

Unleashing the watchdogs of the environment? Qualified participation and review rights for NGOs in Austria

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Abstract

Ever since the respective accession to the Aarhus Convention (AC), the EU's and Austria's non-compliance with its third pillar was being criticised. Some two years after the Court of Justice's judgment in C-664/15, *Protect*, where Austria's system of legal protection was under scrutiny, Austria introduced the respective provisions in its federal sectoral environmental laws and the regional environmental protection laws. The first part of this paper is dedicated to the Court of Justice's judgment and begins with illuminating the broader context of non-compliance with the AC in Austria and in the EU. Then, the Opinion of the Advocate General, the Court of Justice's judgment, and the subsequent judgements of the Austrian Supreme Administrative Court (Verwaltungsgerichtshof, VwGH) are being analysed. Based on that, a second part discusses the consequences of *Protect* for the relationship of art 9 of the AC and art 47 of the Charter of Fundamental Rights of the European Union (CFR), the implications for the EU's and Austria's compliance with both EU law and the AC, and the latest legislative developments on the federal and regional level in Austria. Whereas the amendments bring Austria in compliance with the EU environmental acquis, parts of the AC remain unimplemented.

Catchwords

Aarhus Convention; access to justice; EU environmental law; right to an effective remedy; right to participation; NGOs

Regulations

Art 9 AC; Art 47 CFR; Aarhus Regulation; Habitats Directive; Wild Bird Directive; UVP-G; AWG; WRG; IG-L; Krnt NSG; Krnt FischereiG, Krnt JagdG; NÖ NSchG; JagdG; oö NSchG; Sbg NSchG; Sbg NationalparkG; Sbg JagdG; Sbg FischereiG; StESUG; Tir NschG; Tir JagdG; Tir FischereiG; § VlbG NSchG; VlbG JagdG; VlbG FischereiG

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I. Introduction

›Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing.‹¹

That is how Advocate General *Sharpston* explained the necessity of environmental organisations in 2017. Prior to that, Advocate General *Kokott* described the situation of environmental organisation in 2016 by referring to the opus of renowned authors: ›In Kafka, the man seeking justice is for no discernible reason denied access to the court and eventually dies of exhaustion. Don Quixote, on the other hand, insists on tilting at windmills instead of devoting himself to more sensible pursuits.‹² Despite the EU's and Austria's respective accession to the Aarhus Convention (AC) in 2005,³ such comparison was still adequately describing the situation of environmental NGOs in Austria, at least, prior to recent amendments of environmental laws in 2019. Especially, the (non-)implementation of the third pillar (access to justice),⁴ the aspect that mixed agreements are not explicitly mentioned in the EU Treaties, and a somewhat general reluctance to implement Aarhus-related obligations attracted academic attention.⁵ Some three years after the EU's accession, a Communication from the Public was brought to the AC Compliance Committee's attention, complaining

about the EU's non-compliance.⁶ Similarly, Austria's reluctance to implement Aarhus-related obligations was brought to the Compliance Committee's attention. The European Commission as well as the Court of Justice jumped on the bandwagon of scrutiny.

In the main proceedings of the latest Austrian preliminary reference, a recognised environmental non-governmental organisation (NGO), *Protect*, requested to be admitted as party to administrative proceedings for renewing a permit for a ski lift's (*Aichelberglift Karlstein GmbH*) snow-producing facility, whose water supply serves on a reservoir of a nearby river.⁷ As the request was denied, *Protect* brought an action before the Lower Austria Regional Administrative Court, claiming an infringement of art 9 para 3 AC and of the Water Framework Directive.⁸ That action was dismissed because *Protect* had allegedly already lost its legal standing pursuant to § 42 AVG, since it had not invoked water-related rights in due time and had hence been precluded. Eventually, the Supreme Administrative Court (VwGH) referred the case to the Court of Justice.⁹ In *Protect*, the Court of Justice for the first time read art 9 para 3 AC in conjunction with art 47 Charter of Fundamental Rights of the European Union (CFR), stressed the need for a consistent interpretation, shed light on the issue whether the right to review can be separated from the right to participation, and clarified whether § 42 of the AVG can be applied to the given case. Followed by the Court of Justice's and the VwGH's judgments, the Austrian federal and regional legislators took action.

1 Opinion of Advocate General *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 77. Cf *Stone*, Should Trees Have Standing? – Toward Legal Rights for Natural Objects (1974) and *Schulev-Steindl*, Umweltbeschwerde im Lichte der Aarhus-Konvention, in *Institut für Umweltrecht der JKU Linz* (Hrsg), Jahrbuch des österreichischen und europäischen Umweltrechts (2010) 169.

2 Opinion of Advocate General *Kokott* in EuGH C-243/15, *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2016:491 (hereinafter referred to as *Brown Bears II*), para 2.

3 Council Decision (EU) 2005/370 of 17.2.2005 on the conclusion, on behalf of the European Community, of the Convention on access to information public participation in decision-making and access to justice in environmental matters, OJ L 2005/124, 1.

4 The Aarhus Convention consists of three pillars: access to information, public participation in decision-making and access to justice in environmental matters. As a new kind of environmental conventions, the AC aims at linking environmental rights and human rights as well as government accountability and environmental protection (Cf *UNECE*, The Aarhus Convention: An Implementation Guide², UN Doc. ECE/CEP/72/Rev.1 (2014) 15).

5 See eg *de Baere/Nowak*, The right to ›not prohibitively expensive‹ judicial proceedings under the AC and the ECJ as an international (environmental) law court: Edwards and Pallikaropoulos, CML Rev 2016/53, 1727 (1728); *Klamert*, Dark Matter – Competence, Jurisdiction and ›the Area Largely Covered by EU Law‹: Comment on *Lesoochranárske*, ELRev 2012/37, 340 (340 f); *Krawczyk*, The Slovak Brown Bear Case: The ECJ Hunts for Jurisdiction and Environmental Plaintiffs Gain the Trophy, EnVLR 2012/14, 53 (55); *Jans*, Who is the referee? Access to Justice in a Globalised Legal Order – ECJ Judgement C-240/09 *Lesoochranárske zoskupenie* of 8 March 2011, REAL 2011/, 87 (90). Regarding Austria see for example *Madner*, Study on the Implementation of Art 9.3 and 9.4 of the AC in 10 of the Member States of the European Union + Croatia – Austria (2013), <https://ec.europa.eu/environment/aarhus/access_studies.htm>.

6 *UNECE*, Decision I/7: Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21.–23.10.2002, ECE/MP.PP/2/Add established the AC Compliance Committee as review mechanism provided for in Art 15 AC. Art 13 and art 18 of Decision I/7 mentioned ›Communications from the Public‹ as one option leading to the assessment of a Treaty party's alleged non-compliance. According to art 35 paras 1 and 2 and art 37, the Compliance Committee adopts non-binding findings and recommendations on the Treaty parties' implementation of the AC, on the basis of which the Meeting of the Parties decides on binding subsequent measures – preferably by consensus, if necessary, also by a three-fourths majority.

7 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 20. Initially, there was a second case EuGH C-663/15, *Umweltverband WWF Österreich*, EU:C:2017:623 brought before the Court of Justice in which the same questions arose. Both the cases were joined for the purposes of the written and oral procedure and the judgment. As AG *Sharpston* expressed in her Opinion in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 28–29, she and the Court of Justice were not very pleased as the notification, that an answer in C-663/15 became void, was submitted only some three months later.

8 Directive (EC) 2000/60 of the European Parliament and of the Council of 23.10.2000 establishing a framework for Community action in the field of water policy (Water Framework Directive), OJ L 2000/327,1.

9 Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 14.12.2015 – *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* (Case C-664/15), OJ C 2016/111, 4.

II. Case C-664/15, *Protect*

A. Factual and legal background

1. The Aarhus Convention as mixed agreement of the Union and the Member States

Since mixed agreements are not explicitly mentioned in the EU Treaties, the implementation and interpretation of their provisions is naturally prone to problems.¹⁰ The third pillar of the AC, art 9 AC (access to justice), is in itself tripartite, with a first paragraph referring to access to information, a second one protecting participation in decision-making, and a third one functioning as default provision, which demands »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.«¹¹ The complementary art 9 para 4 AC established certain criteria for granting access to justice under the AC, which are reminiscent of the guarantees of art 47 CFR.

When concluding the AC, the European Community stressed that by having adopted several Directives within the scope of the first and the second pillar it had already – and even prior to the conclusion of the AC – exercised its competence: regarding art 9 para 3 AC, the EC declared that these obligations have not been entirely covered by EU secondary legislation and that until then, the Member States remain responsible.¹² Partially, the Participation Directive also implemented the third pillar (art 9 para 2 AC) by inserting an art 10a into the Environmental Impact Assessment (EIA) Directive, and art 15 into the Integrated Pollution Prevention and Control (IPPC) Directive.¹³ Moreover, the so-called Aarhus Regulation governs access to justice against actions of the EU institutions.¹⁴ As of today, there are two options for ac-

cess to justice in EU related environmental matters: either Directives contain provisions guaranteeing access to justice (eg art 11 of Directive (EU) 2011/92) or such a right flows directly and materially from EU law (eg, as set out in point II.C, the prohibition of deterioration in art 4 of Directive (EC) 2000/60).¹⁵ In both cases, Member States need to observe the principle of equivalence and the principle of effectiveness of EU law.¹⁶

As the Court of Justice found, international agreements of the Union form an integral part of the EU legal order and are thus binding on the EU and its Member States.¹⁷ They enjoy a rank between primary and secondary EU law.¹⁸ The Court of Justice ascertained that the Member States must not only fulfil obligations under international agreements by international law but are also bound under EU law.¹⁹ Yet, the question whether (*all* parts of) mixed agreements, in particular art 9 para 3 AC, form an integral part of EU law, cannot be answered in a general manner, as strictly speaking it would be necessary to distinguish whether a provision falls in the EU's exclusive or in its shared competence or in the exclusive competence of the Member States.²⁰ (Details on the effects of) mixed agreements are not mentioned in the Treaties; hence, the Court of Justice even needed to establish its own jurisdiction as regards their interpretation.²¹ Pursuant to art 19 para 1 TEU, the Court »shall ensure that in the interpretation and application of the Treaties the law is observed (...).« However, it was disputed if the Court of Justice

¹⁰ On mixed agreements see *Hillion/Koutrakos* (Eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (2010); *Rosas*, *Mixed Union – Mixed Agreements*, in *Koskenniemi* (Ed), *International Law. Aspects of the European Union* (1998) 125.

¹¹ Art 9 para 3 AC.

¹² Declaration by the European Community in Accordance with Art 19 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Annex to Council Decision (EC) 2005/370, OJ L 2005/124, 1, para 2.

¹³ Council Directive (EEC) 85/337 of 27.6.1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 1985/175, 40, now art 11 of Directive (EU) 2011/92 of the European Parliament and of the Council of 13.12.2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 2011/26, 1; Council Directive (EC) 96/61 of 24.9.1996 concerning integrated pollution prevention and control, OJ L 1996/257, 26, now Directive (EU) 2010/75 of the European Parliament and of the Council of 24.11.2010 on industrial emissions (integrated pollution prevention and control), OJ L 2010/334, 17.

