



Restriction on the Recognition of Environmental Organisations in § 19 (7) UVP-G in the Light of International and European Environmental Law

Short Study

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1. THE PROBLEM

An amendment to the Austrian Environmental Impact Assessment Act (UVP-G)¹ came into force on 1 December 2018. Its aim is to tighten conditions for the recognition of environmental organisations. According to the new version of § 19 (6) UVP-G, registered associations must have at least 100 members and unions of such associations must have at least five member associations that fulfil the aforementioned requirement in order to be recognized as environmental organisations and thus admitted as parties to environmental proceedings.

In practice such a restriction would cause the number of legitimate environmental organisations to be kept to a minimum – not only in Environmental Impact Assessment procedures but also in countless other areas of law in Austria where requirements refer to the relevant provision of the UVP-G (e.g. the Industrial Code², Mineral Resources Act³, some federal state laws⁴ and, in future, the Waste Management Act⁵, the Air Pollution Control Act⁶, the Water Rights Act⁷ and the Air Emissions Act⁸). This raises both EU and International Law concerns.

2. PROVISIONS OF THE AARHUS CONVENTION

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) regulates in Articles 6 and 9 (2) public participation in environmental proceedings and in Article 9 (3) general access to justice. Article 9 (5) determines how the effectiveness of access to justice must be ensured.

¹ "Umweltverträglichkeitsprüfungsgesetz 2000"

https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2018_I_80/BGBLA_2018_I_80.html (22 January 2018)

² § 356b (7) GewO, BGBl I 194/1004 idF BGBl I 96/2017.

³ § 121 (13) MinroG, BGBl I 38/1999 idF BGBl I 80/2015.

⁴ § 57j Carinthian Nature Conservation Act (Kärntner Naturschutzgesetz 2002 – Ktn NSchG 2002), LGBl 79/2002; § 20b Carinthian Land Parceling Act (Kärntner Flurverfassungs-Landesgesetz 1979 – K-FLG), LGBl 64/1979 idF LGBl 85/2013; § 7 Styrian Genetic Engineering Precautionary Measures Act (Steiermärkisches Gentechnikvorsorgegesetz), LGBl 97/2002 idF LGBl 83/2017; § 24b Styrian Forestry Act (Steiermärkisches Einforstungs-Landesgesetz 1983), LGBl 1/1983 idF LGBl 139/2013; § 5a Viennese Genetic Engineering Precautionary Measures Act (Wiener Gentechnik-Vorsorgegesetz), LGBl 53/2005 idF LGBl 19/2016; and others.

⁵ §§ 40 (1), 40a (1), 42 & 78c AWG,

https://www.parlament.gv.at/PAKT/VHG/XXVI/BNR/BNR_00095/fname_717003.pdf (19 November 2018).

⁶ § 9a IG-L, https://www.parlament.gv.at/PAKT/VHG/XXVI/BNR/BNR_00095/fname_717003.pdf (19 November 2018).

⁷ §§ 102 & 107 WRG, https://www.parlament.gv.at/PAKT/VHG/XXVI/BNR/BNR_00095/fname_717003.pdf (19 November 2018).

⁸ § 6 (7-10) EG-L, https://www.parlament.gv.at/PAKT/VHG/XXVI/BNR/BNR_00096/fname_717006.pdf (19 November 2018).

2.1 ENVIRONMENTAL ORGANISATIONS AS "THE PUBLIC CONCERNED"

According to Article 2 (4) of the Aarhus Convention, the definition of the public also includes non-governmental organisations. Under Article 2 (5), NGOs working to protect the environment and "meet any requirements under national law" also count as "the public concerned". As a result, the conditions for participation in environmental proceedings under Article 9 (2) of the Convention are linked to these criteria.

Although in its wording Article 2 (5) leaves open the question how the "national requirements" for environmental organisations should be formulated legally, the Aarhus Convention Compliance Committee (ACCC) noted (in one of the many cases where it has already tackled the issue of conditions for the recognition of environmental organisations laid down in contracting states), that **the provision should be interpreted in such a way as to give the public concerned "wide access to justice"**.⁹ Contracting States have somewhat limited room for interpretation insofar as access to justice cannot be significantly restricted and the general requirements of Articles 1, 3 and 9 of the Convention must be fulfilled.¹⁰

The conditions under Article 2 (5) are also to be considered in the light of Article 3 (4) of the Convention. It stipulates, that Contracting Parties must **"provide for appropriate recognition of and support to" environmental organisations** and "ensure that their national legal system is consistent with this obligation". Contracting States must ensure that these recognition requirements for environmental organisations are not unduly burdensome. In addition, they should be designed in accordance with the basic principles of the Aarhus Convention, such as the prohibition of discrimination or the **avoidance of technical and financial obstacles**, unnecessary exclusion is inadmissible.¹¹

