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**Betreff: UNECE Aarhus Konvention / Vorbereitung des 6. Treffens der Vertragsstaaten 2017, Aktualisierung des Umsetzungsberichts Österreichs, Konsultation, GZ: BMLFUW-UW.1.4.1/0010-I/1/2016**

Sehr geehrte Frau Dr.in Muner-Bretter,

mit Schreiben vom 29.04.2016, GZ: BMLFUW-UW.1.4.1/0010-I/1/2016, wurde darüber informiert, dass Österreich als Vertragspartei der UNECE Aarhus Konvention bis längstens 15.12.2016 einen aktualisierten Umsetzungsbericht zu übermitteln hat. Darüber hinaus wurden unter anderem auch Umweltorganisationen dazu eingeladen, Beiträge sowie Aktualisierungen bzw. Ergänzungen in englischer Sprache bis spätestens 20.06.2016 in elektronischer Form zu übermitteln. In diesem Zusammenhang wurde darauf hingewiesen, dass aus Sicht des BMLFUW insbesondere die Entwicklungen zu Art 9 Abs 3 Aarhus-Konvention relevant seien, zumal beim letzten Vertragsstaatentreffen 2014 bezüglich dieser Konventionsbestimmung die Nichteinhaltung Österreichs durch Entscheidung V/9b festgehalten worden war. Außerdem wurde im Speziellen ersucht, Informationen über allfällige Novellierungen von Gesetzen und Verordnungen, die im Umsetzungsbericht aus 2014 bereits angeführt sind, bzw. mögliche relevante Websites oder Projekte im Zusammenhang mit der Aarhus-Konvention zu übermitteln, um diese im aktualisierten Umsetzungsbericht Österreichs einfließen zu lassen.

Der Umweltdachverband und seine Mitgliedsorganisationen Kuratorium Wald und Österreichischer Alpenverein bedanken sich für die Einladung zur Abgabe eines Beitrags für einen aktualisierten Aarhus-Umsetzungsbericht Österreichs und nehmen dazu im Folgenden, wie erbeten in englischer Sprache, wie folgt Stellung:
In the following, we kindly like to give our comments on the implementation of the Aarhus Convention by Austria with a special focus on the status of the implementation of the access to justice provisions under Article 9 of the Aarhus Convention; this owed to the fact that by decision V/9b of the Meeting of the Parties, which endorsed the findings of the Aarhus Convention Compliance Committee (ACCC) regarding communications ACCC/C/2010/48 and ACCC/C/2010/63, it was found that Austria is in non-compliance with Article 9 (3) in conjunction with Art 9 (4) of the Aarhus Convention and also fails to comply with Article 4 (7) in conjunction with Art 9 (4) of the Aarhus Convention.

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## Comments on Art 9 (1) Aarhus Convention

### Improvements of access to justice with regard to requests for environmental information on federal law level – abrogation of the requirement of a separate "official notification"

By Decision V/9b on compliance by Austria, adopted by the Meeting of Parties (MoP) at its 5th session, the MoP – in the context of the public´s right to access to environmental information – had endorsed the following findings of the Committee with regard to communication ACCC/C/2010/48:

> "*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;*
> *(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*;"

Meanwhile, Austria has adopted an amendment of the Federal Environmental Information Act (Umweltinformationsgesetz – UIG),[1] to address the non-Aarhus-conform requirement of a separate "official notification" in case of partial or total denial of a request for environmental information. Now, the Federal Environmental Information Act explicitly stipulates that, if the environmental information requested is not at all or not to the requested extent provided, a decree shall be issued without undue delay, but two months after receipt of the request for information at the latest (§ 8 para. 1 of the Federal Environmental Information Act).

From our point of view, we welcome this amendment as a long-needed improvement regarding access to justice under Art 9 (1) of the Aarhus Convention.

### Amendments of all provincial Environmental Law Acts still missing

For the provincial level, the process of amending the provincial Environmental Law Acts accordingly to the amendment on federal level is under discussion and has been already started by some provinces (like Vienna), but is still not completed in any of Austria's provinces.
Therefore, if a request for environmental information concerns an environmental law under the competence of the province (e.g. nature protection law), a separate official notification is still needed in order to challenge the (partial) denial of giving the environmental information as requested and in that way is still not in conformity with the requirements under the Aarhus Convention.

### Further recommendations on improvement of access to justice under Art 9 (1)

To further improve access to justice under Art 9 (1) in conjunction with Art 9 (4) of the Aarhus Convention, we recommend to also shorten time limits for granting access to justice in the appeal procedure itself. At the moment, the administrative authority, which has issued the decree, has a total of two months to make a pre-decision and then, the respective Administrative Court of the Province has another six months to issue a verdict – still too long a time period to get the requested environmental information.
It would be considered a great improvement of access to justice, if the Provincial Administrative Courts also only had a two months´ time period to issue the verdict.
Besides, there are still remedies missing in order to be able to compulsorily execute the Provincial Administrative Court´s verdicts, if the authority continues denying the environmental information as ordered.