¹⁴ Regulation (EU) 1367/2006/EC of the European Parliament and of the Council of 6.9.2006 on the application of the provisions

of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 2006/264, 13.

¹⁵ See also VwGH 26.11.2015, Ra 2015/07/0051.

¹⁶ EuGH C-240/09, *Lesoochránárske zoskupenie*, ECLI:EU:C:2011:125 (hereinafter referred to as *Brown Bears I*), para 48 referring to EuGH C-268/06, *Impact*, ECLI:EU:C:2008:223, para 46 and the case law cited.

¹⁷ EuGH 181/73, *Haegeman v Belgian State*, ECLI:EU:C:1974:41, para 5; EuGH C-21/72 to C-24/72, *International Fruit Company v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, paras 14–18; EuGH C-253/83, *Kupferberg v Hauptzollamt Mainz*, ECLI:EU:C:1985:8, para 13 and the subsequent case law. See *Craig/de Búrca*, *EU Law. Texts, Cases, and Materials*⁶ (2015) 357, 361; *Mendez*, *The Legal Effects of EU Agreements* (2013) 62 ff.

¹⁸ EuGH C-308/06, *Intertanko and Others*, ECLI:EU:C:2008:312, para 42.

¹⁹ EuGH C-61/94, *Commission v Germany (International Dairy Arrangement)*, ECLI:EU:C:1996:313, para 52; *Craig/de Búrca*, *EU Law*⁶, 356.

²⁰ *Granvik*, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, in *Koskenniemi* (Ed), *International Law. Aspects of the European Union* (1998) 256; *Kaddous*, *Effects of International Agreements in the EU Legal Order*, in *Cremona/de Witte* (Eds), *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 294.

²¹ Cf *Koutrakos*, *Interpretation of Mixed Agreements*, in *Hillion/Koutrakos* (Eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (2010) 123; *Eeckhout*, *EU External Relations Law* (2011) 277 ff.

was also competent to interpret *all* the provisions of mixed agreements.²² In other cases, the Court of Justice declared having jurisdiction when provisions of an international agreement apply both to domestic and EU law.²³ Moreover, the Court of Justice confirmed its jurisdiction when the subject matter of an international agreement is largely covered by EU legislation.²⁴ Since the AC was adopted based on a shared competence, it is the Court of Justice's task to demarcate obligations which the Union assumed from those that remained within the Member States' responsibility.²⁵ The Court endorsed its finding in regard to art 9 para 3 AC in the *Brown Bears I* case and argued that it intends to »forestall future differences of interpretation«. ²⁶ Moreover, the Court of Justice reinforced its demand for a consistent interpretation in relation to art 9 para 3 AC.²⁷

2. The EU's non-compliance with the Aarhus Convention

When assessing the EU's implementation of the third pillar, the Compliance Committee laid focus on remedies available on the EU level. Apart from direct actions at the General Court, the so-called Aarhus Regulation (AR) governs access to justice to EU institutions and bodies.²⁸ Therefore, access to justice could be provided via the individual action for annulment (art 263 para 4 TFEU) referred to in art 12 para 1 AR or via the internal review mechanism provided for in art 10 para 1 AR.²⁹ Concerning the former, the Compliance Commit-

tee found that the criterion of individual concern is too strictly defined for the action for annulment to be considered as implementing art 9 para 3 AC.³⁰ The main point of criticism was that the Court of Justice did not adapt the *Plaumann* formula accordingly.³¹ It repeatedly rejected the efforts of the Court of First Instance, eg in *Jégo-Quééré* and *Unión de Pequeños Agricultores*, to re-define the criterion of individual concern.³² However, these cases, which the Compliance Committee addressed in Part I of its findings and recommendations, had either been brought before the Court of Justice prior to the EU's accession to the AC and/or before the AR was adopted. Thus, the Compliance Committee awaited the Court of Justice's ruling in *Stichting Milieu* where both were in place.³³

Having found that the criteria for the individual action for annulment were too strict, the Compliance Committee stated that the internal review mechanism of art 10 para 1 AR was not able to compensate for these shortfalls.³⁴ The personal scope of application of art 10 para 1 AR is indeed narrower than the one of art 9 para 3 AC, because only NGOs and not *all* members of the public have access to the review mechanism.³⁵ Based on this finding, the Compliance Committee concluded that art 9 para 3 AC had not been implemented correctly.³⁶ Even though the Treaty parties may adopt criteria for access to justice for members of the public, these criteria must not be of such a strict nature that *de facto* no one has access to justice.³⁷ Furthermore, the Compliance Committee claimed that art 10 para 1 AR would only cover administrative acts adopted under environmental law, whereas art 9 para 3 AC intended coverage of a wide range of acts.³⁸ Nonetheless, the definition of »environmental law« in art 2 para 1 lit f AR was wider than the Compliance Committee anticipated: »Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy

22 *Jans*, REAL 2011/4, 87 (94f); *Klamert*, ELRev 2012/37, 340 (343); *Krawczyk*, EnvLRev 2012/14, 53 (57); *Szegedi*, The Eastern Way of Europeanisation in the Light of Environmental Policymaking: Implementation Concerns of the AC-Related EU Law in Central and Eastern Europe, ELTE LJ 2014/1, 117 (127); *Hoops*, Interpretation of Mixed Agreements in the EU after Lesoochranarske Zoskupenie, HanseLR 2014/10, 3 (3). See also *Schink*, Der slowakische Braunbär und der deutsche Verwaltungsprozess, DÖV 2012/16, 622 (625).

23 EuGH C-431/05, *Merck Genéricos Productos Farmacéuticos*, ECLI:EU:C:2007:496, para 24. For a critical analysis see *Koutrakos* in *Hillion/Koutrakos* 129.

24 EuGH C-239/03, *Commission v France (Étang de Berre)*, ECLI:EU:C:2004:598, para 29.

25 EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 31; *Jans*, REAL 2011/4, 87 (90).

26 EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 42 and the case law cited.

27 EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 50. See *Pirker*, Access to Justice in Environmental Matters and the AC's Effects in the EU Legal Order: No Room for Nuanced Self-Executing Effect? RECIEL 2016/25, 81 (82, 87).

28 Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6.9.2006 on the application of the provisions of the AC on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 2006/264, 13.

29 For further details on the internal review mechanism see *Garçon*, The Rights of Access to Justice in Environmental Matters in the EU – The Third Pillar of the AC, EFL 2013/2, 78.

30 ACCC/C/2008/32 (EU) (Part II) ECE/MP.PP/C.1/2017/7, paras 64ff.

31 Cf EuGH 25/62, *Plaumann v Commission of the EEC*, ECLI:EU:C:1963:17, para 107.

32 Cf EuG T-177/01, *Jégo-Quééré v Commission*, ECLI:EU:T:2002:112, para 51; cf EuGH C-263/02 P, *Commission v Jégo-Quééré*, ECLI:EU:C:2004:210, para 33. See also EuGH C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, paras 37 and 42.

33 ACCC/C/2008/32 (EU) (Part I) ECE/MP.PP/C.1/2011/4/Add.1, para 10; EuGH C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

34 ACCC/C/2008/32 (EU) (Part II), para 120.

35 Cf ACCC/C/2008/32 (EU) (Part II), para 92.

36 ACCC/C/2008/32 (EU) (Part II), para 93.

37 UNECE, Implementation Guide², 198; ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para 35; ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, paras 31, 35, 41; ACCC/C/2011/58 (Bulgaria), ECE/MP.PP/C.1/2013/14, para 65.

38 ACCC/C/2008/32 (EU) (Part II), para 104.

on the environment as set out in the Treaty«. Accordingly, the Aarhus Regulation could not only be applied to measures based on art 192 TFEU, but also to other areas of EU law where environmental protection generally understood needs to be respected (art 11 TEU and art 37 CFR).³⁹ In addition, the Compliance Committee misinterpreted the peculiarities of EU law, its implementation, and its enforcement: large parts of EU law are implemented and enforced in a decentralised manner, thus, the Member States »shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.«⁴⁰ Consequently, in the assessment of the EU's compliance with the AC, the Compliance Committee should have also taken the Member States' implementation into account and/or examine if and how the EU reminds them of their commitments.

3. Austria's non-compliance with the Aarhus Convention: the road to *Protect*

Ever since Austria's accession to the AC, legal scholars have analysed the impact of the Court of Justice's judgments on Austria's non-implementation of respective obligations.⁴¹ The lack of participation rights for NGOs,⁴² as well as their non-existent or non-effective right to lodge a complaint,⁴³ were vastly criticised.

39 Art 2 para 1 lit f AR.

40 Art 19 para 1 subpara 2 TEU.

41 *Alge/Schamschula*, Meilensteine der Aarhus Umsetzung in *Hochreiter* (Hrsg), 15 Jahre Aarhus-Konvention, Tagungsband (2017) 1; *Berger W*, UVP-Verfahren: Vereinbarkeit von Unionsrecht und Präklusion, RdU-U&T 2012/12, 38 (41 ff); *Goby*, Aktuelle Probleme der Aarhus-Konvention in *Schulev-Steindl* (Hrsg), Ressourcenknappheit – Umwelthaftung und Naturgefahren (2013) 185; *Hauer*, Aktuelle Fragen der Verfahrensbeteiligung, RdU-U&T 2016/26, 103; *Schulev-Steindl*, Instrumente des Umweltrechts – Wirksamkeit und Grenzen, in FS Raschauer B (2013), 527 ff; *Menguser*, Aarhus-Konvention hält Einzug in Naturschutzverfahren, ZVG 2017/4, 297; *Wagner/Fasching*, Grundlagenstudie zur Aarhus Konvention – Umwelthanwaltschaften als Instrument der Umsetzung fairer, rechtssicherer und effektiver Umweltverfahren (2017); *Wagner/Bergthaler/Fasching*, Umsetzung der Aarhus-Konvention in Umweltverfahren (2018).

42 *Alge*, Öffentlichkeitsbeteiligung und gerichtliche Kontrolle – Aarhus und seine Konsequenzen in *Institut für Umweltrecht der JKU Linz*, Jahrbuch des österreichischen und europäischen Umweltrechts (2017) 169; *Bachl*, Alles neu bei der Öffentlichkeitsbeteiligung im UVP-Verfahren?, in *Baumgartner* (Hrsg) Jahrbuch Öffentliches Recht (2016) 270 ff; *Bachl*, Beteiligung in Umweltverfahren, in *Hochreiter* (Hrsg), 15 Jahre Aarhus-Konvention (2017) 33 ff; *Madner*, Öffentlichkeitsbeteiligung und Verwaltung: Instrumente der Öffentlichkeitsbeteiligung – Vielfalt, Funktionen, Grenzen, in *Müller R* (Hrsg) GedS Machacek (2015) 227 (233 ff).