2.2 ACCESS TO JUSTICE

Article 9 of the Convention must also be considered in the light of Article 3 (4).¹² In a case concerning Turkmenistan in 2004, the ACCC denied the possibility of restricting participation in environmental proceedings to organisations with more than 500 founding members, referring to Article 3 (4). Registration procedures and requirements for environmental organisations, which are too difficult to fulfil, violate the obligation to adequately recognize and support NGOs.¹³

If national provisions pursuant to Article 2 (5) of the Convention contain unreasonable or unjustified requirements, this consequently leads to a breach of the obligation laid down in Article 9 (2) to grant the public concerned standing to challenge decisions in procedures with public participation according to Article 6 (1).¹⁴

With regard to Article 9 (3) granting the right of access to justice to the general public (not only to the affected public as in para. 2 leg. cit.), national legislation may set correspondingly higher

⁹ ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, Rn 27; cf. *Compilation of findings of the Aarhus Convention Compliance Committee*, 08.09.2017, para 71, http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_08.09.2017_new.compressed.pdf (19 November 2018).

¹⁰ ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para 81; ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/1, para 75; ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, para 61.

¹¹ *The Aarhus Conventions: An Implementation Guide*², 2014, p. 58, https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf (19 November 2018).

¹² Ibid. p. 66.

¹³ ACCC/C/2004/05 (Turkmenistan), ECE/MP.PP/C.1/2005/2/Add.5, para 21.

¹⁴ ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para 70-73.

requirements for environmental organisations. The present case, however, concerns the environmental impact assessment and thus Article 9 (2). Yet, also regarding Article 9 (3) it is inadmissible to set such strict criteria that prevent almost all members of the public, especially environmental organisations from appealing.¹⁵ **Court access, on the other hand, has to be "the presumption, not the exception".**¹⁶

According to Article 9 (5), Contracting States shall establish appropriate assistance mechanisms "to remove or reduce financial and other barriers to access to justice."

In a Swedish case of 2013, the ACCC examined to which extent restricting court access regarding wind turbines to environmental organisations of 100 or more members is allowed. As a result, such a restriction can only be compliant with the Convention if access to justice granted by Article 9 (2) is not affected by this restriction.¹⁷ **For Austria this means, only if the restriction does not affect EIA proceedings.** In addition, the ACCC claimed that also environmental organisations with fewer than 100 members are granted full access rights **if they prove their support by the public.**¹⁸ This support is applied broadly by Swedish courts and includes, e.g. environmental NGOs with less than 100 members organising expositions with more than 500 visitors.¹⁹ Alternatively, support can also be proved otherwise and is usually accepted in practise.²⁰

2.3. GENERAL RESTRICTIONS REGARDING ENVIRONMENTAL ORGANISATIONS

No substantial argumentation is conceivable as to how the requirement of 100 members could be objectively justified. A direct correlation between form of organisation or number of members and professional expertise is not apparent. At the moment, 57 organisations are legitimated to participate in EIA procedures and challenge decisions. Only half out of these, i.e. **around 30, may be active in all Austria**, the scope of action of the other is limited to certain regions. In fact, environmental organisations **challenge only two EIA decisions per year** and in the past ten years there have not been any NGO appeals in IPPC procedures.²¹ It can be expected, through the present restriction, that a large number of organisations will lose their participatory rights granted by the Aarhus Convention and that the NGO presence in environmental procedures would decrease even further.

Also regarding the professional expertise, it can hardly be argued that an NGO with 80 members should have less technical expertise or interest in environmental protection. With regard to the possibilities for participation, this distinction is therefore not justified.

Alternative ways to prove "legitimacy" and commitment to environmental matters apart from the number of members are not indicated by the amendment of the UVP-G.

¹⁵ Cf. ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/11, para 75 with reference to ACCC/C/2005 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2; ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, para 61; ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, ECE/MP.PP/C.1/2014/3, para 51.

¹⁶ ACCC/C/2011/58 (Bulgaria), para 65.

¹⁷ ACCC/C/2013/81 (Sweden), ECE/MP.PP/C.1/2017/4, para 81-82.

¹⁸ Ibid. para 85.

¹⁹ Swedish Court of Appeal in Environmental Matters „Mark- och miljööverdomstolen", MÖD 2015:17, "Den utåtriktade verksamheten fokuseras sedan år 1976 på en fortlöpande egenproducerad utställning för allmänheten som besöks av närmare 500 personer per år."

