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## The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention

### Udział środowiskowych organizacji pozarządowych w (Austriackim) postępowaniu karnym w świetle Art. 9 (3) Konwencji Aarhus

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**Abstrakt:** Jednym z trzech głównych filarów Konwencji z Aarhus jest zapewnienie obywatelom dostępu do wymiaru sprawiedliwości. Nie oznacza to jedynie zapewnienia dostępu do postępowania administracyjnego, lecz także do postępowania karnego w przypadkach przestępstw przeciwko środowisku. Szczególnymi członkami społeczeństwa zainteresowanymi ochroną środowiska są organizacje pozarządowe. W niektórych krajach europejskich organizacje takie odgrywają czynną rolę w postępowaniach karnych, jednakże w wielu przypadkach są spychane na margines. Niniejsza praca opisuje implikacje i wymagania związane z art. 9 (3) Konwencji z Aarhus dotyczące kwestii dostępu do postępowania karnego, analizuje istniejące sposoby uczestnictwa organizacji pozarządowych w postępowaniach karnych w Austrii oraz przedstawia sposoby, w jakie prawo karne procesowe może być reformowane dla spełnienia wymagań Konwencji z Aarhus. Celem ostatecznym jest doprowadzenie do stanu, w którym ściganie przestępstw przeciwko środowisku będzie najbardziej skuteczne.

**Słowa kluczowe:** dostęp do systemu sprawiedliwości, Konwencja z Aarhus, przestępstwa przeciwko środowisku, prawo karne procesowe

**Abstract:** One of the three main pillars of the Aarhus Convention is access to justice for members of the public. Access to justice can not only be provided for in administrative

proceedings but also via criminal proceedings in cases of environmental crime. Members of the public with an interest in environmental protection are especially environmental NGOs. In some European countries NGOs play an active role in criminal proceedings, however in many cases they are banished to the sidelines. This article describes the implications and requirements of Art. 9 (3) of the Aarhus Convention for access to justice via criminal proceedings, analyzes the existing ways for environmental NGOs to participate in Austrian criminal proceedings and presents ways in which criminal procedure law can be reformed to meet the requirements of the Aarhus Convention. The end goal is to make the prosecution of environmental crime as effective as possible.

**Keywords:** access to justice, Aarhus Convention, environmental crime, criminal procedure law

## 1. Introduction

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('AC') aims at giving nature a voice by giving the public, most notably environmental NGOs, access to administrative and judicial proceedings to challenge decisions, acts and omissions that threaten the environment. The access to justice pillar of Art. 9 AC plays an important role in sustainable development and, especially, the judiciary has become a big factor in climate and environmental protection (Jendroška 2020: 374; Hadjiyianni 2020: 889), as can be seen in the growing number of climate change litigation cases worldwide.

The main approach to guarantee access to justice for the public is via administrative proceedings. The Austrian legislator, e.g., has decided to meet the requirements of Art. 9 (3) AC by mainly giving environmental NGOs autonomous rights of appeal regarding decisions (e.g., permits) in matters of waste and water law (Aarhus Participation Act 2018). The implications of the AC for criminal law and especially the granting of access to justice for the public via the avenue of criminal proceedings are rarely discussed. However, since an intact environment is the basis of life for humans, its protection through criminal law is warranted and an access to criminal proceedings for environmental NGOs – regardless of how this access may look like – should be given some thought. This was also recognized in the Council of Europe Convention for the Protection of the Environment through Criminal Law (ETS 172). Art. 11 of this convention states that the parties can grant any group, foundation or association which, according to its statutes, aims at protection of the environment, the right to participate in criminal proceedings. The EFFACE research project also came to the conclusion that including NGOs in criminal proceedings could be an effective way of guaranteeing access to justice (Faure *et al* 2016: 30). At the end of 2021 the European Commission ('EC') presented a proposal for the

Directive on protection of the environment through criminal law and replacing Directive 2008/99/EC (COM (2021) 851 final). Art. 14 of the proposed Directive requires Member States to ensure that, in accordance with their national legal system, members of the public concerned have appropriate rights to participate in proceedings concerning environmental criminal offences, for instance as a civil party. The public concerned is defined in Art. 2 (4) of the proposed Directive and includes “nongovernmental organisations promoting protection of the environment and meeting any proportionate requirements under national law“. Recital 26 of the proposed Directive references Art. 9 (3) AC and states that the public concerned should be able to act on behalf of the environment “since nature cannot represent itself as a victim in criminal proceedings.”