43 *Berger M*, Unionsrechtliche Anforderungen an einen effektiven gerichtlichen Rechtsschutz für die Grundrechtsträger, ZÖR 2013/68, 563; *Heselhaus*, Effektiver Rechtsschutz und effektiver Umweltschutz in *Institut für Umweltrecht der JKU Linz* (Hrsg), Jahrbuch des österreichischen und europäischen Umweltrechts (2015) 91 (107 ff); *Raschauer N*, Auswirkungen des Unionsrechts auf das Verfahrensrecht im Umweltbereich, in *Griller/Kahl/Kneihls/Obwexer* (Hrsg) 20 Jahre EU-Mitgliedschaft

The Compliance Committee reviewed Austria's compliance with the AC on three occasions. Firstly, communication ACCC/C/2008/48 (Austria) dealt with the *locus standi* for individuals and NGOs.⁴⁴ Secondly, the Compliance Committee found that applying the impairment of rights doctrine (*Schutznormtheorie*) to individuals, *if meeting the standards of the AC*, is *per se* not problematic.⁴⁵ However, the definition of neighbours (ie individuals who would be party to procedures under the EIA Act and would thus also have the right to appeal decisions) was drafted too narrowly, which is why an interpretation in the light of the AC's objectives was recommended.⁴⁶ In the third case, the Compliance Committee referred to previous cases from other Treaty parties, where it had already addressed the *locus standi* of NGOs, before addressing the Austrian status quo: parties do not have to establish a system of *actio popularis* but the criteria under national law must not be so strict »that they effectively bar all or almost all environmental organizations from challenging act or omission that contravene national law relating to the environment.«⁴⁷ The Compliance Committee criticised that several Austrian sectoral environmental acts would not provide standing for NGOs at all, unless the procedure would be consolidated by an integration in an EIA or IPPC procedure.⁴⁸ Accordingly, the criteria for standing shall be »revised and specifically laid down in sectoral environmental laws.«⁴⁹

Likewise, the European Commission (Commission) complained about Austria's sectoral environmental acts in a formal letter of notice.⁵⁰ In particular, the Commission referred to obligations contained in the Habitats Directive, the Water Framework Directive, the Air Quality Directive, and the Waste Framework Directive.⁵¹

Österreichs (2015) 983; *Schulev-Steindl*, Rechtliche Optionen zur Verbesserung des Zugangs zu Gerichten im österreichischen Umweltrecht gemäß der Aarhus-Konvention (Artikel 9 Absatz 3) – Endbericht, Studie im Auftrag des BMLUF (2009) 59 ff; *Weber K/Schmid*, Die Rechtsmittelbefugnis von Umweltorganisationen in Umweltverfahren, in FS Stolzlechner (2013) 705; *Weber T*, Umweltschutz durch Rechtsschutz? (2015).

44 ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, paras 62 ff. In communication ACCC/C/2008/26 (Austria), ECE/MP.PP/C.1/2009/6/Add.1 an alleged transposition deficit of the obligations stemming from Art 9(3) was not considered substantiated enough. In communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3 access to justice of in case of a contravention of administrative penal laws and criminal laws was reviewed.

45 ACCC/C/2010/48 (Austria), para 63.

46 ACCC/C/2010/48 (Austria), para 63.

47 ACCC/C/2005/11 (Belgium), para 25; ACCC/C/2006/18 (Denmark), para 29.

48 ACCC/C/2010/48 (Austria), paras 71 ff.

49 ACCC/C/2010/48 (Austria), para 81.

50 Formal letter of notice of 11.7.2014, C (2014) 4883 final. In the formal letter of notice the European Commission referred to ACCC/C/2008/48 which can only mean ACCC/C/2010/48.

51 Council Directive (EEC) 92/43 of 21.5.1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 1992/206, 7;

Within the scope of application of these Directives, art 9 para 3 AC in conjunction with art 216 para 2 TFEU and the *effet utile* principle would oblige the Member States to grant access to review.⁵² For access to justice in Austria, the impairment of rights doctrine would be of essence: judicial review pursuant to art 132 para 1 B-VG (or to provisions of sectoral environmental acts) would only be possible for natural or legal persons who have been granted *locus standi* in preceding administrative procedures, for which an impairment of individual public-law rights needed to be demonstrated (§ 8 AVG).⁵³ The Commission endorsed the Compliance Committee's finding and noted that only few Austrian provisions provide legal standing for NGOs.⁵⁴ This could be avoided by inserting specific clauses in the sectoral acts as per art 132 para 5 B-VG.⁵⁵ Of particular concern was that regional environmental protection acts did still not grant individual public-law rights, and that § 102 WRG did merely refer to a violation of water-related rights and not to the prohibition of deterioration in art 4 para 1 of the Water Framework Directive.⁵⁶ All in all, the Commission called the Austrian way a zero option, as, apart from an overlapping scope of application with the Participation Directive, acts transposing the said four directives did not provide access to justice.⁵⁷

In the latest case from Austria, *Protect*, a recognised NGO, was denied the status as a party in an administrative procedure because it allegedly had not invoked the respective rights in due time.⁵⁸ Eventually, the VwGH referred three questions to the Court of Justice, which can be rephrased as follows: (i) Does (art 4 of) the Water Framework Directive confer rights pursuant to art 9 para 3 on NGOs in procedures which are not covered by the EIA Directive? (ii) Must the assertion of these rights take place at the administrative stage, or does a right to review the resulting administrative decision suffice?

(iii) May an application of § 42 AVG lead to scenarios where NGOs must raise objections in due time at the stage of the administrative proceedings to maintain their status as a party and their eligibility to bring an appeal before administrative courts?⁵⁹

B. Opinion of Advocate General Sharpston

In the incipit of her Opinion Advocate General *Sharpston* dealt with the question whether the Court of Justice was even competent to give an answer, and, to that end, cited the *Brown Bears I* case, where it had established its jurisdiction to interpret art 9 para 3 AC.⁶⁰ Further on, the Advocate General drew attention to the demarcation of art 9 paras 2 and 3 AC resulting from the applicability of particular alternatives of art 6 AC.⁶¹ Since the *Aichelberglift* project was not covered by Annex I to the AC, art 6 para 1 lit a AC did not apply; neither did art 9 para 2 AC.⁶² However, also the fact that a project »may have significant effects on the environment«⁶³ might have triggered the right to participation in administrative procedures as per art 9 para 2 AC.⁶⁴ If that were not the case, only the right to review according to art 9 para 3 AC would apply.⁶⁵

Before answering the first question, the Advocate General referred to the Court of Justice's ruling in *Bund für Umwelt und Naturschutz Deutschland*, confirming the binding nature of art 4 para 1 lit a Z i of the Water Framework Directive.⁶⁶ *Sharpston* reinforced the Court of Justice's finding that a deterioration of the status of a body of surface water would have to be interpreted in a broad manner and added that the provision should have direct effect.⁶⁷ Even if a provision would not confer rights on individuals, it could be directly applicable, if protecting common natural heritage; anything else

Directive (EC) 2008/50 of the European Parliament and of the Council of 21.5.2008 on ambient air quality and cleaner air for Europe, OJ L 2008/152/, 1; Directive (EC) 2000/60 of the European Parliament and of the Council of 23.10.2000 establishing a framework for Community action in the field of water policy, OJ L 2000/327,1; Directive (EC) 2008/98 of the European Parliament and of the Council of 19.11.2008 on waste and repealing certain Directives, OJ L 2008/312, 3.

52 EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, paras 30, 38; C (2014) 4883 final, 4.

53 Bundes-Verfassungsgesetz idF BGBl I 164/2013; § 8 Allgemeines Verwaltungsverfahrensgesetz (AVG) 1991 idF BGBl I 161/2013; Cf *Hengstschläger/Leeb*, Verwaltungsverfahrenrecht⁵ (2014) § 8 AVG para 1.

54 § 19 para 1 lit 7 Umweltverträglichkeitsprüfungs-Gesetz idF BGBl I 14/2014; § 42(1) lit 3 of the Bundesgesetz über eine nachhaltige Abfallwirtschaft idF BGBl I 193/2013; C (2014) 4883 final, 7.

55 Cf C (2014) 4883 final, 7.

56 C (2014) 4883 final, 7; Wasserrechtsgesetz (WRG 1959) idF BGBl I Nr 54/2014.

57 C (2014) 4883 final, 7.

58 EuGH C-664/15 *Protect*, ECLI:EU:C:2017:987, paras 20–28.

59 Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 14.12.2015 – *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* (Case C-664/15), OJ C 2016/111, 4.

60 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 33–37.

61 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760; 38–48.

62 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 44.

63 Art 6 para 1 lit b AC.

64 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 45–46.

65 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 45–47.

66 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 55–56 referring to EuGH C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, ECLI:EU:C:2015:433, para 43.

67 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 57–58 referring to EuGH C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, ECLI:EU:C:2015:433, para 70 and EuGH 8/81, *Becker*, ECLI:EU:C:1982:7, para 25.

would weaken the effectiveness of such a provision.⁶⁸ Then, *Sharpston* dealt with the core of the first question, namely whether an environmental organisation must be granted legal standing to invoke the said article of the Water Framework Directive. She acknowledged that the EU has not explicitly implemented art 9 para 3 AC, an article which, according to the Court of Justice, does not have direct effect.⁶⁹ Moreover, the Member States need to provide legal protection within their procedural autonomy (limited by the objectives of the AC and the Water Framework Directive).⁷⁰ In her Opinions in *Djurgården* and *Trianel*, *Sharpston* had argued that NGOs need to be able to rely on art 9 para 3 AC and that criteria adopted on the domestic level must not effectively ban all NGOs from invoking rights based on the Water Framework Directive.⁷¹ Environmental NGOs would have to be considered defendants of collective and private interests (ie »social watchdogs«).⁷² If domestic legal systems prevented NGOs from invoking art 4 of the Water Framework Directive, the environment could neither be represented, nor defended.⁷³ *Sharpston* then brought art 47 para 1 CFR into play and carried out a proportionality test based on art 52 para 1 CFR.⁷⁴ However, she merely noted that a provision which makes access to justice extremely difficult would collide with the right to effective judicial protection.⁷⁵ A rights-based rather than interest-based concept of legal standing would not provide for an excuse, on the contrary, the open wording of art 9 para 3 AC intended to

cover as many domestic solutions as possible.⁷⁶ In any case, national procedural rules must not prevent NGOs from access to justice.⁷⁷

When addressing the second question, *Sharpston* found that domestic procedural rules needed to be interpreted in consistency with art 4 and art 14 para 1 of the Water Framework Directive for that NGOs could rely on those provisions in administrative proceedings.⁷⁸ Under such circumstances as in the given case, where the right to obtain a remedy depended on a previously obtained *locus standi* in the administrative proceedings, NGOs needed to be granted the right to participate already on the administrative level.⁷⁹

Thirdly, the Advocate General examined the application of § 42 AVG to the given case and brought art 9 para 4 AC into play. Depending on whether *Protect* »could have been reasonably expected, based on fair and equitable procedural rules, to submit its objections in good time in the administrative proceedings« or not, § 42 AVG could have been applied in compliance with EU law or not.⁸⁰

C. The judgment of the Court of Justice

In response to the first question, the Court of Justice cited its findings in *Bund für Umwelt und Naturschutz Deutschland* on the binding effect of the prohibition of deterioration in Art 4 of the Water Framework Directive.⁸¹ Moreover, the Court of Justice referred to the effectiveness of the Water Framework Directive, which the Member States' judicial systems must ensure pursuant to the principle of sincere cooperation (art 4 para 3 TEU and art 19 para 11 TEU).⁸² The Court of Justice argued that if it could be ruled out that a project has a significant adverse effect on the state of water (art 6 para 1 lit b AC), art 9 para 3 AC would be applicable.⁸³ As ruled in *Brown Bears II*, the Charter would apply to situations where the Member States lay down procedural rules within the scope of application of art 4 of the Wa-

68 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 59 referring to EuGH C-201/02, *Wells*, ECLI:EU:C:2004:12, paras 64–66, EuGH C-118/94, *Associazione Italiana per il WWF and Others*, ECLI:EU:C:1996:86, para 19, and EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, para 44.

