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An das
Bundesministerium für Land- und Forstwirtschaft,
Umwelt und Wasserwirtschaft
Abteilung I/1 – Anlagenbezogener Umweltschutz & Umweltbewertung
z. H. Fr. Dr.in Anna Muner-Bretter
Stubenbastei 5
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Wien, 30.06.2016

Betreff: UNECE Aarhus Konvention - Umsetzungsbericht Österreichs zum 6. Treffen der Vertragsstaaten 2017, Konsultation GZ BMLFUW-UW.1.4.1/0010-1/1/2016

Sehr geehrte Frau Dr.in Anna Muner-Bretter,

wir bedanken uns für die Möglichkeit zur Stellungnahme zum Umsetzungsbericht Österreichs zum 6. Treffen der Vertragsstaaten der Aarhus Konvention. Als Follow-Up zu dem Bericht 2014, soll der Schwerpunkt gerade auf die Entwicklungen seit diesem Bericht und auf Artikel 9/3 der Konvention liegen.

Da um die Übermittlung in englischer Sprache bis zum 30.Juni 2016 ersucht wurde, setzen wir jetzt in dieser Sprache fort.

OEKOBUERO is the alliance of the Austrian environmental movement. It comprises of 16 Austrian organizations engaged in environmental, nature and animal protection (including FoE Austria, Greenpeace, FOUR PAWS and WWF). OEKOBUERO works on the political and legal level for the interests of the environmental movement.

We would like to give our comments on the implementation of the Aarhus Convention in Austria, with a focus on the provisions on Access to Justice and the developments in legislation since the last report in 2014. In the MoP 2014 endorsed (Decision V/9b) findings by the Aarhus Convention Compliance Committee (ACCC) regarding communication ACCC/C/2010/48 and ACCC/C/2010/63, the committee found Austria in non-compliance with Article 9 Paragraphs 3, 4, as well as Article 4/7 in conjunction with Article 9/4 of the Convention.

Article 4 and 9. Access to information

As regards access to environmental information, Austria was criticised by the ACCC, as endorsed by the fifth session of the Meeting of Parties (MoP)[1]:

> *(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;*

[1] ECE/MP.PP/2014/Add.1

(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 ("Umweltinformationsgesetz" – UIG) has been amended (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 moths, originally).

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

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 as unlawful) is not entirely clear. Even more so with externalised public responsibilities, which are handled by corporations, which still fall under the Environmental Information Act, but cannot issue official notifications themselves.

The amendment to the federal Environmental Information Act was done in August of 2015. The implementation in the 9 provincial Environmental Information Acts however is still not completed in any of Austrian's provinces. While a few already started the process (e.g. Vienna, Upper Austria), the full implementation (which thankfully so far follows the federal version) is still missing. A prolonged period of missing implementation and thus diverging time limits could and most likely will lead to confusion of both authorities and citizens. Even more so due to the fact that the same authority might be asked under two different aspects with different time limits. 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/clarification of the rules on enforcement of court rulings
- Timely amendments for the provincial Environmental Information Acts

Article 7 and Art 6 par 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 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, when the public was 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 both the Aarhus and 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)*"

Article 9 par 3: No standing for NGOs

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;*

As regards Access to Justice, unfortunately there have been little effective attempts in implementing new legislation which includes NGOs/the public. While in the EIA and in IPPC procedures, the public concerned has access to justice and participation, outside of this, there is no explicit 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 on Article 9 par 3 of the Aarhus Convention that the provision will be transposed in the near future June 2014, nothing has happened, not even draft legislation had been developed.

In summer 2015, a draft for amending the Waste Management Act ("Abfallwirtschaftsgesetz" – AWG) was circulating, which did not include any 9/3 Access to Justice provisions event though internal drafts contained such provisions. The amendment is still in the legislative process

There are two working groups, one of which consisting of the Federal Ministry for the Environment and the Austrian Provinces, the other one solely of Austrian Provinces, who try to work out solutions for Access to Justice. So far, no proposals were made public to us (June 2016). It is great and positive that this workinggroups exist, but it is disappointing they had not outcome or impact in fact.

The Highest Administrative Court (VwGH) has ruled[2], that Article 9/3 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 9/3 without any new legislation have been dismissed.