Access to justice via criminal proceedings only makes sense with regard to Art. 9 (3) AC because a review procedure for a refusal of access to environmental information (Art. 9 (1) AC) embedded in criminal law is incompatible with the *ultima ratio* principle and a challenge to decisions, acts and omission which are subject to public participation (Art. 9 (2) AC) is only relevant in administrative proceedings, because the initial proceedings for which public participation is required (Art. 6 AC) concern administrative permits.

In the first part, this article aims to discuss the implications and requirements of Art. 9 (3) AC for criminal law that can be found in case law by the Aarhus Convention Compliance Committee (‘ACCC’) and the European Court of Justice (‘ECJ’). Whereas the ACCC judgements are not legally binding, the judgements and the interpretation of the AC by the ECJ are binding for the European Union’s (‘EU’) Member States (ECJ C-240/09 *Brown Bear I*, paragraph 30). The Member States have discretion on how to regulate access to justice in their national law, however the procedural rules must be equivalent in cases concerning the EU law and purely national law and they cannot make the exercise of rights granted under the EU law excessively difficult (ECJ C-115/09 *Bund für Umwelt und Naturschutz*). In the second part of the article, the current legal framework in Austrian criminal procedure law and the existing ways for environmental NGOs to participate in criminal proceedings are explored. The third part of the article aims at presenting different ways and approaches to restructuring public participation in Austrian criminal proceedings to achieve compliance with Art. 9 (3) AC, some based on legal standing and some based on autonomous participatory rights. Although those approaches are explored within the Austrian legal framework, the general ideas and implications for access to justice can serve as inspiration for other legal systems. This article will also briefly discuss existing public participation in criminal trials in other European countries to generate a broad overview of possible approaches to access to justice via criminal proceedings.

## **2. The requirements of Art. 9 (3) AC for criminal proceedings**

Art. 9 (3) AC states that each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Austria is a party to the AC and therefore obligated to comply with the requirements of Art. 9 (3) AC under international law. Since the AC has been ratified by the EU, Member States are also bound by it within the framework of Art. 216 of the Treaty of the European Union (COM (2017) 2616 final n. 24). As a first step, the meaning of the different elements of Art. 9 (3) AC (acts and omission by private persons and public authorities, provisions of its national law relating to the environment, members of the public and challenge) in the context of criminal law and criminal proceedings will be analyzed.

### **2.1. Acts and omissions by private persons and public authorities**

In principle, criminal proceedings can only be used to challenge acts and omissions of private persons and civil servants of public authorities. The public authority itself cannot be tried in a criminal court. In the context of judicial proceedings, it is important to note that bodies acting in a judicial capacity are not public authorities in the sense of the AC (Art. 2 point 2 AC). Therefore, Art. 9 (3) AC does not require that decisions and verdicts of criminal courts (or rather the judges of the criminal court) are challengeable by members of the public (Epiney, Diezig, Pirker and Reitemeyer 2018: Art. 2 n. 9). It is somewhat questionable if Austrian public prosecutor's offices can also be seen as acting in a judicial capacity in criminal proceedings or if they are taking on a hybrid role by enforcing administrative law if an act or omission can only be challenged through criminal law. According to the AC Implementation Guide (2014: 49), the judicial capacity is characterized by the fact that the bodies apply law impartially and without regard to public opinion or voices from the public. Despite the fact that prosecutors are bound by directives they receive from the Minister of Justice, they can still be seen as acting in judicial capacity because prosecutor's offices are obligated to act impartially and unbiased, according to the principle of objectivity regulated in Sec. 3 Austrian Code of Criminal Procedure. In Austrian criminal trials, public prosecutors cannot be equated to administrative authorities because they have a much smaller margin of discretion and are bound by the principle of legality. Although the ACCC states that the label or classification of the domestic law is not decisive (C32

findings Part I, paragraph 29), it is worth noting that in the Austrian system of separation of powers, the public prosecutor's offices also belong to the judiciary and not to the executive branch (Art. 90a Austrian Constitution). Therefore, the acts of the courts/judges and the public prosecutor's offices in the context of judicial criminal proceedings themselves do not constitute acts or omissions by a public authority and do not need to be challengeable by an NGO under Art. 9 (3) AC. However, for acts or omissions by private persons that violate environmental criminal law, access to justice for environmental NGOs via criminal proceedings is feasible.