69 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 65 referring to EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 45 and EuGH C-401/12 P to C-403/12 P *Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4, para 59.

70 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 66.

71 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 74–76 referring to Opinion of AG *Sharpston* in EuGH C-263/08, *Djurgården-Lilla Värtans Miljöskydds-förening*, ECLI:EU:C:2009:421, paras 73–74 and Opinion of AG *Sharpston* in EuGH C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel)*, ECLI:EU:C:2010:773, para 77.

72 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 82, EGMR 28.11.2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*, CE:ECHR:2013:1128JUD003953407, para 34. In para 81, *Sharpston* also elucidated the potential range between applying the impediment of rights doctrine and the *actio popularis*.

73 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 85.

74 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 88.

75 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 89.

76 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 90.

77 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 94.

78 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 104–107.

79 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 111.

80 Opinion of AG *Sharpston* in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 122.

81 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:760, paras 31–32, referring to EuGH C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, ECLI:EU:C:2015:433, paras 43, 48, and 51. For an initial analysis of the case see *Obwexer/Villoti*, Case-law of the CJEU adopted in 2017 and its relevance for Austria, ZÖR 2018/73, 397 (404 ff).

82 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 34–35.

83 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 43.

ter Framework Directive.⁸⁴ Moreover, in *Brown Bears I* it was clarified that the Member States may adopt criteria (to be met by members of the public), for which the principle of effectiveness of art 47 CFR is the yardstick.⁸⁵ Hence, the Court of Justice analysed whether the Austrian procedural rules comply therewith.⁸⁶ § 102 para 1 lit a and lit b of the WRG govern the status as a party in water-related matters as *leges speciales* to § 8 AVG, which is a prerequisite for obtaining the right to appeal an administrative decision.⁸⁷ In principle, also a wide interpretation of § 8 AVG could result in implicitly granting the status as a party.⁸⁸ Like in *Brown Bears I*, the Court of Justice recommended an interpretation which is to the fullest extent in accordance with Art 9 para 3 AC and the principle of effectiveness.⁸⁹ If impossible, domestic procedural rules would have to be set aside to ensure the effectiveness of EU law.⁹⁰

Before answering the second question, the Court of Justice noted that the right to participation would have to be treated separately from access to justice as both rights have different purposes.⁹¹ In the recent case, the project was not listed in Annex I to the AC (art 6 para 1 lit a AC), therefore a right to participation could only be derived if the project may have a significant effect on the environment (art 6 para 1 lit b AC).⁹² In that case, however, the application of art 9 para 3 AC would be excluded.⁹³ Under Austrian procedural rules, obtaining the status as party in administrative proceedings would be a prerequisite for the right to bring a remedy, despite Member States shall »encourage the active involvement of all interested parties in the implementation of this Directive (...).«⁹⁴ The Court of Justice added that the status as an interested party who may raise arguments in administrative proceedings, would not be tantamount to the status as a party.⁹⁵ The latter would include that

competent authorities *must* consider the arguments raised as objections before adopting a decision authorising projects.⁹⁶ Hence, the Court of Justice recommended an interpretation of § 8 AVG which is consistent with art 14 para 1 of the Water Framework Directive and would therefore enable NGOs to also participate in the administrative proceedings.⁹⁷

Finally, the Court of Justice rephrased the third question insofar as it asked whether – in the light of art 9 paras 3 and 4 AC – a domestic procedural rule may impose a time limit, »pursuant to which a person loses the status of party to the procedure and therefore cannot bring an action against the decision resulting from that procedure, if it has failed to submit objections in good time following the opening of the administrative procedure or, at the very latest, during the oral phase of that procedure.«⁹⁸ The Court of Justice then drew attention to the fact that for losing the status as party pursuant to § 42 AVG, *Protect* needed to have previously obtained that status, which however not seemed to be possible under the Austrian procedural rules.⁹⁹ The Court of Justice dealt with the issue nonetheless, as *Protect's* action was dismissed precisely on the basis of § 42 AVG.¹⁰⁰ Having found that a time limit would not *per se* incompatible with art 9 para 3 AC, the Court of Justice carried out a proportionality test in the light of art 9 para 4 AC and art 47 in conjunction with art 52 para 1 CFR.¹⁰¹ When delivering its findings, the Court of Justice stressed that it would be for the referring court (VwGH) to ultimately assess the facts of the case and the national law.¹⁰² The Court of Justice noted that *Protect* had been denied the status as a party based on § 102 para 1 WRG and stressed that it could only have participated as an interested party pursuant to § 102 para 2 WRG, which does not comprise the right to submit objections.¹⁰³ Accordingly, having imposed a time limit on a legal person not even entitled to submit objections seemed to be contravening the *impossibile est nulla obligatio* principle.¹⁰⁴ In addition, the Court of Justice rejected the claim of the Austrian Government that *Protect* could have submitted an initial general statement claiming that the permit for the project contravened the WRG and, at a later stage, handed in justifications for the objections. On the contrary, NGOs could reasonably have concluded that they first have had to obtain the status as a party and only

84 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 44, referring to Case C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, para 52.

85 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 45, referring to Case C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, paras 45 and 51.

86 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 48.

87 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 49–51.

88 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 53.

89 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 54, referring to EuGH C-240/09, *Brown Bears I*, para 52.

90 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 55–57, referring to EuGH 106/77, *Simmenthal*, ECLI:EU:C:1978:49, paras 21–2, 24 and EuGH C-689/14, *PFE*, ECLI:EU:C:1978:49, paras 40–41.

91 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 61–62.

92 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 64–66.

93 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 67. Art 9(3) AC stipulates that it is only applicable in »addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above.«

94 Art 14 para 1 first sentence, of the Water Framework Directive; EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 69–75.

95 Art 102 para 2 WRG; EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 77.

96 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 78.

97 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 80, referring to Case C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 52.

98 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 82.

99 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 83–84.

100 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 85.

101 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 88–90.

102 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 93.

103 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 95.

104 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 96.

then would have been able to submit objections.¹⁰⁵ The Court of Justice concluded that – subject to the verification by the referring court – the application of the time limit of § 42 AVG was a non-justifiable excessive restriction of the right to bring judicial proceedings within the meaning of art 9 para 3, read in conjunction with art 47 CFR, to invoke rights conferred by Art 4 of the Water Framework Directive.¹⁰⁶

D. The subsequent judgments of the Austrian Supreme Administrative Court (VwGH)

Following the Court of Justice's judgment, the VwGH delivered two judgments on 28 March 2018, among them the *Aichelberglift Karlstein GmbH* case.¹⁰⁷ In the first part of its judgment, the VwGH addressed the issue that a review under art 132 para 1 B-VG would be linked to previously having obtained the status as a party and quoted the respective paragraphs of the Court of Justice's judgment.¹⁰⁸ Then, the VwGH acknowledged that if a project may have significant effects on the environment (art 6 para 1 lit b AC), NGOs would have a right to already participate on the administrative stage and, thus, art 9 para 2 AC would be applicable.¹⁰⁹ If not, NGOs must be able to challenge the decision of the authorities pursuant to art 9 para 3 AC.¹¹⁰ However, when refusing to grant *Protect* the status as a party, the Regional Administrative Court erred in law one way or another. On the one hand, if there was a significant effect on the environment likely, *Protect* would have been excluded from the administrative procedure contra art 9 para 2 AC.¹¹¹ In that case, it would not have been necessary to address the applicability of § 42 AVG specifically, since it would either not have been applicable and, thus, the Regional Administrative Court erred in law by applying it, or its application would have led to an excessive restriction of the right to an effective remedy.¹¹² On the other hand, if there was no significant effect on the environment likely, NGOs must nevertheless have been able to exercise their right to bring judicial proceedings against administrative decisions (art 9 para 3 AC).¹¹³ Concerning this matter, the VwGH stated that *Protect* shall be granted the

right to already participate in the administrative procedure.¹¹⁴ Subsequently, the VwGH assessed the question of an excessive restriction of the right to an effective remedy caused by the way of which § 42 AVG was applied to *Protect*.¹¹⁵ The VwGH examined whether it could have been reasonably expected from *Protect* to submit objections.¹¹⁶ Nonetheless, neither § 102 para 1 lit a nor b nor any other provision of the WRG would confer the status as a party to NGOs; nor would an interpretation of § 8 AVG read in conjunction with § 102 WRG produce such a result.¹¹⁷ Therefore, *Protect* could neither have expected to be granted legal standing, nor that it would have effectively been treated as a party and, therefore, § 42 AVG must not be applied.¹¹⁸

The second case, dealt with the request of an NGO to be granted legal standing in a water-related administrative procedure.¹¹⁹ The Regional Administrative Court of Styria based its dismissive judgment on the fact that art 9 para 3 AC does not have direct effect.¹²⁰ The VwGH again quoted several paragraphs of the Court of Justice's judgment in *Protect* and acknowledged that art 102 para 1 lit a and b WRG would not confer the right to obtain the status as a party to NGOs, even if the provision not being definite in nature.¹²¹ Yet, the status as a party would directly flow from EU law, since in Austria the right to bring judicial proceedings would be linked to the legal standing in preceding administrative procedures.¹²² The VwGH then cross-referenced its judgment in the *Protect* case and emphasised that in such a case, legal standing could not be denied, since otherwise art 9 para 3 AC would serve no purpose.¹²³ Eventually, the VwGH recommended to leave national law unapplied (§ 102 WRG) and to interpret § 8 AVG in consistency with EU law.¹²⁴

105 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 97.

106 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 98. See also *Griller*, Die Neuordnung der Gerichtsbarkeit des öffentlichen Rechts, in *ÖJT* (Hrsg), *Bewährung des Rechtsstaats* (2018) 31.

107 VwGH 20.03.2018, Ra 2015/07/0055. Even prior to the two judgments delivered by the VwGH, the Regional Administrative Court of Tyrol in the case LVwG-2018/44/0055-6 decided to grant an environmental organisation the status as a party.

108 VwGH 20.03.2018, Ra 2015/07/0055, paras 24–26.

109 VwGH 20.03.2018, Ra 2015/07/0055, para 28, 30.

110 VwGH 20.03.2018, Ra 2015/07/0055, paras 27–28.

111 VwGH 20.03.2018, Ra 2015/07/0055, para 31.

112 VwGH 20.03.2018, Ra 2015/07/0055, paras 32–33.

113 VwGH 20.03.2018, Ra 2015/07/0055, para 34.

114 VwGH 20.03.2018, Ra 2015/07/0055, paras 35–37, referring to Case C-664/15, *Protect*, ECLI:EU:C:2017:760, paras 68–69.