²⁰ Information of Oscar Ahlrik, environmental lawyer of the recognised Swedeish Environmental Organisation "Naturskyddsföreningen".

²¹ https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_08498/imfname_536883.pdf (19 November 2018).

The requirements of the Articles 2 (5) and 9 (2) of the Convention thus in future will not be met in Austria.

Presuming that most probably a large number of environmental organisations do not have 100 members, the adopted restriction is also not in accordance with Article 9 (3), which provides that criteria in national provisions must not undermine the participation rights of NGOs. The same argument applies regarding Article 9 (5), since the requirement of 100 members can certainly be regarded as an impermissible obstacle. Not least, the obligation to disclose a list of all members is under data protection law not an easily manageable requirement.

3. CONSIDERATIONS REGARDING EUROPEAN LAW

3.1 EIA DIRECTIVE

As the UVP-G is the Austrian implementing provision for the Environmental Impact Assessment Directive (EIA Directive)²², the question arises whether restricting recognition to environmental organisations with 100 or more members contravenes the requirements of this Directive or EU Law as such.

In the *Djugården* case²³, the European Court of Justice (ECJ) in relation to the Swedish Environmental Code dealt with the question, whether a provision must require the public concerned, under certain conditions, to have access to a review procedure in order to challenge the legality of a decision, or whether it is sufficient for smaller environmental organisations to have participation rights in proceedings with a potentially significant impact on the environment.

Almost identical to the provisions of the Aarhus Convention, Article 10 EIA Directive (formerly Article 10a) leaves it open to national legislators to determine the conditions under which an NGO working for environmental protection may have a right of appeal. But it is necessary to grant “wide access to justice” and to ensure the practical effectiveness of those provisions of the Directive regarding judicial remedies.²⁴

EU legislation concerning all those who have a “sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations” must not be nullified by national legislation even under EU law.²⁵

The ECJ ruled in the case *Djugården* that a minimum number of members for environmental organisations could be conceivable to ensure that this association “actually does exist and is active”. However, such a requirement must not run counter to the objectives of the EIA Directive, in particular the judicial control of concerned proceedings.²⁶ This even applies to cases in which

²² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, as last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014.

²³ EuGH 15.10.2009, C-263/08. (*Djugården*).

²⁴ Ibid., para 45.

²⁵ Ibid.

²⁶ Ibid. para 47.

environmental organisations that do not meet the requirements were able to participate in the procedure beforehand.²⁷

Furthermore, according to the ECJ, the EIA Directive does not exclusively concern projects on a regional or national scale, but also “projects more limited in size which locally based associations are better placed to deal with”. Local associations must therefore not be completely deprived of the possibility of challenging decisions.²⁸ It is also **not sufficient for them to be able to turn to accredited (larger) environmental organisations and request legal action. Such a system would “give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the Directive”.²⁹**

Hence, from an EU perspective, it has already been pointed out by the *Djugården* ruling and the EIA Directive that a restriction according to solely a high number of members is not legally justified.

3.2. JUNCTION OF INTERNATIONAL AND EUROPEAN LAW

The EIA Directive particularly aims to ensure the implementation of the Aarhus Convention.³⁰ As part of EU Law, other Union acts must also be interpreted as granting environmental organisations access to justice and not making it practically impossible or excessively difficult for them to exercise this right.³¹

From this point of view, national legislation must not only be interpreted as granting procedural possibilities for challenging decisions. If the legal provisions of a Member State do not permit such an interpretation, the relevant provisions may not be applied either.³² This primacy of Union law and the closely related Aarhus Convention has also been confirmed by national courts in Austria.³³

The European Union is member of the Aarhus Convention and has ratified it already in 2015.³⁴ As international treaty, the Aarhus Convention is located between primary and secondary law within the hierarchy of the legal structure. The Aarhus Convention therefore sets an implementation basis for the EU and its legislation. In other words: Environmental Directives have to comply with requirements of the Aarhus Convention where possible. The brisk ruling activity of the ECJ within the past years shows impressively the inclusion of the Aarhus Convention in EU law as an interpretation base for directives. Thus, the regulatory safeguards of the Convention are of great importance also within EU law.³⁵

Therefore follows that the Aarhus Convention must not only be implemented by the Contracting States from an international law point of view, but must also be observed as mandatory Union law, at least within the framework of the legal areas regulated by Union law. A violation of the Aarhus Convention thus also constitutes a violation of mandatory Union law. National obligations that are not in accordance with it must remain unapplied.