In late 2015 WWF challenged their exclusion from court proceedings over a hydropower plant with the Highest Administrative Court (VwGH). In turn the VwGH then asked the European Court of Justice, on 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[3].

In light of this referral to the ECJ, some courts start to grant access to justice for NGOs, as to proceed with their cases until the ECJ decides[4]. While this is an improvement, it cannot be seen as a solution, as it is a purely temporarily and not a standard procedure depending on the outcome of the ECJ-rulings.

Finally it appears that Austria would 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:

- 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

Standing in EIA screening Procedures

With Environmental Impact Assessments 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" (ECJ 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 ÖKOBÜRO from April of 2014,

[2] Inter alia VwGH 22.04.2015, 2012/10/0016
[3] VwGH 26.11.2015, Ra 2015/07/0055 (EU 2015/0008), ECJ C-664/15
[4] E.g. provicial administrative court of Tyrol: LVwG-2015/15/3208-13

in February of 2015, the Federal Administrative Court ("Bundesverwaltungsgericht") allowed us as NGO to call for an EIA screening procedure (BVwG 11.2.2015, W104 2016940-1/3E). This decision however was challenged and now lies with the Highest Administrative Court ("Verwaltungsgerichtshof" – VwGH).

Our recommendations regarding the EIA Act:

- Adding the right for NGOs to initiate an EIA screening procedure

Weakening of the Environmental Ombudsman

In the 9 Austrian provinces the state has established legal bodies which shall protect the environment and support the public in environmental legal matters. While such an Environmental Ombudsman ("Umweltanwalt/Umweltanwältin") does not fall under the definition of "public" under the Aarhus Convention in any case due to its lack of independence from the state, they do provide invaluable services to the public and are thus far the only body with legal standing in nature protection/conservation procedures. While not per se required under the Convention, their contribution to the enforcement of environmental law falls within the goal of the Aarhus Convention under Article 1 with corresponding procedural rights and proves helpful for both the environment as such and the public.

The body of the Environmental Ombudsman recently came under attack and is threatened to lose its power. With the recent changes in the Upper Austrian Act on Environmental Protection ("Oberösterreichisches Umweltschutzgesetz"), the position of the Ombudsman is severely weakened. It lost the option to challenge decisions before the Highest Administrative Court ("Verwaltungsgerichtshof"), thus losing the option to make an interpretation legally binding beyond its own precedent. Futhermore the Ombudsman has to take into account economic aspects since this change.

To sum up, whereas Austria has not established a single improvement with regard to Article 9 par 3, the situation has even become worse due to the cut down of the Ombudsman.

Our recommendation for the Environmental Ombudsman:

- 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.

Article 9 par 4: Prohibitive costs in ELD procedures

In a recent decision in an Environmental Liability Case in Lower Austria the environmental NGO "GLOBAL 2000" (FoE Austria) was ruled to pay close to 4.000 EUR for the courts costs for a non-official expert, appointed by the court[5]. The Provincial Administrative Court of Lower Austria justified this 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. 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 10.000,- Euro and is not assessable beforehand, is a serious problem for NGOs and is in contrast to Article 9par 4 in

[5] Provincial Administrative Court of Lower Austria, LVwG-AV-31/006-2015

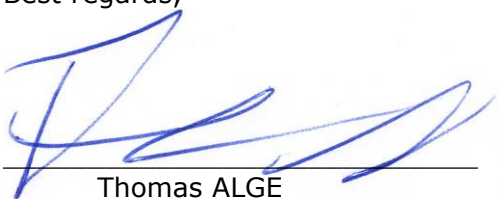
conjunction with Art 3 par 1 of the Aarhus Convention. Since there are no specific regulations on cost protection in the Environmental Liability Act the Court referred to the ECJ-Edwards case.

In the EIA-act there are cost protection rules for public interest litigation, including the Environmental Ombudsman. Other acts lack such provisions. The cost could potentially become very high if an NGO initiates procedures due to the lack of any cost protection provisions and the openness of the ECJ Edwards ruling in terms of actual costs and limits. The lack of cost protection as such and any regulation on that is prohibitive and will stop NGOs bringing Environmental cases. In case Article 9 par 3 is transposed to other laws without cost protections rules the situation will be the same as in ELD-cases.

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 the bear the costs for external expertise in cases initiated by NGOs (same regulation as the Environmental Ombudsman has).

Best regards,



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