[1] See Federal Law No. 95/2015, published in the Federal Law Gazette, August 3rd, 2015.

## Comments on Art 9 (2) Aarhus Convention

### Improvements of access to justice for neighbours in EIA-declaratory procedures (§ 3 (7a) EIA-Act)

In the context of the access to justice requirements under Art 9 (2) of the Aarhus Convention, it can be concluded that the access to justice rights of neighbours have been improved – this owed to the judgement of the European Court of Justice (ECJ) in the case "*Karoline Gruber*":[2]

In this case, the ECJ had to decide upon a request for a preliminary ruling concerning the interpretation of Art 11 of 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. The request has been made in proceedings between Ms Gruber, on the one hand, and the Unabhängiger Verwaltungssenat für Kärnten, the EMA Beratungs- und Handels GmbH and the Federal Minister for Economic Affairs, Family and Youth, concerning a decision authorising the construction and operation of a retail park on land bordering property belonging to Ms Gruber.
The entire case was about the legal question, if Ms Gruber as a neighbour has the right to bring an action directly against the prior decision of a government not to carry out an EIA (Environmental Impact Assessment) in respect of that facility.
The referring court had stated that paragraph 3 (7) of the Austrian EIA-Act (UVP-G 2000) reserves the status of parties to the procedure only to the project applicant, the participating authorities, the ombudsman for the environment and the municipality concerned, and, consequently, limits the possibility of intervening in the procedure leading to the adoption of an EIA declaratory decision and of bringing an action against that decision. Besides, the referring court further explained that, despite the fact that the neighbours of the project, such as Ms Gruber, do not have the status of parties to the procedure leading to the adoption of an EIA declaratory decision, they are bound, like national authorities and courts, by such a decision which has become final.
The ECJ explicitly held that this "*general exclusion restricts the scope of Article 11 (1) and is accordingly incompatible with Directive 2011/92.*" (No. 43) Moreover, "*it follows that an administrative decision not to carry out an EIA taken on the basis of such national legislation cannot prevent an individual, who is part of the 'public concerned' within the meaning of that directive and satisfies the criteria laid down in national law regarding 'sufficient interest' or, as the case may be, 'impairment of a right', from contesting that administrative decision in an action brought against either that decision, or against a subsequent development consent decision.*" (No. 44).
On these grounds, the ECJ ruled that:
"*Article 11 of 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 must be interpreted as precluding national legislation, such as that at issue in the main proceedings pursuant to which an administrative decision declaring that a particular project does not require an environmental impact assessment, which is binding on neighbours who were precluded from bringing an action against that administrative decision, where those neighbours, who are part of the 'public concerned' within the meaning of Article 1(2) of that directive, satisfy the criteria laid down by national law concerning 'sufficient interest' or 'impairment of a right'. It is for the referring court to verify whether that condition is fulfilled in the case before it. Where it is so fulfilled, that court must hold that the administrative decision not to carry out such an assessment is not binding on those neighbours.*"

Consequently, the Austrian Federal EIA-Act got amended in that way, that § 3 (7a) EIA-Act, apart from recognised environmental NGOs, it now also grants neighbours the right to bring an action against negative environmental impact assessment declaratory decisions before the Federal Administrative Court.[3]

[2] ECJ, April 16th, 2015, C-570/13.
[3] See Federal Law No. 4/2016.

## Still shortcomings of access to justice for NGOs in EIA-declaratory procedures (§ 3 (7), (7a) EIA-Act)

Regarding recognised environmental NGOs according to § 19 (7) EIA-Act, a lot of shortcomings in the EIA-declaratory procedure are still to be mentioned:

As already often criticized, recognised environmental NGOs still have no full legal standing in EIA-declaratory procedures, but only have an ex-post right of review for the final EIA screening decision of the authority, if it happens to be negative. In this way, NGOs are excluded from the screening procedure itself. This lack of public participation during the EIA-declaratory procedure is to be seen in non-conformity with the jurisprudence of the ECJ[4] as well as with the jurisprudence of the ACCC[5], which both demand a public participation at such a time where all options are still open.

It becomes very evident that just an ex-post right of review is not sufficient at all if there is no screening procedure: NGOs cannot call for one, thus their ex-post right of review becoming a so-called "res nullius", leaving a gap of legal protection in the system. To address this gap, in early 2015, the Federal Administrative Court (Bundesverwaltungsgericht) decided to allow all NGOs to also apply for a screening procedure.[6] The ruling is still under review at the highest administrative court.

Also, the right of NGOs to address the highest administrative court (Verwaltungsgerichtshof) against decisions of the Federal Administrative Court confirming a negative EIA-screening-decision is still controversially discussed and not explicitly stipulated in the EIA-Act.

# Comments on Art 9 (3) Aarhus Convention

## Legal standing of members of the public is still lacking in most of Austria´s environmental sectoral laws

Article 9 (3) of the Aarhus Convention stipulates that:
"*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*"

The MoP held by the above mentioned decision V/9b that Austria, "*in 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, is not in compliance with article 9, paragraph 3, of the Convention*". In addition, the MoP regarded Austria to be in non-compliance with its obligations under Art 9 (3) of the Aarhus Convention as "*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*".

Unfortunately, it has to be asserted that hardly any new legislation has been enacted to confer legal standing rights to members of the public. Still, it has to be found true that the legal standing rights of acknowledged environmental organizations are rather limited: It is still mainly the EIA and IPPC laws as well as the Act on Environmental Liability that grant legal standing to NGOs.

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[4] See for example: ECJ C-435/97, *WWF* et al; ECJ C-213/03, *Delena Wells*; ECJ C-75/08, *Christopher Mellor*.
[5] See for example *Armenia* ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, May 10th, 2006, para. 29; *Hungary* ACCC/C/ 2004/4 ECE/MP.PP/C.1/2005/2/Add.4, March 14th. 2005, para. 11; *Lithuania* ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 71.
[6] See Federal Administrative Court, W104 2016940-1/3E.

So far, two working groups have been installed: A working group between the Federal Ministry of Agriculture, Forestry, Environment and Water Management and the Provinces, and another working group among the Provinces itself that was installed by the Provincial Administration Chief Executives (LandesamtsdirektorInnen). But to the current day, no new legislation to improve legal standing rights for environmental NGOs has been enacted.
Therefore, the current situation is still one where environmental NGOs in most of the sectoral environmental law procedures have not legal standing and thereby no rights of appeal.

Moreover, the Highest Administrative Court (Verwaltungsgerichtshof, VwGH) has developed a case law saying that Art 9 (3) Aarhus Convention is not directly applicable,[7] because this provision would not be clear and precise enough, since the parties to the Convention can stipulate criteria that members of the public have to fulfill in order to get granted an access to justice. Therefore it would be the competence of the legislator to confer such rights to the members of the public. Accordingly, all claims of NGOs based on direct application of Art 9 (3) Aarhus Convention have so far been denied.

Only some few decisions by authorities or courts in lower instances have interpreted the national procedural law in accordance with the ECJ judgement "*Slovak Brown Bear*",[8] thereby granting environmental NGOs legal standing by direct application of Art 9 (3) Aarhus-Convention. In this context we would like to mention the decree by the governor of Salzburg, granting an environmental NGO the right to request the issue of appropriate measures to fulfil the thresholds for immissions of $NO_2$ in the Province of Salzburg;[9] also, the aforementioned judgement of the Federal Administrative Court granting an environmental NGO the right to request for an EIA-screening procedure is to name.[10]

If the Constitutional Court is changing its strict case-law, according to which NGOs as legal parties have no „true" subjective rights and therefore cannot address the Constitutional Court, is still to be awaited. There is still a case pending before the Constitutional Court, where an environmental NGO has challenged the legality of a spatial planning act in the Province of Burgenland due to nature protection reasons.[11] The Constitutional Court has opened a preliminary proceeding, which may be interpreted as a positive signal.

## Status of Environmental Ombudsman gets weakened

Environmental Ombudsman (Umweltanwaltschaft, http://www.umweltanwaltschaft.gv.at) are bodies established in the (nine) regional governments (and administrations) for the purpose of protecting the environment on regional level.
Even tough environmental ombudsman are to be considered an institution with close direct or indirect ties to the provincial governments and due to this lacking "independence" in our understanding, cannot be considered members of the public in the sense and understanding of the Aarhus Convention, they are well appreciated as institutions and essential co-actors in the environmental field. Also, their initiation can be considered as going beyond the minimum requirements of the Aarhus Convention and therefore is a very valuable contribution to guarantee the proper enforcement of environmental law provisions.
We therefore have noticed with great concern and worry, that in May 2016 by the provincial parliament of Upper Austria decided that the position of the environmental ombudsman in the Province of Upper Austria shall become heavily weakened and that therefore the Upper Austria´s Act on Environmental Protection (Umweltschutzgesetz) shall get amended in a way that the environmental ombudsman there shall – like in the Province of Tyrol - lose its right to appeal to the Highest Administrative Court (Verwaltungsgerichtshof, VwGH) and lose competences regarding environmental matters lying within the special competences of the municipality.
This development has to be strongly criticized as a step back in the general efforts to finally implement the Aarhus Convention in Austria.

[7] See for example: VwGH 27.04.2012, 2009/02/0239; VwGH 22.04.2015, 2012/10/0016; VwGH 28.10.2015, 2012/10/0137.
[8] See ECJ 08.03.2011, C-240/09, *Lesoochranárske zoskupenie (Slovak Brown Bear)*.
[9] Decree of the governor of Salzburg, August 14th, 2014, Zl 205-01/1785/10-2014.
[10] Judgement of the Federal Administrative Court, 11.02.2015, GZ: W104 2016940-1/3E.
[11] Case No. V 87/2014-2.

## Comments on Art 9 (4) Aarhus Convention

Under Art 9 (4), the Aarhus Convention mainly requires, that the procedures under Art 9 of the Aarhus Convention "*shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*."

In this context we may refer to the above said under sub-chapter "comments on Art 9 (1) Aarhus Convention", where we already acknowledged the abrogation of the requirement of a separate "official notification" to get granted access to justice as an improvement towards a timely procedure for getting access to justice in environmental information matters. Still, we also may bring into mind our remarks on how to further improve access to justice under Art 9 (1) to make it even more timely and effective.

### ECJ-judgment on prohibition of foreclosure

With regard to the Aarhus Convention´s requirement of "effective remedies", we may refer to one of the latest judgments of the ECJ on the legal institute of "foreclosure" (Präklusion), which is quite common in Germany as well as in Austria.
In its judgement C-137/14, the ECJ clearly held that by restricting "*the standing to bring proceedings and the scope of the review by the courts to the objections which have already been raised within the time-limit set during the administrative procedure which led to the adoption of the decision*", the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75. The court has to be able to make full review of the merit of the administrative authority´s decision at stake. In this context, the ECJ elaborates that "*the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety*."

## Comments on Art 9 (5) Aarhus Convention

Art 9 (5) of the Aarhus Convention stipulates that "*in order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*" Also capacity building measures can qualify as appropriate assistance mechanisms under Art 9 (5) of the Aarhus Convention. To "*develop a capacity-building programme and provide training on the implementation of the Aarhus Convention for federal and provincial authorities responsible for Aarhus-related issues, and for judges, prosecutors and lawyers*" was also one recommendation under decision V/9b by the MoP.

### Capacity-building project "KOMM-Recht"

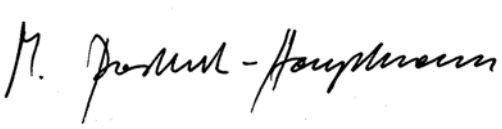
In this context, an Aarhus capacity building project ("KOMM-Recht"), carried out by the "Umweltdachverband", an environmental NGO (umbrella organisation) together with its member organizations (mainly "Kuratorium Wald" and "Österreichischer Alpenverein") and the University of Graz, was approved by the Federal Ministry of Agriculture, Forestry, Environment and Water Management for a time period from June 1st, 2015 to June 30th, 2017. The target groups are administrative authorities and courts as well as members of the public (NGOs, citizen initiatives). The capacity building measures will focus on informing about the Aarhus Convention and recurrent as well as current environmental legal topics, and explaining possibilities of participation for the public in environmental procedures under current national law. Work packages will be: 6 Aarhus capacity building workshops throughout Austria, a guidance document on "participation possibilities" for the interested members of the public, a law clinic carried out by the University of Graz, an academic conference in close cooperation with the University of Graz, the building-up of an NGO-networking-platform and public relations.

Need for special legal rules regarding the carrying of costs in ELD-procedures

In one of its latest rulings, the Provincial Court of Lower Austria has held that an environmental NGO, that has requested to carry out an ELD-procedure, has to carry the costs of a non-official expert, that was appointed in this very procedure under the Environmental Liability Act, justifying this decision by reference to § 76 General Administrative Procedure Act (Allgemeines Verwaltungsverfahrensgesetz, AVG) that generally regulates who has to carry procedural costs, in this case, the applicant calling for the procedure.[12]

It would very much undermine the possible roles of non-profit organisations in these procedures, if it becomes a case law that NGOs, calling for a procedure under the Environmental Liability Act, have to cover all cash expenditure, which may easily exceed their financial limits. Therefore, a special norm in the Environmental Liability Act is needed to exempt NGOs from experts' costs that may result from these procedures, because the general norm in the General Administrative Procedure Act is not suitable for NGOs, such ELD-cases and would also be likely not to be in compliance with the requirement of reducing financial barriers as laid down in Art 9 (5) of the Aarhus Convention.

Mit freundlichen Grüßen,



Mag. Michael Proschek-Hauptmann
Geschäftsführer Umweltdachverband

Mag. Franz Maier
Präsident Umweltdachverband

[12] See judgment of the Provincial Court of Lower Austria from 12.05.2016, LVwG-AV-31/006-2015.