²⁷ Ibid. para 49.

²⁸ Ibid. para 50.

²⁹ Ibid. para 51.

³⁰ See objectives 18-21 of Directive 2011/92/EU; EuGH 15.10.2009, Rs C-263/08 (*Djugården*), para 33.

³¹ ECJ, 20.12.2017, C-664/15 (*Protect*), para 54; ECJ, 08.03.2011, C-240/09 (*Slovakian Brown Bear*), para 48.

³² ECJ, 20.12.2017, C-664/15 (*Protect*), para 55.

³³ Supreme Administrative Court (VwGH), 19 February 2018, Ra 2015/07/0074, para 60ff, Administrative Court of Lower Austria (LVwG Niederösterreich), 9 April 2018, LVwG-AV-751/001-2017.

³⁴ Council Decision 2005/370/EC of 17 February 2005, OJ L 124, pp. 1-3.

³⁵ See Communication from the Commission of 28 April 2017, C(2017) 2616 final, http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf (19 November 2018).

4. CONCERNS REGARDING DATA PROTECTION

The adopted amendment has been subject to several changings throughout the preliminary process. Originally it was planned that environmental organisations would have to submit a list of their members to the authority as proof of their number of members. The amendment to the law that has now been passed has been made in a less intrusive manner, in comparison: Now it is "only" necessary to "show probable cause" that the organisation actually has at least 100 members. The explanations³⁶ cite as an possibility, that the list is transmitted to third trustees (e.g. a notary), who then confirm the fulfilment of the requirement.

The information that a certain person is member of an environmental organisation falls within the personal data of both, the person her- or himself as well as the respective association. As these data contain information on the political opinion of the member, they are specially protected according to Article 9 GDPR³⁷ as well as § 1 of the Austrian Data Protection Act³⁸. The obligation to reveal personal data of organisational members therefore can hardly be managed in conformity with data protection provisions.³⁹

The legal situation will – depending on the actual handling of course, but most likely– have to be classified as not conforming to data protection law.⁴⁰

³⁶ 10040/BR d.B., https://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_10040/fname_717984.pdf (19 November 2018).

³⁷ (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

³⁸ Bundesgesetz zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten (Datenschutzgesetz – DSG), BGBl. I Nr. 165/1999, last amended by BGBl I Nr 24/2018.

³⁹ See: Expert opinion of Prof.Dr. Ennöckl LL.M., University of Vienna, http://www.oekobuero.at/images/doku/stellungnahme_verwaltungsreformgesetz.pdf (19 November 2018).

⁴⁰ See also: Expert opinion of Prof.Dr. Ennöckl LL.M., University of Vienna, http://www.oekobuero.at/images/doku/stellungnahme_ennoeckl.pdf (19 November 2018).

5. CONCLUSION

Apart from the fact that the adopted amendment to the UVP-G may be unconstitutional due to a lack of objective justification, which did not need to be dealt with here, it constitutes a clear violation of the Aarhus Convention and the respective secondary law, concretely the EIA Directive. Additionally, on EU level, clear and legally binding rulings exist on the non-compliance of restrictions referring solely to the number of members as determined in the present legislative amendment.

In practice, the requirement for environmental organisations to have at least 100 members in order to be involved in almost all environmental proceedings in Austria leads to a far-reaching restriction of access to courts to notably smaller circle of NGOs. Other options to prove the competency and commitment of environmental organisations as provided in Swedish law are not foreseen in the amendment. The obligation to disclose data of members and the resulting data protection concerns are an additional objectively unjustified burden.

The present amendment is in conflict with Article 2 (5) of the Aarhus Convention providing that environmental organisations should be granted wide access to justice. Even though restrictions through national legislation are possible, they must be objectively justified and may not lead to a fundamental obstacle in practise. Such a burden, however, can be assumed in the present case. The ACCC has found that a restriction according to quantitative characteristics is not in compliance with the Convention. The "Swedish model" provides for alternative criteria for access to justice not granted in the UVP-G.

Not only considering the fact that, currently, environmental organisation challenge not more than two EIA decisions per year, the amendment does not comply with the principle of "wide access to justice" laid down in the Aarhus Convention and ECJ ruling. In addition, the provision contradicts the obligation to sufficiently recognise and support environmental organisations.

As a result, environmental organisations could still become involved in future proceedings even if not meeting the criteria set by the amendment. They could invoke this illegality to be accorded the status of party or participant, if necessary retrospectively. This would lead to increased legal uncertainty both for project applicants and for the public.