## **2.2. Provisions of the national law relating to the environment**

Environmental criminal law is also among the national law relating to the environment (ACCC C63 findings, paragraph 55; and the Austrian studies Schulev-Steindl 2009: 38; Fellner and Wratzfeld 2009: 22; Wagner, Fasching and Bergthaler 2018: 74; Weichsel-Goby 2018: 28). Consequently, members of the public must, in principle, also be granted access to courts in the case of acts or omissions which violate environmental criminal law.

## **2.3. Challenge**

To ensure access to justice via criminal procedure law, members of the public must have the right to challenge acts and omissions by private individuals before a criminal court. The ACCC considers access to justice to be sufficiently given if proceedings can be effectively initiated, NGOs can actively participate in such proceedings or adequate remedies can be enforced (ACCC C86 findings, paragraph 85).

It is unclear how exactly this "effective initiation of proceedings" should look like. Simply granting the NGO the right to notify the police or the prosecution about a crime is not sufficient to guarantee access to the courts. Even the possibility of bringing a complaint to the Environmental Ombudsman's Office is not sufficient if the environmental NGO cannot proceed further against the rejection of the complaint according to the ACCC C63 findings (paragraphs 61-63; Milieu 2007: 13).

In the light of the findings of the ACCC in C36, it could be argued that proceedings are effectively initiated when they go past the prosecutorial investigation phase and reach the main trial before the court. In Austrian criminal procedure, the main trial phase is reached once the prosecutor's office files the indictment (Sec. 210 (2) Code of Criminal Procedure). However, the prosecutorial investigation phase can end in different ways beforehand, through

a discontinuation of the investigation proceedings or a withdrawal of the prosecution (diversion).

In the context of the Austrian criminal procedure, this means that members of the public should at least have the right to challenge a discontinuation of the investigation by the public prosecutor's office.<sup>1</sup> Accordingly, NGOs should have the right to file a motion for continuation of the investigation proceedings (Sec. 195 Code of Criminal Procedure), which is not the case in the current legal framework.

The discontinuation of the investigation can also be decided by the court itself (Sec. 108 Code of Criminal Procedure and Sec. 485 (1), (3) Code of Criminal Procedure). In my opinion, it is not necessary that environmental NGOs can also take action against a judicial discontinuation of the investigation proceedings. The judicial discontinuation of the preliminary proceedings is more "judgment-like" and is subject to a stricter standard than the prosecutorial discontinuation, since it must be certain that further prosecution is inadmissible (ErläutRV 25 BlgNR 22. GP 146). Accordingly, the court decides on the act or the omission in question and proceedings have been effectively initiated.

In the light of the fact that a mere possibility to report a crime to the prosecution is not sufficient to meet the requirements of Art. 9 (3) AC and to initiate proceedings, a legal remedy against a prosecutor's decision not to initiate an investigation according to Sec. 35c StAG (Prosecutor's Office Act) would probably have to be created in Austrian law. According to Sec. 35c StAG, the public prosecutor's office can refrain from initiating preliminary proceedings if there is no initial suspicion (ErläutRV 181 BlgNR 25. GP 22). In this case, there is no right to file a motion for continuation, either for environmental NGOs or for the victim.

