

Aarhus Convention Secretariat

c/o Fiona Marshall
Palais des Nations
8-14 Avenue de la Paix
1211 Geneva 10, Switzerland

Vienna, 24 October 2022

Regarding: Comments on the plan of action on Decision VII/8b (Austria)

Dear Ms. Marshall,

Dear Aarhus Secretariat,

OEKOBÜERO - Alliance of the Environmental Movement appreciates the opportunity to comment on the Action Plan for the implementation of Decision VII/8b of the Meeting of the Parties to the Aarhus Convention concerning Austria.

OEKOBÜERO is the alliance of the Austrian Environmental Movement. It consists of 20 Austrian organizations engaged in environmental, nature, and animal protection like GLOBAL 2000 (Friends of the Earth Austria), FOUR PAWS, BirdLife Austria, and WWF Austria. OEKOBÜERO works on the political and legal level for the environmental movement.

OEKOBÜERO welcomes the issuing of an Action Plan with concrete steps for the implementation of Austria's obligations under international law resulting from the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention) as well as the possibility to comment on the present Action Plan. However, the plan unfortunately does not indicate that the control instruments (in the sense of comprehensive access to justice for the public in environmental matters) stipulated in Article 9

of the Convention will soon be fully implemented in Austria. According to OEKOBÜERO, deficits remain in the following areas:

1. Right to review instead of full party status in multiple fields of law.

Although a mere right to review without full party status is conceivable under certain circumstances for the implementation of Article 9 (3) of the Aarhus Convention, a right to review has procedural and legal disadvantages compared to full party status. It is neither objectively nor practically justified that environmental organizations are disadvantaged compared to other parties in the appeal procedure. Considering that environmental protection organizations oftentimes get involved in a small number of cases that are particularly controversial, full party status is more appropriate to make use of the peace-making function of full party status.

2. No consistent implementation of Art 9 Aarhus Convention in environmental law.

Austria is a party to the Aarhus Convention. Accordingly, following the principle of "pacta sunt servanda", Austria and its federal states have the obligation to implement the Convention by means of national law, regardless of Union law infringement proceedings and Union law principles. It is therefore not sufficient to grant access to administrative procedures and courts only in areas determined by European environmental law. For lack of conclusive implementation, substantial areas of national environmental law are removed from the legal control by the public. This includes procedures for the protection of species, waste management, forestry and the like.

3. Lack of rights to petition and appeal against omissions.

In addition to the right to act against acts that violate environmental law, Art 9 (3) of the Aarhus Convention explicitly calls for legal protection against omissions. The lack of legal means to intervene in case of inactiveness of authorities beyond ongoing proceedings constitute a problem that is significant in practice. Examples include the failure to conduct inspections, to check compliance with requirements, to issue legal acts or to initiate procedures (such as EIA/SEA procedures, nature impact assessments, remediation procedures), or the failure to act although it would be legally required to do so (such as intervention in the case of illegal landfills). This indirectly covers illegal actions by "private persons", as envisaged by Article 9 (3). If natural or legal persons commit violations of the law, the authorities must act against them. If this omitted, environmental protection organizations must be able to take legal action. Especially in Austria's legal protection system, which is geared towards personal involvement, environmental

protection organizations have no ex lege possibility to act if environmental rights are disregarded or violations are not prosecuted.

4. Inadequate legal protection against plans and programs.

Article 9 (3) of the Aarhus Convention also grants environmental organizations the right to have ordinances, plans and programs in the environmental field reviewed by the courts. This also applies to their non-enactment. The provision could be implemented by authorization of the constitutional legislator to empower environmental protection organizations to review such plans and programs by law or ordinance. This is relevant in spatial planning and zoning law, but also in water law, waste law, nature conservation and/or matters that are subject to an SEA or a public participation procedure. The Immission Control Act Air (IG-L) constitutes an example: according to this law, environmental organizations as well as natural persons who are directly affected by the exceeding of an emission limit can ask for the review or revision of an air pollution control program. The application is subject to an appealable decision.

5 No party status in environmental criminal law.

Effective legal remedies for environmental protection organizations must be created in criminal law and administrative criminal law based on Decision VII/8b of the Aarhus Meeting of the Parties against Austria in accordance with Article 9 (3) of the Aarhus Convention. OEKOBÜRO proposes party status or the status as private parties for environmental protection organizations in criminal proceedings. They must be able to exercise environmental protection regulations as subjective rights. This includes the right to inspect files in the proceedings. Legal protection must become more effective and efficient, as in the points mentioned above.

6. Stricter recognition criteria for environmental NGOs.

With the amendment to the UVP-G entering into force in 2018, additional recognition criteria for environmental organizations were adopted. Since all previously adopted provisions implementing Art 9 (3) of the Aarhus Convention refer to Section 19 UVP-G, this amendment also affects access to justice. Within the scope of Art 9 (3) of the Aarhus Convention, it is unlawful to set such strict criteria, as they prevent almost all members of the public - in particular environmental protection organizations - from the opportunity to appeal. The general rule that environmental protection organizations are only recognized if they include 100+ members indeed does not contravene Art 9 (3) in principle. However, other indicators must be introduced, so that smaller organizations can prove their credibility and attain procedural rights. In this

context, Austria has already pointed out that a tightening of recognition criteria is a step in the wrong direction with regards to the implementation of the Convention. The supreme administrative court (“Verwaltungsgerichtshof – VwGH”) has recently upheld this provision against a challenge by an environmental NGO, leaving only the legislator in charge to correct this provision, as there are no more legal steps national NGOs can take against it.¹

7. No list of legal fields in which additional implementation is planned.

In para 2 (c) of decision VII/8b, the Aarhus Meeting of the Parties requests Austria to initiate a review of the relevant body of national law (both federal and provincial) to identify areas of law relating to the environment that require adaptation to meet the provisions of para 3 (a) and (b) of decision VI/8b. It also calls for submission to the Committee as soon as possible, but no later than 1 July 2022. According to the information available to OEKOBUERO, a list of legal matters requiring adaptation still has not been submitted by Austria, although it had already been requested in February 2019.²

8 No substantive right to review of NGOs in nature conservation law.

From OEKOBUERO's point of view, it must be clarified that environmental protection organizations are entitled to appeal to the Administrative Court (VwGH). Since the Administrative Court considers the party status of environmental protection organizations a formal one and therefore affirms a right to appeal only if procedural rights are violated, this constitutes a disadvantage compared to other parties to the proceedings. This contravenes the principle of equivalence under EU law in connection with Art 47 of the Charter of Fundamental Rights as well as Art 9 of the Aarhus Convention. At the moment, access to a challenge with the Supreme Administrative Court is only available against EIA decisions, but not for other areas such as nature protection, hunting, fishery, waste management et al. This of course is on top of the already very small area in which access to justice is granted at all.

OEKOBUERO has repeatedly illustrated the above-mentioned points during the review procedure of the Aarhus Convention Compliance Committee (ACCC) for the implementation of Decisions V/9b and VI/8b of the Meeting of the Parties.

¹ VwGH 29.8.2022, Ra 2021/07/0093-5.

² See ACCC 25.2.2019, First progress review of the implementation of decision VI/8b on compliance by Austria with its obligations under the Convention, https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8b_Austria/Correspondence_with_the_Party_concerned/First_progress_review_on_VI.8b_Austria_adopted_22.02.2019.pdf (20.10.2022), para 32.

OEKOBÜERO comments as follows on the individual requirements cited in the present plan:

Para 2 (a) and (b) of decision VII/8b.

In para 2 (a) of decision VII/8b, the Aarhus Meeting of the Parties requires Austria to *"as a matter of urgency, take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that criteria for nongovernmental organizations to have standing to challenge acts or omissions by private persons or public authorities that contravene national law relating to the environment under article 9 (3) of the Convention are revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for non-governmental organization standing in its laws on environmental impact assessment, integrated pollution prevention and control, waste management or environmental liability."*

In para 2 (b) of decision VII/8b, the Aarhus Meeting of the Parties requires Austria to *"ensure that, when addressing subparagraph (a) above, members of the public, including non-governmental organizations, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national law, including administrative penal laws and criminal laws, relating to the environment"*.

Austria cites further implementation in federal and state law as planned implementation steps:

For example, the upcoming amendment to the UVP-G 2000, which is to be adopted in the winter of 2022/2023, is cited. In this regard, ÖKOBÜERO emphasizes that the published draft assessment does not provide for any improvements regarding legal protection of the public. In particular, the more difficult recognition requirements for environmental protection organizations introduced by the 2018 amendment were maintained.

The planned revision of the other legal areas mentioned by way of example (transport and energy laws) is beyond the scope of OEKOBÜERO's assessment, as no further details are provided on the specific legislative measures or publicly available. Moreover, the amendment of the law on SEA concerning the nationwide transport route network (SP-V-G) as well as the Aarhus Amendment 2022 in Upper Austria have not yet been published.

In view of recent legislative amendments, ÖKOBÜRO also regrets that the present draft does not mention any implementation of Art 9 in the Forest Act 1975, although the applicability of Art 9 of the Aarhus Convention has meanwhile even been clarified by the highest court in Austria.³

Moreover, the recent amendments on the provincial level fail to meet the requirements of Art 9 Aarhus Convention, as they remain limited to environmental law as determined by Union law (Salzburg Nature Conservation Act 1999, Salzburg National Park Act 2014, Hunting Act 1993, Fishing Act 2002, Environmental Protection and Environmental Information Act. In addition, they do not include a possibility for recognized environmental organizations to appeal against plans, programs, or ordinances, maintains preclusion rules and does not offer party status. The same applies to the amendment of the Tyrolean Hunting Act 2004.

As a further measure, the Action Plan mentions the Austrian Aarhus Working Group, which consists of the BMK, the Federal Provinces, as well as other ministries. Its purpose is to review implementation gaps and to discuss measures as well as legislative proposals. From OEKOBÜERO's point of view, participation of a broader range of stakeholders (including NGOs, project advertisers, experts, science etc.) is necessary. This way, a comprehensive implementation of the legal protection provisions could take place, meeting international and EU law requirements and considering practical experience.

In addition, an updated jurisprudential study on the state of implementation of the Aarhus Convention in Austria is now overdue. The last study published in 2009 is long out of date.⁴ A new study should also address the party or private party status of environmental organizations in criminal law as well as possible adjustments in general procedural law. A concrete roadmap for the full implementation of the Aarhus Convention could then be derived from the legislative proposals envisaged in the study.

The understanding of the recognized environmental protection organizations is crucial to avoid bypassed parties who might act against a decision even after it has become legally binding. The notification must be practical for both the environmental organizations and the authorities. In this context, OEKOBÜERO welcomes the fact that all provinces have chosen electronic

³ VwGH 20.12.2019, Ro 2018/10/0010-3.

⁴ *Schulev-Steindl/Goby*, Rechtliche Optionen zur Verbesserung des Zugangs zu Gerichten im österreichischen Umweltrecht gemäß der Aarhus-Konvention (Artikel 9 Absatz 3) (2009).

notification in their previous Aarhus implementations. However, since different platforms exist at both federal and provincial level, all of which have different structures and levels of detail, the regular review of the platforms requires extensive resources for environmental protection organizations. Therefore, OEKOBÜERO welcomes the creation of a working group for the establishment of a nationwide announcement platform for procedures and decisions of public interest. Based on its experience as a user of the platform, OEKOBÜERO also calls for the involvement of the public.

Point 2 (d) of decision VII/8b

In paragraph 2 (d) of decision VII/8b, the Aarhus Meeting of the Parties requires Austria to *"develop a capacity-building program and provide training on the implementation of the Convention for judges, prosecutors and lawyers"*.

Regarding the training program of the Austrian Academy of Administrative Justice mentioned in the Action Plan, OEKOBÜERO notes that in the current program, no trainings are scheduled in relation to the Aarhus Convention and resulting law.

OEKOBÜERO appreciates the EU-funded project under the auspices of the Austrian Federal Criminal Police Office for capacity building in the field of environmental (criminal) law. However, the plan does not indicate as to what extent this project will also impart knowledge regarding the application of the legal protection provisions in criminal law stipulated in the Aarhus Convention.

ÖKOBÜERO notes that in Austria there was little progress made in the implementation of access to justice according to the Aarhus Convention. Especially the narrow implementation focussing only on EU environmental law, and the lack of possibilities to challenge omissions, plans and programmes shows a severe hole in legal protection for the environment. Supreme Court decisions have somewhat altered the legal landscape in allowing challenges in forestry law (which remains to be implemented into the legal framework), but also tightened access to the Supreme Administrative Court significantly. ÖKOBÜERO therefore notes, that the presented plan is insufficient to address the shortcomings in Austria.

Yours sincerely,



Thomas ALGE

Managing Director,

OEKOBÜRO – Alliance of the Austrian Environmental Movement