115 VwGH 20.03.2018, Ra 2015/07/0055, paras 38–39, referring to Case C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 82–100.

116 VwGH 20.03.2018, Ra 2015/07/0055, para 39.

117 VwGH 20.03.2018, Ra 2015/07/0055, paras 40–41.

118 VwGH 20.03.2018, Ra 2015/07/0055, paras 42, 46.

119 VwGH 28.03.2018, Ra 2015/07/0152, para 1.

120 VwGH 28.03.2018, Ra 2015/07/0152, paras 3–8.

121 VwGH 28.03.2018, Ra 2015/07/0152, paras 25–27, referring to Case C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 68–70, 76, 80.

122 VwGH 28.03.2018, Ra 2015/07/0152, paras 28–32.

123 VwGH 28.03.2018, Ra 2015/07/0152, para 33.

124 VwGH 28.03.2018, Ra 2015/07/0152, para 34.

III. Consequences for the right to public participation and access to justice

A. General remarks on the Court of Justice's line of jurisprudence

In *Protect*, the Court of Justice built on its line of jurisprudence regarding Aarhus-related matters in the Member States and transferred earlier findings to the given case. In *Trianel*, the Court of Justice ruled that NGOs could be barred from their right to access to justice by domestic procedural rules limiting it to individual public-law rights.¹²⁵ In addition, the right to review would directly flow from Art 10a of the EIA Directive.¹²⁶ The Court of Justice reinforced this finding when dealing with violations of the succeeding art 11 of the new EIA Directive in the *Commission v Germany* case.¹²⁷ Moreover, the Court of Justice stated that in this specific case, access to justice for environmental NGOs must not be limited to applications submitted in due time.¹²⁸

In *Brown Bears I*, the Court of Justice dismissed the direct effect of art 9 para 3 AC, but stated that domestic procedural rules needed to be interpreted in consistency with the AC to the fullest extent possible.¹²⁹ In a subsequent case, *Stichting Milieu*, the Court of Justice re-emphasised that finding.¹³⁰ When doing so, the Court zealously argued that the Aarhus Regulation does not implement the Aarhus Convention but to that end used a flawed reference to a paragraph in *Brown Bears I* which stated the exact opposite.¹³¹

In *Brown Bears II*, the Court of Justice had to demarcate the scope of application of art 6 para 1 AC which triggers an application of art 9 para 2 AC.¹³² If an assessment of the implications of a project as regards potential significant effects on a site were carried out, eg pursuant to art 6 para 3 of the Habitats Directive, the requirement of art 6 para 1 lit b AC would be fulfilled.¹³³ Moreover, the referring Slovak Supreme Court brought

art 47 CFR into play, when it specifically asked whether Slovak procedural rules were compatible with the right to an effective remedy.¹³⁴ The procedural rules lead, in essence, to a situation where administrative procedures could be definitely concluded, while an action on the clarification of legal standing was still pending.¹³⁵ The Court of Justice recognised the link of art 47 para 1 CFR and of art 9 para 4 AC, but then rather focussed on the fact that actions against decisions refusing the status as a party were automatically dismissed, while permits were being granted in the corresponding administrative procedures.¹³⁶ Rather, such actions should have precluded the conclusion of administrative procedures, until a decision on the underlying claim was being delivered.¹³⁷ In addition, the status as an interested party is not sufficient to claim a high level of environmental protection in the sense of art 6 para 3 of the Habitats Directive, since bringing an action is only available to parties to the procedure.¹³⁸ In *Protect*, the Court of Justice brought all of this together for an application of art 4 of the Water Framework Directive in conjunction with art 9 para 3 AC and art 47 para 1 CFR.

B. The relationship of art 9 AC and art 47 CFR and implications for the right to an effective remedy

Interestingly, the VwGH by no words mentioned the Aarhus-internal standards for remedies pursuant to art 9 para 4 AC and immediately chose to assess compliance with art 9 para 3 AC read in conjunction with art 47 para 1 CFR.¹³⁹ Also, the Court of Justice neither compared the substance of, nor dwelt on the details of, the relationship of art 9 AC and art 47 CFR. The standards for effective remedies enlisted in both articles largely overlap. Art 9 para 4 AC demands that a remedy is »capable of real and effective enforcement« and adequate in the sense that it »requires the relief to ensure the intended effect of the review procedure«. ¹⁴⁰ Art 47 CFR was based on art 6 and art 13 of the European Convention on Human Rights (ECHR) whose application is limited to disputes related to civil law rights and obligations.¹⁴¹ Moreover, the right to an effective remedy – a subprinciple of the principle of effectiveness (art 19 para 1 TEU),

125 EuGH C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel)*, ECLI:EU:C:2011:289, para 45.

126 EuGH C-115/09, *Trianel*, ECLI:EU:C:2011:289, para 48.

127 EuGH C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683, para 91.

128 EuGH C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683, paras 96–97.

129 EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 52.

130 EuGH C-404/12 P and C-405/12 P, *Stichting Milieu*, ECLI:EU:C:2015:5, para 47. For an analysis of the case see *Pirker*, RECIEL 2016/25, 81.

131 EuGH C-240/09, *Brown Bears I*, ECLI:EU:C:2011:125, para 41 v EuGH C-404/12 P and C-405/12 P, *Stichting Milieu*, ECLI:EU:C:2015:5, para 51.

132 C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, para 57. See also *Menguser*, ZVG 2017/4, 297 (298 f).

133 C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, paras 46–49.

134 Request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovakia) lodged on 27.5.2015 – Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín (Case C-243/15), OJ C 2015/279, 18.

135 EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, para 28.

136 EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, paras 29 and 63.

137 EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, para 72.

138 EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, paras 71–72.

139 VwGH 20.03.2018, Ra 2015/070055, para 35.

140 UNECE, Implementation Guide², 200 (both quotes).

141 Explanations relating to the Charter of Fundamental Rights, OJ C 2007/303, 17, art 47 CFR.

which is encompassed in the principle of sincere cooperation (art 4 para 3 TEU) – forms a general principle of EU law, being derived from the Member States' constitutions in the 1980ies and later also from art 6 ECHR.¹⁴² At first sight, both the AC and the Charter explicitly require effective remedies. Yet, art 9 para 4 AC merely enlists minimum qualitative standards for remedies,¹⁴³ whereas the procedural *right* to such remedies is established in art 9 para 1 to 3 AC. Depending on the applicable pillar, requirements on access to justice vary: in cases covered by art 9 paras 1 and 2 AC, review must be carried out by a »court of law or another independent and impartial body established by the law.«¹⁴⁴ To meet the standards of the AC, such body must at least be quasi-judicial (due process, independent from the executive, public).¹⁴⁵ Within the scope of art 9 paras 1 and 2 AC the contracting parties must ensure a judicial or otherwise independent and impartial review, while within the ambit of art 9 para 3 AC administrative review procedures suffice.¹⁴⁶ Whereas art 13 ECHR merely requires an effective remedy in the form of a complaint, art 47 para 1 CFR requires an effective review by a tribunal previously established by the law in the sense of art 6 ECHR.¹⁴⁷ Consequently, whenever the criteria of art 47 CFR are met by a review body, those of art 9 para 4 AC are fulfilled simultaneously. Art 9 para 3 AC as a default provision is more open and covers a wider range of administrative or judicial (public, criminal, or civil) procedures.¹⁴⁸ It could hence occur that review procedures comply with the AC, but do not reach the threshold of art 47 CFR.

Furthermore, Art 47 para 1 CFR conveys the right to an effective remedy when »rights and freedoms guaranteed by the law of the Union are violated.«¹⁴⁹ According to the Court of Justice, art 9 paras 2 and 4 AC needed to be read in conjunction with art 47 CFR.¹⁵⁰ In *Protect*, the Court of Justice stated the same for art 9 para 3 AC.¹⁵¹ The question is, whether art 47 para 1 CFR protects the procedural rights of art 9 AC, or whether there are other material rights, which themselves are protected both by

art 9 AC and art 47 para 1 CFR. The AC, as an international agreement of the Union in the sense of art 216 para 2 TFEU, forms an integral part of EU law in the rank of primary EU law (see II.A.1.). Technically, this leads to a double protection: firstly, the third pillar of the AC is part of EU law and provides for effective access to justice. Secondly, an application of art 47 para 1 CFR is not limited to cases, where related provisions establish a right to access to justice, rather it suffices that substantial EU law rights (such as the prohibition of deterioration of the water quality) are endangered and cannot be effectively invoked.¹⁵² Nonetheless, without a provision such as the prohibition of deterioration of the water quality (Art 4 of the Water Framework Directive), neither art 9 para 3 AC, nor art 47 para 1 CFR could be activated. Both art 9 para 3 AC and art 47 para 1 CFR, which protects EU law rights, need a provision of environmental law to be violated. An example is art 6 of the Habitats Directive, which aims at preventing a deterioration of natural habitats and the habitats of species. As a provision of an international agreement of the Union, also access to justice as provided for in art 9 para 3 AC is such a right. However, according to the Court of Justice, art 9 para 3 AC would not have direct effect, due to its vagueness.¹⁵³ Nevertheless, some commentators speak of direct effect.¹⁵⁴ Others derived a *de facto* direct effect of art 9 para 3 AC via the application of art 47 para 1 CFR in conjunction with art 4 of the Water Framework Directive.¹⁵⁵ Nevertheless, without a material EU environmental law provision having direct effect art 9 para 3 AC would not be activated at all.

In contrast to the material environmental standards of art 4 of the Water Framework Directive and art 6 of the Habitats Directive, art 11 of the EIA Directive and art 16 of the IPPC Directive themselves contain a right to review, which is then also protected by the right to an effective remedy in art 47 para 1 CFR. However, a direct effect of these provisions of the Directives renders an application of art 47 para 1 CFR unnecessary. Art 15 of the IPPC Directive established a right to access to information and public participation in the permit proce-

142 Cf Opinion of AG Kokott in EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:491, para 94 and the case law cited; Opinion of AG Sharpston in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 87 and the case law cited; EuGH C-222/84, *Johnston*, ECLI:EU:1986:206; EuGH C-222/86, *Heylens*, ECLI:EU:C:1987:442; EuGH C-97/91, *Borelli*, ECLI:EU:C:1992:491. See Hofmann, III. Specific Provision (Meaning), in Peers et al (Eds), *The EU Charter of Fundamental Rights (2014)* 1211 f.

143 UNECE, *Implementation Guide*², 199.

144 Art 9 para 1 AC, Art 9 para 2 lit b AC.

145 UNECE, *Implementation Guide*², 191.

146 UNECE, *Implementation Guide*², 190.

147 Shelton, C. Sources of Art 47 Rights in Peers et al (Eds), *The EU Charter of Fundamental Rights (2014)* 1207 ff.

148 Art 9 para 3 AC.

149 Art 47 para 1 CFR.

150 EuGH C-243/15, *Brown Bears II*, ECLI:EU:C:2016:838, para 63.

151 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 89.

152 Opinion of AG Sharpston in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, para 84 and the case law cited.

153 EuGH C-664/15, *Protect*, ECLI:EU:C:2017:987, para 45.

154 Sobotta, *Umweltrecht: Klagerecht von Umweltverbänden gegen Verschlechterung des Zustands von Wasserkörpern*, EuZW 2018, 158 (165). However, this finding was not repeated in a later version of the article Sobotta, *New Cases on Article 9 of the AC*, JJEPL 2018/15, 241 (252 ff).

155 Kittl, *Neues zur Beschwerdelegitimation und zur Präklusion*. Anmerkungen zu EuGH 20.12.2017, C-664/15, *Protect*, ÖZW 2018, 180 (183); Klinger, *Klagerecht von Umweltverbänden gegen Verschlechterung des Zustands von Wasserkörpern*, NVwZ 2018, 225 (232); Wegener, *Der Braunbär lernt schwimmen. Die »Protect«-Entscheidung des EuGH stärkt den Rechtsschutz im Umweltrecht*, ZUR 2018, 217 (219).

dure. Violations of these rights are, in principle, covered by art 9 para 2 AC, but the Court of Justice has not yet dealt with the provision's direct applicability. Regardless of that, art 47 para 1 CFR would now also without a provision such as art 9 para 2 protect the rights stemming from these Directives.

C. Implications for compliance with the Aarhus Convention

1. The EU's compliance with the Aarhus Convention

The length and detail of the European Commission's Notice on Access to Justice in Environmental Matters of April 2017 showed that the EU acknowledged the Compliance Committee's findings and recommendations and noted the persistent non-compliance of certain Member States.¹⁵⁶ The EU's system of legal protection depends on the functioning of the Member States' legal systems, as the procedures before the EU Courts are not tailored to provide individuals with remedies but rather to ensure the correct implementation and application of EU law (art 4 para 3 and art 19 para 1 TEU).¹⁵⁷ The majority of the EU environmental *acquis* consists of Directives implemented and enforced by the Member States, which is monitored by the European Commission.¹⁵⁸ Letters of notice sent to non-complying Member States threatened the initiation of infringement proceedings.¹⁵⁹ Since 2017, the European Commission has issued Environmental Implementation Review country reports, providing advice on how to apply EU environmental law.¹⁶⁰ Those reports were being accompanied by a Communication identifying common challenges across Member States.¹⁶¹ Furthermore, the European Commission created the »TAIEX-EIR PEER 2 PEER« instrument, to bring together experts and environmental authorities from all over the EU.¹⁶²

In several cases, the Court of Justice dealt with the Member States' non-compliance with the AC and more recently applied art 47 para 1 CFR to these situations (III.A.). When adopting the Charter, the codification of the right to an effective remedy in art 47 para 1 CFR was not intended to change the system of judicial review of the EU and should have had no effect on the criteria for legal standing for direct actions such as the individual action for annulment.¹⁶³ The exclusiveness of these criteria had, however, been the largest point of criticism of the AC Compliance Committee (II.A.2.), but an application of art 47 para 1 CFR to Aarhus-related matters does not *per se* affect the EU's compliance. Nevertheless, it facilitates the application of the principle of effectiveness to environmental law issues covered by secondary EU legislation. Under EU environmental law, the standards of art 47 para 1 CFR need to be fulfilled, which in art 9 para 3 AC-cases even exceeds the requirements of the AC. Admittedly, art 47 para 1 CFR could have been applied to Aarhus-related matters ever since the Charter had become binding in 2009.¹⁶⁴ In sum, applying art 47 CFR to Aarhus-related cases arising from the Member States' legal orders contributes to the EU's compliance especially in areas where there are no legal remedies available on the EU level (art 19 para 1 TEU), and the Member States shall observe the principles of effectiveness and of equivalence (art 4 para 3 TEU).

2. Austria's approach to enhance compliance with the Aarhus Convention

The application of art 47 para 1 CFR to Aarhus-related cases has numerous consequences for the Austrian system of participation in administrative procedures and judicial review in environmental matters. Firstly, after the Court of Justice's judgment in *Protect*, it became clear that all matters covered by the AC must be enforceable in a way which is compatible with the principle of effectiveness. Establishing the link between art 47 para 1 CFR, art 9 AC and EU environmental law leads to a situation where any review needs to fulfil the EU's standards of judicial review. Coincidentally and related to non-compliance with art 6 ECHR, the latest reform in Austria changed the system of an administrative review proce-

¹⁵⁶ Notice of the European Commission of 28.4.2017 on Access to Justice in Environmental Matters, COM (2017) 2616 final.

¹⁵⁷ See *Craig/de Búrca*, EU Law⁶, 430.

¹⁵⁸ Eg *European Commission*, Monitoring the application of EU law 2015 Annual Report of 15.7.2016, COM(2016) 463 final, 39 ff; *European Commission*, Monitoring the application of EU law 2016 Annual Report of 6.7.2017, COM(2017) 370 final, 5; *European Commission*, Monitoring the application of EU law 2017 Annual Report of 12.7.2017, COM(2018) 540, 10 ff.

¹⁵⁹ For example, the Formal Letter of Notice of 11.7.2014 C (2014) 4883 final.

¹⁶⁰ *European Commission*, Country reports and common challenges, ec.europa.eu/environment/eir/country-reports/index2_en.htm (Last updated 7.8.2019).

¹⁶¹ *European Commission*, The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results (Communication) of 3.2.2017, COM(2017) 63 final.

¹⁶² *European Commission*, Peer Learning for environmental authorities, ec.europa.eu/environment/eir/p2p/index_en.htm (Last updated: 7.8.2019).

¹⁶³ Explanations relating to the Charter of Fundamental Rights OJ C 2007/303, 17, art 47 CFR.

¹⁶⁴ When EuGH C-263/08, *Djurgården*, ECLI:EU:C:2009:631, was pending before the Court of Justice, the Charter was not yet binding but the principle of effectiveness could have been applied since it forms a general principle of EU law. In EuGH C-115/09, *Trianel*, ECLI:EU:C:2011:289, the Court of Justice ruled that NGOs could be barred from invoking a violation of art 6 of the Habitats Directive, even if national procedural rules linked access to justice to a violation of individual interest in addition to general interests.

dure to a judicial one.¹⁶⁵ Oddly enough, on the EU level – apart from cases where the criteria for legal standing are fulfilled (art 12 AR) – review is carried out on an administrative level (art 10 AR).

Secondly, in *Protect*, the Court of Justice suggested a consistent, hence wide, interpretation of the Austrian provisions on legal standing to guarantee effective legal protection. In another response to *Protect*, the *Kalserbach* case,¹⁶⁶ the Regional Administrative Court of Tyrol granted the WWF legal standing and access to justice based on art 9 para 3 AC, art 47 para 1 CFR and the Water Framework Directive.¹⁶⁷ If, however, it is intended that NGOs shall be granted a right to review independent from participating at administrative procedures, the respective provisions could be inserted in sectoral environmental laws (art 132 para 5 B-VG).

Thirdly, the Court of Justice stated that a time limit may even contribute to complying with the obligation stemming from the AC to provide effective judicial review mechanisms.¹⁶⁸ The Court of Justice referred to the *Pušár* case and carried out a proportionality test: if applied in a proportional manner, and if NGOs are being made aware of their rights as parties as well as of the obligation to submit objections to avoid being excluded pursuant to § 42 AVG, time limits could be applied.¹⁶⁹ Nevertheless, *Protect* does still not clarify whether within the scope of art 9 para 2 AC the time limit of § 42 AVG can be applied. On the contrary, the exclusive effect of § 42 AVG might violate the essence of art 9 para 2 AC (public participation) and thus not pass the proportionality test of art 52 para 1 CFR.¹⁷⁰

Fourthly, the Court of Justice's judgment in *Protect* could have entailed the reopening of legally concluded – probably even judicially reviewed – administrative procedures. In *Commission v Germany*, the Court of Justice emphasised that the principle of *res judicata* is part of the EU legal order, since »it is important that judicial decisions which have become definite after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question«. ¹⁷¹ A similar notion was being ex-

pressed in *Kühne & Heitz*, where criteria which confine the possibility for administrative bodies to reopen cases in response to the Court of Justice's case law were being established.¹⁷² The WWF *Österreich* announced that it will seek for a reassessment of recent power station cases.¹⁷³

Eventually, in response to *Protect*, the Austrian federal and regional legislators tried to fulfil their duty of consolidation as well as to ensure compliance with the third pillar of the AC. On the federal level, the *Aarhus-Beteiligungsgesetz* entered into force in November 2018, amending sectoral acts which implemented the Waste Framework Directive, the Air Quality Directive, and the Water Framework Directive.¹⁷⁴ Firstly, recognised NGOs (§ 19 para 7 UVP-G) were being granted the status as a party under the Waste Management Act (AWG), if they have submitted written objections in compliance with § 40 AWG; these NGOs may then claim compliance with EU environmental provisions in the administrative procedure (§ 37 para 1 in conjunction with § 42 para 1 Z 13 AWG). § 40a para 1 AWG stipulates that requests for authorisation shall be published online and can be commented within six weeks; authorising decisions need to be published online as well, and after two weeks of publication are considered to be fictionally delivered to NGOs, including those which have not participated in the proceedings in due time. Those NGOs which have submitted written objections may bring remedies against authorising decisions (§ 42 para 1 Z 13 AWG). § 42 para 1a AWG states that NGOs which have not submitted written objections may still lodge a complaint against authorising decisions, if the omission was in the absence of fault and negligence. Furthermore, NGOs may appeal against authorising decisions which violated environmental law provisions implementing EU law (§ 42 para 3 AWG). Consequently, as regards those environmental law provisions not covered by EU law, the AC has still not been sufficiently implemented.¹⁷⁵ The amendment has retroactive effect on decisions which have not yet (or for less than one year since the proclamation of the amendment) become final and binding (§ 78c para 1 AWG). Secondly, in the area of air quality the Immission Protection Act (IG-L) was amended. Natural per-

165 Verwaltungsgerechtigkeitsnovelle BGBl I 51/2012.

166 According to the Opinion of AG Sharpston in EuGH C-644/15, *Protect*, ECLI:EU:C:2017:760, paras 28 et seq, case C-663/15 was first joined with *Protect* and then on a rather short notice withdrawn.

167 LVwG Tirol 21.02.2018, 2018/44/0055-6.

168 Case C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 88 f.

169 Case C-664/15, *Protect*, ECLI:EU:C:2017:987, paras 90 et seq. referring by analogy to EuGH C-73/16, *Pušár*, ECLI:EU:C:2017:725, paras 61 et seq. On § 42 AVG and art 9 para 2 AC see *Ennöckl*, Präklusion – der schrittweise Abschied von einem bewährten Rechtsinstitut, ZÖR 2017/72, 445 (465).

170 Cf *Kingreen*, EU-GRCharta Art 52 in *Calliess/Ruffert* (Eds), EUV/AEUV⁵ (2016) para 64 and the case law cited.

171 EuGH C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683, para 96.

172 EuGH C-453/00, *Kühne & Heitz*, ECLI:EU:C:2004:17, para 28.

173 WWF *Österreich*, EuGH-Urteil ermöglicht neue Ära im Natur- und Gewässerschutz, <<https://www.wwf.at/de/wwf-oesterreich-eugh-urteil-ermoglicht-neue-ara-im-natur-und-gewaeserschutz>> (Last updated: 20.12.2017).

174 Aarhus-Beteiligungsgesetz BGBl I Nr 73/2018. See also Erläuterung 270 BgNR XXVI. GP; *Dworschak* in *Altenburger/Raschauer N* (Hrsg), Aktueller Diskurs im Umweltrecht 4. UVP-G, StEntG, Aarhus Beteiligungsgesetz (2018) 26 ff; *Kittl*, ÖZW 2018, 180 (188 ff); *Schulev-Steindl*, Das Aarhus-Beteiligungsgesetz – Ende gut, alles gut?, ÖZW 2019, 14; *Wagner-Reitinger*, Änderung der Öffentlichkeitsbeteiligung in Verfahren nach dem AWG. Was bringt das Aarhus-Beteiligungsgesetz 2018?, ÖJZ 2019/27.

175 Cf *Kittl*, ÖZW 2018, 180 (189).

sons and recognised NGOs (§ 19 para 7 UVP-G) may demand the Regional Governor's review of the suitability programme's measures to achieve the limit value (§ 9a para 1a IG-L). Moreover, according to § 9a paras 11 and 12 IG-L, natural persons and NGOs may submit a reasoned request regarding the development of programmes and challenge related decisions of the Governor at the Regional Administrative Court. Only natural persons need to demonstrate direct concern, whereas NGOs need to prove their recognition and to justify the grounds of appeal (§ 9a para 13 IG-L). Finally, the Water Act (WRG) was amended: § 102 para 2 WRG now explicitly entitles locally recognised NGOs (§ 19 para 7 UVP-G) to participate in administrative procedures if a deterioration of the water quality (§ 104 para 1 lit b WRG) is likely. Participation now includes the right explain interests and to that end also to submit reasoned opinions, information, and analyses (§ 102 para 3 WRG). The right of a party to submit objections, which needed to be addressed in the proceedings, is however not included. Yet, the AC does not define the forms of public participation.¹⁷⁶ Recognised NGOs may contest the validity of related decisions at the Regional Administrative Court as per § 102 para 5 WRG. Relevant information shall be provided online for six weeks (§ 107 paras 1 and 3 WRG). A detailed provision (§ 145 para 15 WRG) deals with the consequences for pending administrative and judicial procedures. Obviously, any additional right to participation or review helps to bring the Austrian zero option in more compliance with the EU environmental acquis and the AC. Unfortunately, as far as the amendments only target compliance with EU secondary legislation implementing the AC, other Aarhus-related matters can still not be reviewed.¹⁷⁷

On the regional level, environmental protection and related acts which are implementing the Habitats Directive and the Birds Directive have been or are in course of being amended.¹⁷⁸ However, not in all the cases do the (proposed) amendments lead to more compliance with the AC and with the EU environmental acquis. The Viennese reform proposal has been put on hold since 2016¹⁷⁹ and at the time of writing, the amendments in

Carinthia¹⁸⁰ were still pending. Environmental laws in Burgenland,¹⁸¹ Lower Austria,¹⁸² Upper Austria,¹⁸³ Styria,¹⁸⁴ Salzburg,¹⁸⁵ Tyrol¹⁸⁶ and Vorarlberg¹⁸⁷ were amended in the course of 2019. In all these cases, the amendments clearly targeted a better implementation of the three pillars of the AC. Regarding the first pillar, the right to information, in Carinthia, Lower Austria, Upper Austria, Styria and Salzburg, an electronic platform, respectively an electronic information system (Burgenland) was established, where the main request and related documents, as well as all decisions are to be published.¹⁸⁸ NGOs may *request* access (Carinthia, Upper Austria, Salzburg), access must be *granted* (Burgenland, Lower Austria), or the electronic platform must simply be *accessible* (Styria). In Vorarlberg and Tyrol, the information must be published online.¹⁸⁹ Except from Lower Austria (one week),¹⁹⁰ decisions published in that way are fictionally delivered after two weeks.¹⁹¹ Concerning

176 UNECE, Implementation Guide³, 120 f.

177 Cf press release of the Umweltdachverband of 4.10.2018 <https://www.ots.at/presseaussendung/OTS_20181003_OTS0167/aarhus-beteiligungsgesetz-oeffentlichkeitsbeteiligung-an-umweltverfahren-darf-nicht-beschnitten-werden>.

178 According to art 15 para 1 B-VG environmental protection and hunting and fishing are areas where the Bundesländer (regions) are competent for legislation and implementation.

179 Entwurf eines Gesetzes, mit dem das Gesetz über den Nationalpark Donau Auen (Wiener Nationalparkgesetz) und das Wiener Naturschutzgesetz geändert werden. The draft was analysed in *Wagner/Fasching*, Grundlagenstudie, 83 ff and in *Menguser*, ZVG 2017/4, 297 (298 ff).

180 Entwurf eines Gesetzes, mit dem das Kärntner Naturschutzgesetz 2002 geändert wird (Aarhus-Novelle); Entwurf eines Gesetzes, mit dem das Kärntner Fischereigesetz, das Kärntner Jagdgesetz 2000, das Kärntner IPPC-Anlagengesetz, das Kärntner Landes-Pflanzenschutzmittelgesetz und das Kärntner Gentechnik-Vorsorgegesetz geändert werden (Kärntner Aarhus- und Umwelthaftungs-Anpassungsgesetz). Paragraphs relating to this envisaged amendment are referred to with -neu.

181 Gesetz vom 14. November 2019 über die Anpassung der Burgenländischen Rechtsordnung an die Aarhus-Konvention (Burgenländisches Aarhus-Beteiligungsgesetz), LGBl Nr 89/2019.

182 Landesgesetz, mit dem das NÖ Naturschutzgesetz 2000 und das NÖ Jagdgesetz 1974 geändert werden, LGBl 26/2019.

183 Landesgesetz, mit dem das Oö. Natur- und Landschaftsschutzgesetz 2001, das Oö. Nationalparkgesetz und das Oö. Umwelthaftungsgesetz geändert werden (Oö. Natur- und Landschaftsschutzrechtsnovelle 2019), LGBl Nr 54/2019.

184 Gesetz vom 17. September 2019, mit dem das [vorarlberger] Gesetz über Einrichtungen zum Schutz der Umwelt geändert wird, LGBl Nr 75/2019.

185 Gesetz vom 6. November 2019, mit dem das Salzburger Naturschutzgesetz 1999, das Salzburger Nationalparkgesetz 2014, das Jagdgesetz 1993 und das Fischereigesetz 2002 geändert werden (Sbg. Aarhus-Beteiligungsgesetz 2019) LGBl Nr 67/2019.

186 Gesetz vom 19. Dezember 2019, mit dem das Tiroler Naturschutzgesetz 2005, das Tiroler Jagdgesetz 2004 und das Tiroler Fischereigesetz 2002 geändert werden (Tiroler Aarhus-Beteiligungsgesetz 2019) LGBl Nr 163/2019.

187 Gesetz über Beteiligung im [vorarlberger] Naturschutz-, Jagd- und Fischereirecht (Aarhus-Beteiligungsgesetz) – Sammelnovelle, LGBl Nr 67/2019.

188 § 52a para 2 Bgld NG, § 78 para 8 Bgld JagdG, and § 71 para 1 Bgld FischereiG icw § 52c paras 1 and 2 Bgld NG; § 24b para 1a Krnt NSG-neu; § 35c para 2 Krnt FischereiG-neu; § 54c para 3 Krnt JagdG-neu icw § 54a para 2 Krnt NSG-neu; § 27a NÖ NSchG; § 133b NÖ JagdG; § 39b para 1 oö NSchG icw § 39a para 2 oö NSchG; § 55b Sbg NSchG; § 20a para 2 Sbg NationalparkG; § 150a para 2 Sbg JagdG; § 49a para 2 Sbg FischereiG; § 8 para 2 StESUG.

189 § 43 para 7 Tir NSchG; § 53a para 2 Tir JagdG; § 21 para 6 Tir FischereiG; § 46b para 3 VlbG NSchG; § 46b para 3 and § 64c para 3 VlbG NSchG; § 66a para 2 VlbG JagdG; § 29a para 2 and § 29b para 2 VlbG FischereiG.

190 § 27a para 3 NÖ NSchG; § 133b para 3 NÖ JagdG.

191 § 52b para 8 Bgld NG; § 78 para 9 Bgld JagdG; § 71 para 2 Bgld FischereiG; § 54a para 3 Krnt NSG-neu; § 35c para 2 Krnt Fi-

the second pillar, the right to participation, in all seven cases, locally recognised NGOs (§ 19 para 7 UVP-G)¹⁹² are vested with some rights to participate in administrative procedures.¹⁹³ In all seven cases, this right encompasses access to the administrative act¹⁹⁴ and the right to submit a reasoned, sometimes also written (Tyrol), opinion.¹⁹⁵ Except from Salzburg,¹⁹⁶ Tyrol,¹⁹⁷ and Upper Austria,¹⁹⁸ the opinion must be submitted within four weeks after information had been provided online.¹⁹⁹ Hence, it is questionable, whether two weeks (Salzburg) fulfil the criterion of »reasonable time frames for phases of public participation«, which can in principle be set flexible.²⁰⁰ In addition, said reasoned opinion is treated differently in the respective administrative proceedings. In Burgenland, Carinthia, Upper Austria, and Styria the opinion must be *considered* and in the latter

two cases it can also be presented in the oral proceedings.²⁰¹ In Tyrol and Vorarlberg the opinion must be considered *appropriately*,²⁰² whereas in Lower Austria and Salzburg the treatment is not further specified. According to the *UNECE*, however, the outcome of public participation (art 6 AC) should duly be taken into account.²⁰³ Moreover, the scope of the opinion varies from EU environmental protection provisions,²⁰⁴ nature compatibility of the project²⁰⁵ and compliance with provisions on impact assessment,²⁰⁶ on the expert opinion and on the project,²⁰⁷ on the project,²⁰⁸ on project and on evidence²⁰⁹ to on evidence.²¹⁰ In Vorarlberg, also opinions on drafts of regulations are possible.²¹¹ In Burgenland, NGOs shall be included in authorising and declaratory environmental impact assessments as participants according § 8 AVG.²¹² In Tyrol, NGOs even received the status as a party pursuant to § 8 AVG in environmental authorisation proceedings.²¹³ Consequently, depending on the respective project and on the scope of the reasoned opinion, a two week time frame could be sufficient in some cases, but it in general it seems to be a rather short period to include all potential aspects in due time. In addition, depending on the scope of the reasoned opinion and on the further treatment, the powers of NGOs largely vary across the Austrian regions. Regarding the third pillar (access to justice), a right to bring an appeal against decisions was included.²¹⁴ Apart from Vorarlberg, the appeal is limited to decisions affecting the species protected by the Habitats or the Wild Birds Directive²¹⁵ or by other EU environmental protection provisions.²¹⁶

schereiG-neu; § 54c para 3 Krnt JagdG-neu; § 39b para 5 oö NSchG; § 55a para 6 Sbg NSchG; § 20a para 6 Sbg NationalparkG; § 150a para 6 Sbg JagdG; § 49a para 6 Sbg FischereiG; § 8 para 4 StESUG; § 43 para 7 Tir NSchG; § 53a para 2 Tir JagdG; § 21 para 6 Tir FischereiG; § 46c para 3 VlbG NSchG; § 66a para 2 VlbG JagdG; § 29b para 2 VlbG FischereiG.

192 § 52a para 1 Bgld NG; § 78 para 9 Bgld JagdG; § 71 para 1 Bgld FischereiG; § 54a para 1 Krnt NSG-neu; § 35c para 1 Krnt FischereiG-neu; § 54c para 1 Krnt JagdG-neu; § 27b para 1 NÖ NSchG; § 3 para 11 NÖ JagdG; § 39a para 1 oö NSchG; § 55a para 1 Sbg NSchG; § 20a para 1 Sbg NationalparkG; § 150a para 1 Sbg JagdG; § 49a para 1 Sbg FischereiG; § 8 para 2 StESUG; § 3 Z 11 Tir NSchG; § 2 para 16 Tir JagdG; § 2 para 11 Tir FischereiG; § 46b para 5 VlbG NSchG; § 66a para 1 VlbG JagdG; § 29b para 1 VlbG FischereiG.

193 § 52a para 1 Bgld NG; § 24b para 1b Krnt NSG-neu; § 27b para 1 NÖ NSchG; § 39b para 2 oö NSchG; § 55a para 1 Sbg NSchG; § 20a para 1 Sbg NationalparkG; § 150a para 1 Sbg JagdG; § 49a para 1 Sbg FischereiG; § 8 para 2 StESUG; § 14 para 10 Tir NSchG; § 46b para 3 icw § 46b para 2 VlbG NSchG.

194 § 52a para 4 Z 1 Bgld NG; § 52b para 9 Bgld NG; § 78 para 8 Bgld JagdG; § 71 para 1 Bgld FischereiG; § 24b para 1a Krnt NSG-neu icw § 54a para 3 Krnt NSG-neu; § 35c para 2 Krnt FischereiG-neu; § 54c para 2 Krnt JagdG-neu; § 27c para 2 NÖ NSchG; § 39b para 1 oö NSchG; § 55a para 3 Sbg NSchG; § 20a para 3 Sbg NationalparkG; § 150a para 3 Sbg JagdG; § 49a para 3 Sbg FischereiG; § 8 para 2 StESUG; § 14 para 10 lit a Tir NSchG; § 53a para 2 Tir JagdG; § 21 para 6 Tir FischereiG; § 46c para 3 lit d VlbG NSchG.

195 § 52a para 4 Z 2 Bgld NG; § 78 para 8 Bgld JagdG; § 71 para 1 Bgld FischereiG; § 24b para 1b Krnt NSG-neu; § 27b para 4 NÖ NSchG; § 39b para 2 oö NSchG; § 55a para 3 Sbg NSchG; § 20a para 3 Sbg NationalparkG; § 150a para 3 Sbg JagdG; § 49a para 3 Sbg FischereiG; § 8 para 2 StESUG; § 14 para 10 Tir NSchG; § 46b para 3 lit d icw § 46b para 2 VlbG NSchG: including participation in the oral proceedings.

196 § 55a para 3 Sbg NSchG; § 20a para 3 Sbg NationalparkG; § 150a para 3 Sbg JagdG; § 49a para 3 Sbg FischereiG: two weeks after online publication.

197 § 14 para 10 Tir NSchG: until the end of oral proceedings or two weeks after request to comment evidence.

198 § 39b para 2 oö NSchG: four weeks after expert opinion or until the oral proceedings.

199 § 52a para 4 Z 2 Bgld NG; § 78 para 8 Bgld JagdG; § 71 para 1 Bgld FischereiG; § 24b para 1b Krnt NSG-neu; § 27b para 4 NÖ NSchG; § 8 para 2 StESUG; § 46b para 2 icw § 46b para 3 VlbG NSchG.

200 *UNECE*, Implementation Guide², 124.

201 § 52a para 4 Z 2 Bgld NG; § 24b para 1b Krnt NSG-neu; § 39b para 2 oö NSchG; § 8 para 2 StESUG.

202 § 14 para 11 Tir NSchG; § 46b para 2 icw § 46b para 3 VlbG NSchG.

203 *UNECE*, Implementation Guide², 124.

204 § 8 para 2 StESUG.

205 § 24b paras 1 and 1b Krnt NSG-neu.

206 § 14 para 10 lit d Tir NSchG.

207 § 52a para 4 Z 2 Bgld NG; § 27b para 4 NÖ NSchG.

208 § 39b para 2 oö NSchG.

209 § 46b para 2 icw § 46b para 3 VlbG NSchG.

210 § 55a para 3 Sbg NSchG.

211 § 46a para 4 VlbG NSchG; § 66a para 3 VlbG JagdG; § 29a para 2 VlbG FischereiG.

212 § 52a para 1 Bgld NG.

213 § 43 para 5 Tir NSchG.

214 § 52b para 1 Bgld NG; § 78 para 10 Bgld JagdG; § 71 para 1 Bgld FischereiG; § 54a para 1 Krnt NSG-neu; § 35c para 1 Krnt FischereiG-neu; § 54c para 1 Krnt JagdG-neu; § 27b para 6 NÖ NSchG § 27c para 1 NÖ NSchG; § 3 para 11 NÖ JagdG; § 39b para 4 oö NSchG; § 55a para 4 Sbg NSchG; § 20a para 4 Sbg NationalparkG; § 150a para 4 Sbg JagdG; § 49a para 4 Sbg FischereiG; § 8 para 3 StESUG; § 43 para 6 Tir NSchG; § 53a para 1 Tir JagdG-neu; § 21 para 5 Tir FischereiG; § 46c para 2 VlbG NSchG; § 66a para 1 VlbG JagdG; § 29b para 1 VlbG FischereiG.

215 § 52a para 1 Bgld NG; § 54a para 1 Krnt NSG-neu; § 27c para 1 NÖ NSchG; § 39b para 4 oö NSchG; § 43 para 6 Tir NSchG.

216 § 55a para 4 Sbg NSchG; § 20a para 4 Sbg NationalparkG; § 150a para 4 Sbg JagdG; § 49a para 4 Sbg FischereiG; § 8 para 3 StESUG.

The appeal period is four weeks in all cases.²¹⁷ In Carinthia (Fishery Act), Burgenland and Lower Austria (for the transitional period), and Upper Austria the appeal does not have a suspensory effect.²¹⁸ Novel grounds of appeal (compared to administrative proceedings) may only be used if in the absence of fault and negligence.²¹⁹ Thus, the time frame for submitting opinions influences the chances of being able to subsequently lodge a complaint against decisions, which is another reason why the time frame for submitting the reasoned opinion must not be too short. In Vorarlberg, also a revision to the VwGH is possible.²²⁰ Finally, the amendments include transitional provisions governing to right to appeal decisions which are not yet legally binding or which have become legally binding within a certain period of time prior to the amendment within six weeks (Salzburg: four weeks) after the respective amendment entered into force.²²¹

IV. Conclusion

Ever since the respective date of accession, the implementation of the AC as a mixed agreement had proven difficult both on the EU and on the domestic level. Especially, the implementation of the third pillar of the AC (access to justice), the Court of Justice's approach on the EU's competence, and how it established its own jurisdiction to interpret all the provisions of mixed agreements received attention among legal scholars. Deficiencies were being addressed by the AC Compliance Committee. As regards the EU, the Compliance Committee seemed – at least to some extent – to have misinterpreted the EU's system of legal protection. Pursuant to art 4 para 3 TEU in conjunction with art 19 para 1 TEU, and the principle of effectiveness, the Member States are responsible for providing effective remedies, if none are available on the EU level. Consequently, Member States' compliance with the AC also brings the EU in more compliance.

Austria, however, not only showed reluctance to its obligations under public international law, but also to those under EU law. Hence, the European Commission sent Austria a Formal Letter of Notice criticising non-compliance with the Habitats Directive, the Water Framework Directive, the Waste Management Directive, and the Air Quality Directive and related obligations stemming from art 9 para 3 AC. A major point of criticism was the zero option for NGOs to obtain legal standing and the right to review administrative decisions. Eventually, in *Protect*, the Court of Justice was given the opportunity to examine the Austrian system of legal protection. As the Court of Justice found, in a system where the right to review is tied to previously having obtained the status as a party, NGOs must also be granted that status with respect to art 9 para 3 AC. In the judgment, the Court of Justice followed its line of jurisprudence and established a link between art 9 para 3 AC and art 47 para 1 CFR, however, did not carry out an in-depth analysis of the consequences.

The application of art 47 para 1 CFR to art 9 para 3 AC-matters effectuates that the latter provision's non-direct effect can be compensated. Hence, and by reminding the Member States of their commitments, an application of art 47 para 1 CFR contributes to the EU's compliance with the AC. Regarding Austria, the Court of Justice's findings in *Protect* lead to a disapplication or consistent interpretation of the most central provisions governing *locus standi* in order to comply with EU law. In order to fulfil the duty of consolidation and to ensure compliance not only with the AC, but also with the EU environmental acquis, the federal and seven regional Austrian legislators adopted new acts, and there is one more proposal pending in Carinthia. In principle, these efforts are to be welcomed but the devil is in the detail: the federal and regional reforms do to a large extent merely attempt compliance with EU environmental law and there is large cross-sectoral and cross-regional variety in the implementation.

²¹⁷ § 54a para 4 Krnt NSG-neu; § 35c para 3 Krnt FischereiG-neu; § 54c para 3 Krnt JagdG-neu; § 39b para 6 oö NSchG. In the other cases according to § 7 para 4 VwGVG.

²¹⁸ § 81 para 22 Bgld NG; § 171 para 10 Bgld JagdG; § 75 para 7 Bgld FischereiG; § 35c para 2 Krnt FischereiG-neu; § 38 para 10 NÖ NSchG; § 43a para 1 oö NSchG.

²¹⁹ § 52b para 4 Bgld NG; § 27b para 6 NÖ NSchG; § 39b para 7 oö NSchG; § 55a para 5 Sbg NSchG; § 20a para 5 Sbg NationalparkG; § 150a para 5 Sbg JagdG; § 49a 5 Sbg FischereiG; § 8 para 3 StESUG; § 43 para 6 Tir NSchG; § 46c para 4 VlbG NSchG.

²²⁰ § 46c para 2 VlbG NSchG.

²²¹ § 81 para 22 Bgld NG; § 171 para 10 Bgld JagdG; § 75 para 7 Bgld FischereiG; Art II Krnt NSG-neu; § 38 para 10 NÖ NSchG; Art IV para 5 and 6 oö NSchG; § 62a para 11 Sbg NSchG; § 14a StESUG; § 48 para 12 Tir NSchG; § 60a VlbG NSchG.

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