It is questionable, however, whether there is also a need for an appeal against a withdrawal from prosecution (diversion). Diversion is a "termination of criminal proceedings without a guilty verdict and without formal sanctioning of the accused" (Schroll and Kert 2019: n. 2). Through diversion, the prosecutor's office assumes "responsibilities similar to punishment" and "duties similar to those of a judge" (Schütz 2017: 57). If one follows the view that a diversion has

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<sup>1</sup> In Austria, the prosecutor can, e.g., decide to discontinue the investigation if the conduct on which the investigation proceedings are based is not punishable by criminal law or if the prosecution of the accused is not permissible for reasons of law or if no factual grounds exist to pursue the prosecution of the accused (Sec. 190 Code of Criminal Procedure). Furthermore, the investigation can be discontinued if in consideration of the guilt, the consequences of the offence and the conduct of the accused after the offence, the nuisance caused by the offence would be regarded as trifling, and punishment does not appear necessary to deter the accused from committing criminal acts or to counteract the commission of criminal acts by others (Sec. 191 Code of Criminal Procedure).

a preventive character (Schroll and Kert 2019: n. 1/1) and has an effect similar to a sanction (Schütz 2017: 58), one could already consider this an effective (judicial) challenge of the conduct in the case of a diversionary settlement.

Art. 9 (3) AC does not require that the decisions made in the course of the effectively initiated proceedings can also be contested with an appeal (AC Implementation Guide 2014: 198; Holzer 2017: 38). Accordingly, NGOs do not have to have the right to file an appeal against the verdict of the competent court (AC Implementation Guide 2014: 198), this is also due to the fact that courts and (Austrian) public prosecutor's offices do not fall under the concept of public authorities as defined in Art. 2 point 2 AC. Access to justice in criminal proceedings concerns the challenge of incriminating conduct of the accused and not the conduct of the public prosecutor. As shown above, the effective initiation of judicial proceedings concerning the polluting conduct of the accused inherently leads to the right to challenge acts of the public prosecutor, e.g., the right to challenge the decision to discontinue the investigation proceedings. In my opinion, Art. 9 (3) AC does not require the legislator to grant NGOs the right to challenge every act and decision of the public prosecutor's office in environmental criminal trials (e.g., the order of an investigative measure, the decision to file an indictment, the request for acquittal during the main trial). If public prosecutors grossly neglect evidence, they themselves could be prosecuted in a separate criminal trial anyway (for abuse of office or potentially even for an environmental crime).

Access to justice could also be strengthened through additional participatory rights for members of the public in the investigation phase and during the main trial. The participation rights must meet the requirements of Art. 9 (4) AC (ACCC C86 findings, paragraph 84), they shall therefore provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.

## 2.4. Members of the public

Art. 9 (3) AC does not require that all environmental NGOs or even individual citizens must be granted access to courts, e.g., in the form of an *actio popularis*. Restricting national criteria can therefore be permissible ("where they meet the criteria"), as long as they are not so strict that practically all environmental NGOs are excluded from the proceedings (ACCC C11 findings, paragraph 35; ECJ C-664/15, *Protect*, paragraph 48; ECJ C-240/09 *Brown Bear I*, paragraph 49; AC Implementation Guide 2014: 198). Accordingly, a restriction on the participation in criminal proceedings to certain environmental NGOs that are concretely affected by the crime, would be permissible. A restriction

of participation rights to environmental NGOs that are officially recognized and fulfil certain criteria, e.g., a minimum number of 100 members, as is the case in Austrian environmental impact assessment proceedings (Sec. 19 (6), (7) Austrian Environmental Impact Assessment Act), has both advantages and disadvantages. As illustrated by Jendrośka (2020: 385), the term NGO in the context of the AC is to be understood broadly and should not only encompass large organizations that have existed for a long period of time. However, criminal proceedings should be conducted within reasonable time (Art. 6 ECHR) and giving any *ad hoc* NGO access to justice in the form of participatory rights might be in conflict with the rights of the accused to proceedings that are conducted expeditiously and without undue delay (Sec. 9 Code of Criminal Procedure).

### **3. Involvement of environmental NGOs in Austrian criminal proceedings *de lege lata***

In Austria, environmental NGOs were recently awarded further procedural rights in administrative proceedings (e.g., the right to appeal certain decisions made by administrative bodies) in the course of the implementation of Art. 9 (3) AC (cf. Aarhus Participation Act 2018). This is a novelty in Austrian law, because traditionally standing or any participatory rights are limited to persons whose rights have been infringed – based on the “Schutznormtheorie“. This rights-based approach is far more restrictive than legal systems where procedural rights are granted on the basis of legitimate interests (Hadjiyianni 2020: 904). The role of NGOs in criminal proceedings is limited mainly to the right to notify the police or the prosecution of a possible crime pursuant to Sec. 80 (1) Code of Criminal Procedure and to the possibility of witnessing the proceedings as an uninvolved listener pursuant to Sec. 228 (1) Code of Criminal Procedure. NGOs can only actively participate in the proceedings if they are considered victims of the environmental crime. Then they could also choose to join the proceedings as the so-called private party (“Privatbeteiligte”).

According to Sec. 65 point 1 lit c Code of Criminal Procedure, any person who might have suffered damage or whose legal interests protected by criminal law might have been violated through a criminal offence is to be regarded as a victim. Victims become private parties pursuant to Sec. 65 point 2 Code of Criminal Procedure by expressly declaring that they wish to participate in the proceedings in order to obtain compensation for any damage or impairment suffered as a result of the crime.



Victims and private parties have many different rights in criminal proceedings. They have the right to view files, to be present during the trial and to question defendants, witnesses and experts and to file a motion for continuation (Sec. 65 Code of Criminal Procedure). Private parties also have the right to file motions for evidence and to maintain the prosecution as a subsidiary prosecutor if the public prosecutor withdraws from it (Sec. 67 Code of Criminal Procedure).

Legal entities can also fall under the definition of victim under Sec. 65 point 1 lit c Code of Criminal Procedure (OGH 17 Os 9/14y; Gappmayer 2013: n. 136), therefore environmental NGOs can in principle participate in the proceedings as victims or even as private parties if they meet the requirements set out in the law. However, according to Austrian case-law, the term “victim” is to be interpreted as narrowly as possible in order to avoid excessively long proceedings. Therefore, victims as defined by the Code of Criminal Procedure must strictly be distinguished from persons who otherwise have a certain interest in the respective proceedings and the criminal prosecution (Kier 2018: n. 4).

### 3.1. “Who might have suffered damage through a criminal offense”

The concept of damage in the sense of Sec. 65 point 1 lit c Code of Criminal Procedure includes claims under civil law, which can be both material, i.e. pecuniary, and immaterial (Gappmayer 2013: n. 173). The damage can result both directly and indirectly from the criminal act. Indirect damage, also called third party damage, is such that is not directly covered by the protective purpose of the prohibition norm (Spending 2013: n. 23). This applies to damage that occurs only as a side effect in another sphere of interest. Such damages can only be regarded as damages within the meaning of Sec. 65 point 1 lit c Code of Criminal Procedure if they are “explicitly compensable under civil law”, such as the claim of the surviving dependents to compensation for funeral costs under Sec. 1327 Austrian Civil Code (Kier 2018: n. 22; Kirschenhofer 2015a: n. 5).

Thus, if an environmental NGO suffers direct damage as a result of the criminal act and consequently has claims under private law against the perpetrator, it meets the definition of a victim according to Sec. 65 point 1 lit c Code of Criminal Procedure and can join the proceedings as a private party. This would be possible in the case of environmental pollution on land owned by the NGO,<sup>2</sup> if the NGO incurs expenses for removal or suffers a reduction

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<sup>2</sup> Some areas are specifically acquired by nature conservation NGOs in order to protect the animal and plant species living on them, see <https://www.naturfreikauf.at/beispielflaechen.html> (last accessed on 30.03.2022).

in value as a result (Fasoli 2017: 30). Direct damage would also exist if the livestock or even individual animals owned by the NGO were affected, resulting in veterinary costs or other expenses (Gappmayer 2013: n. 185).<sup>3</sup>

Generally speaking, in the case of environmental criminal law offenses, it is questionable which damage is within the scope of protection of the offenses and is thus direct damage. The protected legal interests are the environment in its manifestations: soil, air and water, the animal and plant population, and also the life, physical integrity, health and physical safety of people. Also protected are the financial interests of those who have to bear an obligatory removal expense, e.g., as the owner of the property or the operator of a national park (OGH 6 Ob 229/16v) with regard to environmental pollution.

Not protected are the financial interests of people who later buy polluted property (OGH 7 Ob 47/97f) and those of environmental NGOs which clean up polluted areas voluntarily without any specific obligation (e.g., ownership of the property) to do so. The same is true for costs incurred by the NGO in providing the necessary information to the public about the environmental damage that has occurred and the associated risks in the course of hazard prevention (cf. Fasoli 2017: 34). The whole damage does not constitute a victim position in the sense of the Code of Criminal Procedure because any voluntarily compensated damage is not considered to have been “caused by the criminal act” (Korn and Zöchbauer 2019a: n. 5; Kirschenhofer 2015b: 3).

Other third-party damage includes, e.g., costs incurred by the NGO in investigating environmental offenses or attempting to prevent persons from committing environmental offenses, or costs for general campaigns for the protection of certain animal species that are then significantly endangered by the offender. However, such damage is not explicitly compensable under civil law and therefore does not meet the requirements of Sec. 65 point 1 lit c Code of Criminal Procedure (cf. OLG Wien 18 Bs 244/11f).

Similarly, immaterial damage in the form of damage to reputation resulting from the impression that the NGO cannot adequately implement its goal of environmental protection and prevent environmental crimes does not constitute a victim status. Compensation for such damage is not provided for by law (cf. Kier 2018: n. 25; cf. Fasoli 2017: 31). Compensation for pure environmental damage cannot be claimed by the NGO under civil law either.

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<sup>3</sup> For example, in the following case, the environmental NGO Pfothenhilfe, had veterinary costs for four malnourished and sick dogs that were rescued by authorities and handed over to the NGOs. In the following criminal trial for animal abuse, they participated as a private party. Read more under [https://www.meinbezirk.at/schaerding/c-lokales/38-mumifizierte-hunde-urteil-gegen-tierquaelerin-ist-nun-rechtskraeftig\\_a1665133](https://www.meinbezirk.at/schaerding/c-lokales/38-mumifizierte-hunde-urteil-gegen-tierquaelerin-ist-nun-rechtskraeftig_a1665133) (last accessed 30.03.2022).

### **3.2. “Whose legal interests protected by criminal law might have been violated through a criminal offense”**

Victims are also persons whose legal interests protected by criminal law might otherwise have been violated. In Austria, criminal law protects legal interests of individuals but also the so-called general legal interests like the environment or the functioning of the administration of justice. In principle, the impairment necessary to constitute a victim position in the sense of the Code of Criminal Procedure can also be present in the case of a violation of general legal interests, if the interests of an individual have also been secondarily interfered with.

Thus, even in the case of a violation of a criminal norm protecting the environment, it is conceivable in principle that NGOs could be considered victims without having suffered direct damage. However according to judicial practice, the NGO would have to prove two things: first – an indirect encroachment on its legal interest, that is at least co-protected by the violated criminal norm, and second – that the NGO in question is concretely and personally affected by the crime (Kier 2018: n. 30; OGH 17 Os 9/14y; Nordmeyer 2017: n. 12).

The requirement of being concretely and personally affected is necessary to narrow the number of potential victims; otherwise, all environmental NGOs or even everyone interested in environmental protection could be considered a victim and have the right to participate in criminal proceedings (cf. ErläutRV 25 BlgNR 22. GP 235). A concrete and personal concern of all NGOs that have any interest in environmental protection is naturally not the case with an environmental crime (OLG Wien 23 Bs 211/98a; OLG Graz 11 Bs 63/08k). However, a personal, concrete concern and, consequently, also a violation of the interests protected by criminal law could exist in the case of pure environmental damage if further restrictive criteria are applied. Such criteria could be, e.g., conservation activities of the NGO in the damaged area or with regard to a certain endangered animal species or an environmental medium, which are then damaged in the course of an environmental crime (cf. ECCE Study 2017: 42). In the various administrative procedures, the participation of environmental NGOs is limited to those that are officially recognized in the affected local area (Sec. 19 (7) Environmental Impact Assessment Act). The local connection to an area must be proven in the course of the recognition procedure, for example, by activity reports or projects in individual regions. