5 November 2012

Response

to the Committee's "*Questions with regard to Communication ACCC/C/2011/63*", as detailed in the Committee's letter of 4 October 2012

In the course of the discussion of the above mentioned communication on 26 September 2012 in Geneva, the Committee requested the Party concerned to submit some additional information, as detailed in the questions annexed to the Committee's letter of 4 October 2012. In response to these questions, the Party concerned would like to submit the following information.

Before dealing with these questions in detail, the Party concerned would like to reiterate its position that access to justice under the Aarhus Convention

- does **not extend to proceedings under criminal (penal) law** and
- does **not include matters of animal protection in a sense that goes beyond the protection of animals in their natural habitats in Austria** (including, however, measures to protect animals from being illegally captured from their natural habitats and kept outside their habitats) and **does not cover animal welfare in the stricter sense** (eg protection against animal torture)

This legal view is also reflected in the Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters of 24 October 2003, COM(2003) 624 final, attached hereto. Under Art 2(1) f of the proposed directive,

"*'environmental proceedings' means ….**other than proceedings in criminal matters**, before a court…*" (p. 11)

In the explanatory note it is stated that it is up to "*the Member States [to] decide before which body these proceedings may be brought*". This implies that there is no obligation to extend access to justice to criminal (penal) proceedings.

In outlining the scope of environmental law, the proposal refers to an "*indicative list*" (p.12, 18) which does not explicitly include animal protection or the trade of species, but rather

implicitly refers to the protection of species in the context of "*nature conservation and biological diversity*". This reference seems to imply that the aim of species protection under the Aarhus Convention is to **protect the life of animals in their natural (biologically diverse) habitats**, but not in households.

This distinction between the protection of animals under aspects of environmental law (eg species protection law) on the one hand and under specific animal protection laws on the other hand has also been highlighted in several recent decisions by German courts (e.g. LG Lüneburg 23.10.2010 – 29 Ns/3105 Js 321487/07; OLG Celle 23.5.2011 – 32 Ss31/11), which were dealing with conflicts between species protection and animal protection. These two fields of law stem from different roots and have different objectives: While **environmental law aims to preserve animals as parts of ecosystems (in these ecosystems)**, **animal protection law aims to protect animals simply as fellow creatures** of mankind (in other words: animal protection in the stricter sense has no and needs no connection to the environment).

Notwithstanding these general remarks, the Party concerned will show in the following that by the measures currently being discussed and developed pursuant to the Committee's findings in ACCC/C/2010/48, issues addressed in case ACCC/C/2011/63 could be satisfied as well. Actually, the Party concerned will explain in the course of the provided case examples that there are already effective legal remedies in place to deal with most of the issues raised in the Communication.

Ad question I: ***"Please provide a timeline of the measures developed, including legislation, to address the shortcomings identified in the Committee's findings on communication ACCC/C/2010/48"***

First of all, the Party concerned would like to point out that the findings and recommendations of case ACCC/C/2010/48 still need to be formally approved by the next MOP in 2014. To our knowledge such approval can be accompanied by a request to provide "*a timeline*" for legislative and/or other measures the Party concerned intends to take in reaction to the findings and recommendations. The Party concerned acknowledges, however, that an outline of the measures currently being discussed and developed in relation to case ACCC/C/2010/48 will be helpful in showing that aspects of case ACCC/C/2011/63 are also addressed.

Notwithstanding these general remarks, the Party concerned will briefly address the measures being developed and discussed in Austria (and also add information on the prospective timeline, where possible), focusing mainly on the aspect of legal standing in the

discussed fields of law which are relevant for case ACCC/C/2011/63.

Overview of steps undertaken and foreseen in relation to the findings in case ACCC/C/2010/48:

- March 2012: Information on and provision of the findings to the affected Ministries, the Federal Provinces and other stakeholders concerned.

- March 2012: An internal meeting with concerned units of the Ministry of Agriculture and Forestry, Environment and Water Management to discuss the findings took place on March 16.

- April 2012: A meeting with all stakeholders concerned (including Ministries and Federal Provinces) to inform about and discuss possible consequences of the findings took place within the Ministry of Agriculture and Forestry, Environment and Water Management on April 25.

- September 2012: Information on the findings and on recent relevant judgments of the EU Court of Justice in relation the Aarhus Convention was submitted to judges of Courts of first instance and the Administrative Court on September 18.

- November 2012: Presentation of the findings to representatives/ civil servants of the Province of Carinthia ("Klagenfurter Legistik-Gespräche") on November 9.

- November 2012: Meeting between the Ministry of Agriculture and Forestry, Environment and Water Management and the Federal Provinces to discuss possible amendments of the Environmental Information Act on November 13.

- November 2012: Participation in meeting organized by the European Commission in relation to ongoing studies in the field of access to justice in the EU Member States and related plans by the EC to present a new Proposal for a Directive on access to justice in 2013.

- Regular contacts between the Ministry of Agriculture and Forestry, Environment and Water Management and the Ökobüro (the communicant) to discuss and plan ongoing steps and steps to be taken in relation to case ACCC/C/2010/48.

- January 2013: Joint event by the Ministry of Agriculture and Forestry, Environment and Water Management and the Ökobüro with a large group of stakeholders (including Environmental Ombudsmen, Academia, other Ministries, Federal Provinces, Social

Partners) concerning ongoing measures and further steps to be taken in case ACCC/C/2010/48 as well as information on ongoing case ACCC/C/2011/63.

- Spring 2013: Nationwide Conference of Environmental Ombudsmen; the prospective agenda will also include discussion with regard to a joint legislative proposal for introducing a right for NGOs to request the Environmental Ombudsman to take action.

- Further steps will follow but are not scheduled yet

The main finding identified in case ACCC/C/2010/48 was the limited scope of NGOs legal standing in many sectoral environmental laws. According to the Committee's findings, this scope should be extended to sectoral laws beyond the existing EIA, IPPC and environmental liability proceedings. The fact that the Environmental Ombudsman already has legal standing in many further proceedings under sectoral laws was considered by the Committee as not being sufficient to compensate for this shortcoming, since the NGOs have no effective right to request the Ombudsman to take legal action.

In order to address these matters, **two main legal options** have been developed or are presently being discussed, i.e.

- extending NGO's legal standing (by introducing new rights or extending the scope of existing rights and remedies – see under lit a below),

- introducing a right for NGOs to request the Environmental Ombudsman to take action (see under lit b below).

These options are to be understood as measures that may be implemented alternatively or in combination. Due to the Federal structure of Austria, some legislators may decide to go just for one of the measures, others may prefer a differentiated use in the relevant sectoral laws. It is up to the Federal and Provincial legislators to decide which of these options they may wish to implement.

Before outlining these options in further detail, the Party concerned would like to state that already before the Committee's findings in ACCC/C/2010/48 were issued the Ministry of Agriculture and Forestry, Environment and Water Management commissioned a study by the University of Natural Resources and Life Sciences (Univ. Prof. Dr. Eva Schulev-Steindl) on options for legislative measures providing access to justice, on which these measures are based:

a) Extending NGO's legal standing

In order to achieve an extension of NGO's legal standing a variety of measures is being discussed (some of them have already been implemented to a certain extent):

- Introducing a new right for NGOs to challenge acts and omissions

  In a first step, a **specific right for review has already been introduced** in screening procedures under the EIA-Act (in the course of which a decision is made whether a project is subject to an EIA or not – thus fulfilling a demand made by the communicant in ACCC/C/2010/48). **On 3 August 2012**, § 3 para 7a EIA-Act (Federal Law Gazette I 2012/77) **entered into force** providing that

  "*in case the authority decides according to para 7 that a project is not subjected to an environmental impact assessment under this Act, an environmental organization acknowledged according to § 19 para 7 is entitled to file an application to the Independent Environmental Tribunal for a review, whether the provisions concerning the obligations for an environmental impact assessment have been complied with. (…) The Independent Environmental Tribunal has to issue a decision on this application within six weeks."*

  By this amendment, NGO's legal standing under the EIA-Act – which until then was limited to EIA-permitting procedures – has been extended to screening procedures. As a consequence, NGOs may enforce the obligation for an environmental impact assessment, even if the authority has denied such an obligation in its decision. This "*right for a review*" represents an **effective legislative remedy against acts and omissions** in the context of EIA-screening decisions.

  This provision may serve as a model to be introduced into other sectoral laws as well.

- Extending the scope of existing rights and remedies of NGOs

  An alternative option to extend NGO's legal standing may be taken by using existing legal standing and extending its scope of applicability, both with regard to permitting laws as well as liability laws:

  - For instance, within many **sectoral permitting laws**, NGO's standing is mostly limited to projects which are subject to the EU-IPPC-Directive – a scope which the Committee deemed too narrow to comply with Art 9 para 3 of the Convention. By widening this scope (lowering the thresholds, adding further projects) NGOs could be granted legal standing in further proceedings.

- As addressed by the Committee in Question II (see below), *"a **wider scope of application of the liability directive"*** may also be considered. In this context we would like to stress that the **instrument of the environmental complaint** – as granted to NGOs at Federal level as well as at Provincial level – entitling NGOs to file a request for action in case of significant damages to the environment could be used or integrated into other sectoral contexts as well. If such wider requests were granted also in cases of other "*acts and omissions*" in the meaning of Art 9 para 3 of the Convention, this could again constitute a possible measure to comply with the findings in ACCC/C/2010/48 and ACCC/C/2011/63.

Currently in the course of a large **reform** concerning the **Administrative Court system in Austria, many sectoral laws** are being reviewed and amendments are being drafted, including the Industrial Code, Waste Management Act, Act on Combustion Plants as well as many sectoral laws within the competence of the nine Federal Provinces. In the course of drafting these amendments, **extending the scope of NGOs participation is being actively discussed.** Drafts are expected to be submitted to the legislative bodies and institutions within the next months.

b) Introducing a right for NGOs to request the Environmental Ombudsman to take action

This is one of the options presented in the study of the University of Natural Resources and Life Sciences, since the legal standing of Environmental Ombudsmen goes beyond the rights granted to NGOs in certain sectoral laws. For instance, in Upper Austria, the Environmental Ombudsman has standing in all permitting proceedings concerning all **kinds of buildings or construction works** (in rural as well as urban areas) as well as all projects in natural areas (not just nature protection areas).

Immediately upon publication of the Committee's findings in ACCC/C/2010/48, the **Environmental Ombudsman of Upper Austria offered to use his standing rights in favor of the NGOs** requesting him to do so in specific cases (he actually has done so in several cases since then already). Furthermore he has stated that he would **support legislation implementing a right for NGOs to request such action** by him (also providing that in case he failed to take action, NGOs would be entitled to take action themselves).

This proposal has gained widespread approval among Environmental Ombudsmen from other Provinces. The present Chairperson of the **Nationwide Environmental Ombudsmen Conference**, the Environmental Ombudsman of Burgenland, has indicated that joint efforts are being made together with NGOs to strengthen participatory rights in a

mutually beneficial way. **Many NGOs perceive the institution of the Environmental Ombudsman as a valuable resource** in expertise, manpower and influence, favouring a legislative solution which secures the co-existence of Ombudsmen and NGOs. The option outlined above would accomplish that. Thus, in a next step, a proposal for legislative measures – to be implemented on a nationwide level - will be put on the prospective agenda for the spring 2013 meeting of the Environmental Ombudsman conference. Preparatory drafting work is already being undertaken and discussed.

Also this proposal is being discussed in the current debates on amendments in the context of the ongoing reform.

It has to be added that these options have to be seen and understood within the framework of an **entirely and thoroughly renewed Administrative Court system** in Austria. In effect, the traditional administrative structure of reviews and remedies that were dealt with by "*administrative tribunals*" will be replaced by an administrative judiciary, i.e. **Administrative Courts at Federal as well as Provincial level**. The constitutional amendments for implementing this new system have already been made and are entering into force in successive steps that have commenced on 1 September 2012 and will be finalized on 1 January 2014.

Ad Question II: ***"Please elaborate on how the measures that are currently being developed in response to the recommendations on communication ACCC/C/2010/48 will ensure access to judicial proceedings in the situations raised by the present communication. If not, what possible additional measures should be taken to adequately address this situation (e.g. wider scope of application of the liability directive, etc.) so as to adequately meet the requirements of Article 9, paragraph 3?"***

This question will be answered on a case by case-basis, since the conditions raised by the communication and in the course of the discussion in September in Geneva are dealt with by different laws: First, the case presented in the written communication will be analysed with respect to the options outlined above (under lit a). Thereafter, the cases presented in the Communicant's oral statement will be dealt with (under lit b):

a) Importing protected Egyptian vultures

The case referred to in the communication concerns Egyptian Vultures. These birds are protected by several laws in Austria: First of all, under the nine Provincial nature protection laws transposing the EU Birds Directive 2009/147/EC but also by the Federal Animal Protection law, which protects all wild animals. As regards the illegal import of Egyptian

Vultures to Austria, permitting and notification procedures for trading these animals are regulated by the EU-Regulation Nr. 338/97 (every single import and export of species listed in the annexes to Regulation 338/7 requires a permit). The supervision and control, whether imports comply with this Regulation, lies within the administrative competence and powers of Austrian authorities and is provided for primarily in the Species Trade Act.

Protection under the Species Trade Act:

- According to § 4, any intended import of animals has to be notified in advance to the authorities.
- According to § 6, authorities are entitled to enter any premises and to stop and to open any vehicles and vessels, to thoroughly inspect these premises, vehicles and vessels and to examine any papers and documentation in order to control and supervise compliance with the laws mentioned above. In case authorities find animals in the course of such inspections (which are held or have been imported in violation of the laws mentioned above), authorities are entitled to securing these animals.
- According to § 10, such animals imported without permission may be confiscated by authorities; these authorities will then - in a next and separate step - instigate criminal (penal) proceedings.

These provisions show that administrative laws are in place to effectively protect these species. Quite similar to the laws concerning the shipment of waste, proceedings on species trading follow the structure of transboundary shipment proceedings in which permits have to be presented at the time of import to the authorities (almost exclusively relying on documentary evidence). In the investigatory phase of the procedure concerning the import permit scientific authorities (nine for the nine Federal provinces) are involved to check whether the import does not harm the status of a species. In 2011 the competent authority in Austria had to deal with more than 10.000 proceedings (all of them due to provisions of said EU-Regulation subject to strict deadlines of one month).

The objectives of the Aarhus Convention can be dealt with more effectively by proceedings concerned with the **on-site-situation** of the animals/species in question. The EU Birds Directive 2009/147/EC requires actions by the local authorities – **primarily** in the Member State where the vulture is illegally captured **in its habitat** and **subsidiarily**, in case the vulture has already been transported across borders, where the vulture is illegally held **outside its habitat**. Thus, the instrument of a request for action (= the environmental complaint as described above) as outlined above could represent a suitable option.

There is no necessity to implement any changes to (criminal) penal law as claimed by the Communicant.

b) Other cases presented by the communicant

The other cases presented during the oral debate can be divided into two separate groups:

– cases within the scope of the Aarhus Convention (under lit ba below) and
– cases outside the scope of the Aarhus Convention (under lit bb)

ba) Cases within the scope of the Aarhus Convention:

- **Poultry farm near a Nature 2000 area, dumping wastewater into the areas water system**

If dumping wastewater amounts to a significant damage NGOs are entitled to file an Environmental complaint (request for action) under the Federal Environmental Liability Act. In such case the present **legal situation already provides for sufficient legal remedies** in this case. A translation of the respective provisions is attached hereto.

- **Killing a frog population near a pond**

Provided killing a frog population (frogs are protected animals under Austrian Nature Protection Laws) amounts to a significant damage NGOs are entitled to file an Environmental complaint (request for action) under the Provincial Environmental Liability Acts. Again, the present **legal situation already provides for sufficient legal remedies** in such case. A translation of the respective provisions is attached hereto (as this is a matter of Nature Protection Law that lies within the legislative competence of the nine Provinces, a translation of one of the Provincial laws is presented. (If needed we can provide translations of the laws of the other Provinces as well).

bb) Cases outside the scope of the Aarhus Convention:

- **Using a cheetah in a fashion show**

Using animals for presentations and events of any kind whatsoever (including fashion shows) requires a permission according to § 28 of the Federal Animal Protection Act. In this permitting procedure – as well as in all controlling and inspecting procedures connected therewith – the Animal Protection Ombudsman has legal standing. As outlined above, the Party concerned holds that animal protection laws do not fall under the Aarhus Convention – especially not this example (individual animal protection for a single individual and not for an

entire species).

Again, there is no necessity to provide for special prosecuting rights in penal laws.

- **Capturing a fox and using the fox as training bait for hunting dogs**

Capturing, keeping and using wild animals for such purposes is not allowed under Austrian nature protection laws nor under the Austrian animal protection law.

Conclusions:

To sum up what has been outlined above, to our opinion there is no legal obligation under the Aarhus Convention to **extend the NGO's access to justice to proceedings under criminal (penal) law** and/or to **matters of animal protection in a sense that goes beyond the protection of animals in their natural habitats in Austria.**