendment of Article 19 concerning additional requirements for environmental organisations to be recognized was introduced and adopted. The political parties represented in the Austrian Parliament (National Council) proposing the amendment did consider that environmental organisations are granted considerable rights on access to justice with regard to the Aarhus Participation Act 2018 and therefore only active environmental organisations with a certain number of members should have legal standing. The Parliament based its amendment on the judgement of the European Court of Justice in case C-263/08 “Djurgården” where the Court ruled that a limitation of 2000 members of environmental organisations was not admissible. Thus, a requirement of 100 members was considered as feasible by the Austrian legislators (Article 19 (6) of the EIA Act). A federation of environmental organisations will obtain recognition as well if it comprises of at least five member associations which reach together the minimum number required for five recognized environmental organisations.

The EIA Act refers not only to organisations under the Austrian law on associations (*Vereinsgesetz*) but also foundations are entitled to attain the status of a recognized

² *Bundesgesetz über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden*; Federal Law Gazette I No. 55/2009 as amended by Federal Law Gazette I No. 74/2018

environmental organisation if the organisation or foundation meets the criteria according to Article 19 of the EIA Act.

The criterion that an environmental organisation must have a minimum number of members has been considered by the legislator as useful in ensuring that an organisation actually exists and is also active in promoting environmental protection. As the European Court of Justice in case C-263/08 “Djurgården” has stated, the required number of members cannot be determined by national law at such level that it contravenes the objective of facilitating the judicial review of projects within the scope of European Union law.

The criterion that an environmental organisation must have existed for a certain period of time is a criterion also used by other Parties of the Convention in order to make sure that the environmental organisation is active in the field of environmental protection. Therefore, this cannot be considered as a new criterion (cf. Article 19 (6) pt. 3 of the EIA Act).

The rationale for the review of the recognition every three years is transparency in order to check whether the organisations are still active in matters of environmental protection. It cannot be considered as an obstacle to submit reports of their work and further documents such as an association register extract to the Ministry every three years. The Ministry and EIA authorities can also request an assessment of a certain environmental organisation if there are doubts whether a criterion is still fulfilled.

With the amendment of the EIA Act the participation of environmental organisations in environmental impact assessment approval procedures as well as their rights on access to justice are still ensured. Recognized environmental organisations have legal standing in EIA approval procedures, the right to lodge a complaint against EIA screening decisions and are entitled to appeal to the Federal Administrative Court (*Bundesverwaltungsgericht*) or to the Supreme Administrative Court (*Verwaltungsgerichtshof*). In EIA procedures, also affected neighbours or citizens groups (*Bürgerinitiativen*) have the right to participate in the procedures and are entitled to lodge complaints as well.

For the time being, the review procedures have been started in 2019 on the recognition of existing environmental organisations in Austria. According to the amendment, environmental organisations - which had already been recognized by 1 December 2018 for more than three years – had to submit documents for review of their recognition by 1 December 2019 at the latest. The recognition has to be reviewed every three years. Furthermore, Article 46 (28) pt. 5 of the EIA Act states that even if the review of a recognized environmental organisation shows that

the criteria are no longer met, locus standi or the entitlement to complain is retained for pending procedures - in those procedures in which the environmental organisation has already obtained locus standi or the entitlement to lodge a complaint.

As the result of the actual review process demonstrates, there has been no evidence of an obstacle for the majority of organisations to show that they achieve the minimum number of hundred members.

Prior to the amendment of Article 19 of the EIA Act fifty-seven environmental organisations had been recognized, fifty-one of them needed to be reviewed by 1 December 2019. Seventy-eight percent, which means forty environmental organisations got a confirmation for their status as environmental organisation. Nine recognized environmental organisations had not submitted any documents for review of their recognition although the Environment Ministry³ informed those environmental organisations three times in 2019 on the review and furthermore another time about the consequences of non submission of documents. As a result, for those nine environmental organisations the approval as an environmental organisation had to be withdrawn, as there seemed to be no interest of those organisations in keeping their recognition anymore. In two cases, documents of review of their recognition were submitted but were incomplete. In one of these cases, an environmental organisation submitted documents which were not complete and the organisation accepted the withdrawal of recognition. In the other case a complaint against the withdrawal of recognition has been lodged. This sole case is still pending at the Federal Administrative Court.

Already six new environmental organisations were recognized after the amendment of Article 19 of the EIA Act entered into force. In September 2020, there are fifty-three recognized environmental organisations. Therefore, the criteria for environmental organisations are not too restrictive and access to justice for environmental organisations is still guaranteed.

Most of those organisations which did not receive the recognition anymore seem not to have been active in EIA procedures during the last years. Moreover, they may re-apply for recognition in the future if they fulfil the criteria.

The Ministry did not envisage any obstacles on the renewals of the recognition and does not expect that there will be any concerns or problems arising with regard to the further review of

³ as of 7 January 2020 Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology (BMK)

already existing environmental organisations as most of the environmental organisations obtained a renewal of their recognition.

Almost half of all environmental organisations have been recognized for the whole federal territory, others just in the requested Provinces and neighbouring Provinces if they have applied so.

The Ministry has no information on the number of work days it took environmental organisations to prepare the documents for the review as there is no legal basis for such an inquiry according to the EIA Act. This would rather be a question to be answered by the communicant on behalf of environmental organisations or by the organisations themselves.

The Ministry keeps and updates via its website the information on the status of the recognition of environmental organisations ("*Liste anerkannter Umweltorganisationen*"). For each environmental organisation also the area of activity is held evident.⁴

However, the Ministry is currently preparing a draft law amending the EIA Act at federal level. One element of the discussions ongoing is also to reconsider the requirement of hundred members concerning the recognition of environmental NGOs as set out above.

The provincial level

For the provincial level as requested by the Committee in para. 63 of the second progress review, Austria hereby submits English translations of the provincial laws amending their corresponding legislative acts as annexes to this report.

The provisions on access to justice are laid down in the different provincial acts on nature protection, including the protection of species, and in the laws on hunting and fishing:

- Burgenland Nature Conservation and Countryside Protection Law, Burgenland Hunting Act 2017 and Burgenland Fishing Act 1949 (*Burgenländisches Naturschutz- und Landschaftspflegegesetz, Burgenländisches Jagdgesetz 2017, Fischereigesetz 1949*)
- Carinthian Aarhus and Environmental Liability Amending Act (*Kärntner Aarhus- und Umwelthaftungs-Anpassungsgesetz*)
- Lower Austrian Nature Conservation Act and Lower Austrian Hunting Act (*NÖ Naturschutzgesetz 2000 und NÖ Jagdgesetz 1974*)
- Salzburg Aarhus Participation Act 2019 (*Salzburger Aarhus-Beteiligungsgesetz 2019*)

⁴https://www.bmk.gv.at/themen/klima_umwelt/betrieblich_umweltschutz/uvp/anerkennung_org.html

- Styrian Amendment of the Law on Institutions for the Protection of the Environment (*Gesetz vom 17. September 2019, mit dem das Gesetz über Einrichtungen zum Schutz der Umwelt geändert wird*)
- Tyrolian Aarhus Participation Act (*Tiroler Aarhus-Beteiligungsgesetz 2019*)
- Vorarlberg Aarhus Participation Act (*Aarhus Beteiligungsgesetz*)
- Upper Austrian Nature and Landscape Conservation Act Amendment 2019, Upper Austrian Act amending the Fishing and Hunting Act (*Oö. Natur- und Landschaftsschutzrechtsnovelle 2019, Landesgesetz, mit dem das Landesgesetz über die Regelung des Fischereiwesens in Oberösterreich (Oö. Fischereigesetz 2020) erlassen und das Oö. Jagdgesetz geändert wird*).

For Vienna, a draft law amending the corresponding legislation has been sent out for public consultation until July 2020 (*Begutachtungsentwurf eines Wiener Landesgesetz, mit dem das Wiener Nationalparkgesetz, Wiener Fischereigesetz und Wiener Jagdgesetz geändert wird*⁵).

