



## **SHADOW REPORT ON IMPLEMENTATION OF THE AARHUS CONVENTION IN AUSTRIA TO THE 6TH MEETING OF THE PARTIES**

19/05/17

OEKOBÜERO – ALLIANCE OF THE ENVIRONMENTAL MOVEMENT

**OEKOBÜERO is the alliance of the Austrian Environmental Movement. It consists of 16 Austrian organizations engaged in environmental, nature and animal protection like GLOBAL 2000 (Friends of the Earth Austria), FOUR PAWS, Greenpeace, and WWF. OEKOBÜERO works on the political and legal level for the interests of the environmental movement.**

With this Shadow Report we would like to provide our views on the implementation of the Aarhus Convention in Austria, with a particular focus on the provisions on access to justice and the developments in legislation since the last report in 2014. In 2014, the Meeting of Parties (MoP) endorsed (via Decision V/9b) the findings of the Aarhus Convention Compliance Committee (ACCC) regarding communications ACCC/C/2010/48 and ACCC/C/2011/63, according to which Austria was found to be in non-compliance with Article 9, paras. 3 and 4, as well as Article 4 para. 7 in conjunction with Article 9, para. 4 of the Convention.

### **Exemplary Consultation Process for Austria's Implementation Report**

At the outset we would like to bring special attention to the exemplary and transparent way in which the Austrian Implementation Report was written, the fact that it responds to and reflects much of the feedback provided, as well as the extensive time given to NGOs to deliver their views on the subject. Indeed, the content of this Shadow Report is largely derived from the comments we provided during the course of these consultations, supplemented by small additions and updates.

The consultation process the Austrian Ministry of the Environment undertook for its Implementation Report can truly serve as a model for other Parties to the Convention.

### **Articles 4 and 9: Access to information**

As regards to access to environmental information, Austria was criticised by the ACCC, as endorsed by the fifth session of the MoP<sup>1</sup>:

- (a) The requirement for a separate "official notification" as a precondition for an appeal of a denial of an information request is not in compliance with article 4, paragraph 7, of the Convention;*
- (b) The Party concerned, by not ensuring access to a timely review procedure for access to requests for information, is not in compliance with article 9, paragraph 4, of the Convention;*

Since this MoP decision the Austrian Federal Environmental Information Act ("Umwelthinformationsgesetz" – UIG) was amended in August of 2015 (BGBl. I Nr. 95/2015) to shorten the period of time for access to justice in this matter. According to the findings, the amendment to the UIG requires authorities to give an official notification ("Bescheid") if the request is denied fully or partially. Thus, the time from the request until a decision by the court over a potential denial is shortened to a maximum of 10 months (from 17 months, originally). The time period from the request until the case reaches the administrative court is now up to 4 months (from 10 months, originally).

We welcome the amendment as a strong improvement in access to information.

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<sup>1</sup> ECE/MP.PP/2014/Add.1

While the matter of a timely decision improved quite a bit, some practical questions remain. Especially the matter of enforcement of court rulings (i.e. when the court deems a refusal by the authorities to be unlawful) is not entirely clear. This is even more unclear in cases with externalised public responsibilities, which are handled by corporations, which still fall under the Environmental Information Act, but which lack the competence to issue official notifications themselves.

Implementation at the provincial level has recently been accomplished in seven of the nine federal provinces. Where this has occurred, implementation has followed the federal version and in our view, these laws are fully compliant with the Convention. We find these developments quite positive indeed.

Lacking implementation in the remaining two (Lower Austria and Styria) remains a problem, however. Not only does this entail continued noncompliance, but this period of prolonged missing implementation and thus diverging time limits could and most likely will lead to confusion amongst both authorities and citizens. Even more so due to the fact that the same authority might be confronted with a case under two different aspects with different time limits (e.g. a question regarding water rights under federal law and aquatic biology under state law). It has to be noted that the provincial environmental information laws are very important and regulate exclusively certain matters such as nature protection.

Our recommendations regarding Environmental Information are as follows:

- Shortened time periods for the appeal procedures themselves (2 months instead of 6)
- Improving/clarifying the rules on enforcement of court rulings
- Timely amendment of the remaining two provincial Environmental Information Acts

<p><b>Article 6 para. 1(a) and Art 9 para. 2: Strong and well-regulated EIA processes and generally positive associated access to justice rights</b></p>
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Austria's procedures in the EIA (and IED) context largely implement Article 6 para. 1(a) in a way that, in our view, can serve as a model for other Parties to the Convention. This is particularly so because, unlike in many other countries, the EIA procedure itself serves as the permitting procedure for projects. As a consequence of this robust and predictable procedural structure, many potential problems concerning implementation of the Convention in this context simply do not arise.

We also appreciate that there are certain provisions for costs protection, a very positive feature which we think could be duplicated in other laws both within and outside of Austria. We note, though, that these protections apply not to one's own incurred costs, but only other costs; this aspect is discussed again below with respect to Art 9 para. 4. The associated access to justice rights, too, are generally to be viewed positively. That being said, there are two sources of concern: (1) certain recent amendments to Austria's EIA-Act ("Umweltverträglichkeitsprüfungsgesetz – UVP-G"); and (2) standing in EIA screening procedures.

### **Recent Amendments to the EIA-Act**

In the very recent amendment to the EIA-Act, the environmental Ombudsmen ("Landesumweltschlichter") were stripped of their procedural rights. This is cause for

concern. These legal bodies were established in the nine federal provinces to protect the environment and support the public in environmental legal matters. While they do not fall under the definition of “public” under the Aarhus Convention and cannot alone adequately represent the interests of the public (concerned) in environmental matters, we nonetheless acknowledge the invaluable role they have to play. Their continued functioning, along with adequate access to justice rights for the public, is crucial to ensuring proper implementation of the Convention in Austria.

The EIA-Act was also amended to place additional burdens of proof regarding newly-made allegations when demanding access to justice. Thus when raising a new argument for purposes of appeal, the NGO must offer proof as to why this was not raised earlier in the EIA itself, at the risk of being dismissed.

### **Standing in EIA screening Procedures**

With EIAs as the main procedure which grants public participation the EIA-Act is in the spotlight of the attention. Following the ECJ judgment in the case of *Karoline Gruber* (C-570/13), the EIA-Act was amended to give neighbours the right to challenge negative EIA screening decisions, just like NGOs may.

This right to challenge EIA screening decisions ex post has been criticised by NGOs as excluding them from the main procedure and for not allowing them to initiate screening procedures. Thus, if there is no screening procedure to begin with, the right to challenge one is not applicable; it is a “res nullius”. Following a legal challenge by ÖKOBÜERO from April of 2014, in February of 2015, the Federal Administrative Court (“Bundesverwaltungsgericht”) allowed us as an NGO to call for an EIA screening procedure (BVwG 11.2.2015, W104 2016940-1/3E). This decision however was challenged and the Highest Administrative Court (“Verwaltungsgerichtshof” – VwGH) revoked the decision, ruling the Federal Administrative Court has no jurisdiction over this matter. The question therefore is undecided and no case is still pending.

Our recommendations regarding the EIA Act:

- Restoring the rights of the environmental Ombudsmen
- Removing the newly-created burdens on NGOs seeking access to justice
- Adding the right for NGOs to initiate an EIA screening procedure

### **Article 7 and Art 6, para. 8: No early and effective participation**

For public participation to be a useful and effective tool it requires for the public to be included early on in the procedure. While a requirement for a minimum of 6 weeks to participate is important, it alone is not sufficient to assure the effectiveness of participation. If planning procedures are done for several years and the public is only asked at the very end for a few weeks to weigh in, its impact is obviously minimal at best. And this is standard practice in Austria and basically in line with domestic legislation.

To give an example: the river basin management plan for Tyrol “Wasserwirtschaftlicher Rahmenplan zur Verwirklichung von Großwasserkraftwerksvorhaben im Tiroler Oberland“ (BMLFuW - uW.4.1.2/0029 - IV/1/2014) was handed to the Federal Ministry of the Environment by the regional power supplier TIWAG in December 2008. The public was not

informed about this, nor was it in the following five-and-a-half year period, during which the plan was discussed and amended in cooperation between the applicant TIWAG and the Ministry. It was only after the finalising of the plan that public was informed about this and invited for participation on the 800-page document, in July of 2014. Moreover, the time period of 6 weeks was set during the summer holidays, which lowers the potential participation even further. This kind of late and shortened participation is not in line with either the Aarhus or the Espoo Convention, as it is neither early nor effective (see also ACCC/C/2012/70, para 65) :

*"Given that the preparation process for the application was initiated on 31 October 2009 and that formally the general public had only seven days to get acquainted with the draft and submit comments, starting on 19 August 2011, that is, almost two years after the start of the application's preparation, the Committee finds that the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention, because no early public participation was ensured, when all options were open. (para. 58)"*

<p><b>Article 9, para. 3: No standing for NGOs</b></p>
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The MoP in its Decision V/9b on the case of Austria also stipulated the following:

*[Austria is] not ensuring standing of environmental non-governmental organizations (NGOs) to challenge acts or omissions of a public authority or private person in many of its sectoral laws [and thus] is not in compliance with article 9, paragraph 3, of the Convention.*

*[The MoP] also endorses the finding of the Committee with regard to communication ACCC/C/2011/63 that, because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention;*

**Legislative measures (not) taken**

As regards to access to justice, unfortunately there have been no effective attempts in implementing new legislation which includes NGOs/the public. While in the EIA and in IED procedures discussed above, the public concerned has access to justice and participation rights, outside of this context there is no possibility for NGOs to take part in procedures or to challenge acts and omissions. This is particularly hard for environmental NGOs in the fields of nature protection/conservation, water protection, wildlife and animal protection, environmental criminal law and such.

Whereas the Minister of Environment expressly stated in a parliament hearing in June of 2014 on Article 9 para. 3 of the Aarhus Convention that the provision will be transposed in the near future, nothing has happened, not even draft legislation has been developed.

In the summer of 2015, a draft for amending the Waste Management Act (“Abfallwirtschaftsgesetz” – AWG) was circulated, which did not include any Article 9, para. 3 access to justice provisions, even though internal drafts contained such provisions. The amendment is still in the legislative process.

Contrary to assurances made earlier by the Vice Chancellor that this would not occur, the Austrian Trade Act (“Gewerbeordnung”), is in the process of being amended to strip the environmental Ombudsman of their legal standing and access to justice in nature protection cases when a commercial enterprise is realising a project. Similar to the stripping of the rights of the environmental Ombudsman in the EIA context discussed above, we see this as cause for great concern. In this context, however, the loss of these rights for the environmental Ombudsman is arguably even more problematic, as NGOs are given neither legal standing nor access to justice in these cases.

In a similar vein, in the Upper Austrian Act on Environmental Protection (“Oberösterreichisches Umweltschutzgesetz”), the position of the environmental Ombudsman was severely weakened. This body lost the option to challenge decisions before the Highest Administrative Court, thus losing the option to make an interpretation legally binding beyond its own precedent. A further change to the law requires that the Ombudsman take into account economic aspects.

### **Working groups**

There are two working groups, one of which consists of the Federal Ministry for the Environment and the Austrian Provinces, the other one solely of Austrian Provinces, which are trying to work out solutions for access to justice. So far, no proposals were made public to us. It is great and positive that these working groups exist, but it is disappointing they have not led to outcomes or impacts in fact.

### **Court decisions**

The Highest Administrative Court has ruled<sup>2</sup>, that Article 9, para. 3 of the Aarhus Convention cannot be applied directly, as it is not precise enough and its content not clear. Thus, all claims by NGOs to try to apply Article 9, para. 3 without any new legislation have been dismissed. The Constitutional Court (VfGH), furthermore, has denied legal standing to environmental NGOs in two different cases (VfGH V 87/2014-11 and V 134/2015-7) to challenge regulations which they argued contradicted national environmental law. The Court explained that in its view Article 9, para. 3 was not applicable and standing for NGOs would require a change to Article 139 of the Austrian Constitution. In the first case the Constitutional Court also failed to refer questions to the ECJ, although key issues relating to the Convention and EU law were clearly at stake.