On the alleged differences of legislative developments as outlined in para. 60 of the second progress review Austria refers to the fact that the different legislative measures at provincial level are a result of the regulatory powers divided between the federal level and the Provinces as laid down by the Austrian Constitution. Therefore, distinctions between certain provisions implementing Article 9 (3) of the Aarhus Convention are due to the legislative competence of the legislators at federal and provincial level. In every area of provincial law, not only in the field of environment, any potential complainant has to deal with the specific legal situation of the respective Province. As a consequence, the Provinces may introduce different legislative measures which are a result of already existing different legal systems and which have been in place in the area of nature protection even before implementing the Aarhus Convention. Therefore, the allegations referred to in para. 58 (c) to (f) would need to be concretised for the respective Province in order to respond in detail and with legal precision.

For example, several Provinces have granted the retroactive effect of the new rights to appeal as of the date of the publication of the “Protect” judgement of the European Court of Justice (December 2017) or the corresponding judgement of the Administrative Court in March 2018. Furthermore, in some Provinces environmental organisations are entitled to lodge an appeal against permits affecting species which are protected also according to the provincial law on nature protection or to lodge a complaint if they are of the opinion that the authority has failed in its decision whether the species is protected by European Union law.

⁵ <https://www.wien.gv.at/recht/landesrecht-wien/begutachtung/pdf/2020005.pdf>

In general, appeals against decisions have a suspensive effect according to federal administrative law (Article 13 (1) *Verwaltungsgerichtsverfahrensgesetz*). In some Provinces this effect has been suspended only for those permits or decision which were released during the retroactive phase until the entry into force of the amendment.

On preclusion requirements as referred to in para. 58 (c) of the second progress review Austria draws the attention to the difference of provisions granting access to justice according to Art. 9 (2) and (3) of the Convention. Art. 9 (3) of the Aarhus Convention requires access to justice for the public, especially environmental organisations, concerning acts and omissions irrespective of whether or not an administrative or permit procedure is existing. When in implementing measures of some Provinces preclusion requirements are foreseen these have been introduced in implementing Art. 9 (2) and 6 of the Convention and in accordance with the relevant jurisdiction by the European Court of Justice (case C-243/15 “Slovak Brown Bear II”). With regard to Art. 9 (3) of the Convention the European Court of Justice has ruled out that provisions on preclusion are admissible in principle if they do not impose an disproportionate barrier to access to justice (case C-664/15 “Protect”). Austria therefore does not see a conflict with Art. 9 (3) of the Convention as the preclusion provisions have been introduced in relation to nature impact assessment procedures and in implementing the case law of the European Court of Justice. The judgement in case C-243/15 which needed to be implemented within the Austrian legal system (at the level of the Provinces) explicitly relates to Art. 6 and 9 (2) of the Convention and thus permit approvals in the area of nature protection with regard to Art. 6 of the EU Natural Habitats Directive 92/43/EEC.

Paragraph 3(b) of decision VI/8b

With regard to legal standing of environmental organisations referred to in para. 69 of the second progress review Austria refers to the amendments at provincial level concerning the Provinces of Burgenland and Vienna as stated above.

With regard to the findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2010/63 Austria announces that it has initiated the internal process for amending the Wildlife Trade Act (*Artenhandelsgesetz*). The planned amendment will include a broad range of necessary changes and will take into account the findings on that communication.

For the Province of Burgenland Article 52 (1) pt. 1 of the Nature and Landscape Conservation Act introduces a right to appeal for environmental organisations at the Provincial Administrative Court (*Landesverwaltungsgericht*) alleging possible infringement of the provisions of that law

adopted in implementation of the EU Habitats Directive and the Wild Birds Directive as well as decisions on exceptions as far as they concern protected animal and plant species listed in those Directives. With the right to participate and to appeal according to Article 22e of that Act the Province of Burgenland considers Art. 9 (3) of the Convention implemented in its legislation on nature protection.

Paragraph 3(c) of decision VI/8b

As outlined above Austria refers under this section to its statements made under the proceeding sections with regard to the implementation at federal and at provincial level.

However and with regard to para. 75 of the second progress review Austria dismisses the assessment that to date no detailed plan of action on how to implement the recommendations has been submitted to Committee. Austria recalls its past progress reports also on the implementation of former decision V/9b concerning compliance by Austria. With those reports Austria has explained in detail which steps have been taken in the various discussion processes which have led to the Aarhus Participation Act 2018 at federal level and the legislative measures meanwhile adopted at provincial level. Furthermore, Austria has also participated in the relevant audioconferences of Committee meetings by answering the questions and submitting the requested information afterwards in writing.

The Committee might consider the efforts made by Austria as not being sufficient, however Austria has already shown its willingness to implement the recommendations which lead to the adaptation of and the introduction of new legislation and by informing the Committee accordingly.

Paragraph 3(d) of decision VI/8b

With regard to paragraph 3 (d) of decision VI/8b on a capacity-building programme and training for judges on the implementation of the Convention Austria provides the Committee with the following information as requested in para. 80 (a), (b) and (c) of the second progress review:

The Advisory Board on Further Education (*Fortbildungsbeirat*) of the Ministry of Justice was informed about the Committee's findings on communication ACCC/C/2010/48 and ACCC/C/2011/63 on non-compliance by Austria during its programme session on 28 and 29 September 2020. The Ministry of Justice also encouraged the Board to develop training activities in the field of environmental (criminal) law. The actual implementation and funding of training activities falls within the competence of the four Higher Regional Courts. Furthermore, the

Ministry of Justice provides a major part of its budget dedicated to personnel development measures for the training of Court and Prosecutor's office staff.

As one of thirteen judicial training providers the Ministry of Justice, together with the Ministry for Climate Action (BMK), is participating in a specific programme on environmental criminal law organised by the Austrian Federal Criminal Agency and financed by the European Commission. With this programme, two training events for judges and prosecutors are envisaged in 2022, one taking place in Vienna and another one in the city of Salzburg. In addition to national practitioners, also international experts and teaching professionals are to be involved. In this regard, contact has already been established with an experienced Dutch public prosecutor for environmental criminal cases and an Austrian University professor specialised in criminal law. The project is currently in the planning phase. In order to reach as many interested persons as possible, the topic of environmental criminal law will be linked to other related legal areas. It is also planned to explicitly address the Aarhus Convention and its relevant provisions. Austria is willing to provide information on the progress and results of these events in due course.

With regard to para. 82 of the progress review Austria notes that a description of the seminar organised by the Austrian Academy for Administrative Courts (*Österreichische Akademie der Verwaltungsgerichtsbarkeit*) of the Johannes Kepler University of Linz has been attached in an English version to Austria's progress report in 2018. As reported by the Academy and the Ministry of Justice the seminar on the Aarhus Convention attracted great interest among the administrative judiciary as twelve judges from the Provincial Administrative Courts attended the seminar.

Finally, on the achievements of the two capacity building projects "KOMM-Recht"⁶ and "KOMM-Recht reloaded"⁷ Austria draws the attention to the fact that both the practical guidebook⁸ and the legal study⁹ on Article 9 (3) of the Convention were elaborated as main output of these projects. Upon request by the Ministry for Climate Action the environmental organisations have confirmed that these publications form the basis analytical material when it comes to specific questions on the implementation of the Aarhus Convention and its third pillar into the Austrian law. All the information on these capacity building activities and the related events that took

⁶ <https://www.umweltdachverband.at/themen/umweltrecht/komm-recht/>

⁷ <https://www.umweltdachverband.at/themen/umweltrecht/kommrecht-reloaded/>

⁸ Praxisratgeber „Beteiligung der Öffentlichkeit nach geltendem Umweltrecht in Österreich“, November 2017

⁹ „Völker- und unionsrechtliche Anforderungen an einen Zugang zu Gerichten“ Rechtswissenschaftliche Studie zu Artikel 9 Absatz 3 Aarhus-Konvention, August 2018

place in the margins of the two projects are available at the website of the environmental organisation "*Umweltdachverband*".¹⁰

With this Austria believes to have sufficiently presented the required information on initiatives and activities in response to paragraph 3 (d) of decision VI/8b.

As a conclusion, Austria is convinced to have appropriately demonstrated to the Committee that the already adopted laws and envisaged amendments at federal as well as at provincial level are implementing the provisions on access to justice in order to meet the requirements of decision VI/8b.

¹⁰ <https://www.umweltdachverband.at/themen/umweltrecht/aarhus-konvention/>