In another case, in late 2015 WWF challenged their exclusion from court proceedings over a hydropower plant to the Highest Administrative Court. That court in turn then asked the European Court of Justice whether the Water Framework Directive of the European Union, which is implemented through the Water Protection Act (“Wasserrechtsgesetz” – WRG), has to be read according to the Aarhus Convention, thus requiring access to justice for environmental NGOs<sup>3</sup>.

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<sup>2</sup> Inter alia VfGH 22.04.2015, 2012/10/0016

<sup>3</sup> VfGH 26.11.2015, Ra 2015/07/0055 (EU 2015/0008), ECJ C-664/15

In light of this referral to the ECJ, some courts are starting to grant access to justice for NGOs, so as to proceed with their cases until the ECJ decides<sup>4</sup>. While this is an improvement, it cannot be seen as a solution, as it is a purely temporary and nonstandard procedure, and is dependent on the outcome of the ECJ-ruling. We would add that the permitting authorities in no less than four different cases are not granting NGOs standing or access to justice in the field of nature protection, despite citing the ECJ's *Slovak Brown Bears II* decision (C-243/15).

To sum up, whereas Austria has not established a single improvement with regard to Article 9 para. 3, the situation has even become worse due to the significant new limitations put on the Ombudsman. Finally, we would add that Austria appears to only react on EU law matters, but does not aim to improve the legal position in other environmental laws.

Our recommendations regarding access to justice:

- Restore and strengthen the position of the Ombudsman, including the right to access the Highest Administrative Court and strict focus on environment and nature, not other interests.
- Implement full legal standing for NGOs in all environmental procedures,
  - including domestic environmental law outside EU obligations
  - including right to review plans and programmes,
  - including review procedures for omissions

#### **Article 9, para. 4: Prohibitive costs in ELD and EIA procedures**

In a recent decision in an Environmental Liability case in Lower Austria, the environmental NGO GLOBAL 2000 (FoE Austria) was ordered to pay close to 4,000 Euros for court costs for the commissioning of an expertise (expert opinion) appointed by the court<sup>5</sup>. As there are no specific regulations on costs protection in the Environmental Liability Act, the Provincial Administrative Court of Lower Austria justified its ruling with a reference to § 76 of the General Administrative Procedure Act (“Allgemeines Verwaltungsverfahrensgesetz” – AVG), which says that the costs of a procedure have to be met by the applicant of said procedure. The court also relied upon its interpretation of the ECJ's ruling in *Edwards* (C-260/11).

If this ruling becomes a precedent, it would effectively undermine the role of environmental NGOs in those few cases where they do have legal standing. The financial barrier, which in big cases can reach several tens of thousands of Euros, and which is not assessable beforehand, is a serious problem for NGOs and is in contrast to Article 9, para. 4 in conjunction with Article 3, para. 1 of the Convention.

Other acts in the field of environmental law similarly lack any provisions for cost protections. This lack and the openness of the ECJ's *Edwards* ruling mean that the costs in environmental litigation could potentially become very high, particularly where an NGO initiates the procedures. This is prohibitive, and will stop NGOs bringing environmental cases. If Article 9, para. 3 is transposed to other laws without cost protections rules, the situation will be the same as in ELD-cases.

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<sup>4</sup> E.g. The Provincial Administrative Court of Tyrol: LVwG-2015/15/3208-13

<sup>5</sup> Provincial Administrative Court of Lower Austria, LVwG-AV-31/006-2015

In the EIA-Act there are certain cost protection rules for public interest litigation which we regard as very positive, as mentioned above. Yet we note that the problem of prohibitive costs arises here as well because these rules say nothing about one's *own* incurred costs, which in Austria can be quite huge in actual practice. This is because only factual arguments which are supported by a technical expertise are legally effective. Effective participation or challenges to EIAs would thus constantly require an expertise (to counter the EIA) that costs 10,000 to 20,000 Euros. Under the existing legal regime in Austria, the NGO or member of the public would have to bear these costs. We note with appreciation that this point is included in the Austrian Implementation Report at page 18.

Our recommendations regarding prohibitive costs:

- Establish cost protection rules for public interest parties in all areas of environmental law similar to the provisions of the EIA act, in particular including
  - clear cost limits and
  - waiver from duty to bear the costs for external expertise in cases initiated by NGOs (same regulation as the Environmental Ombudsman has).

Best regards,



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ZVR 873642346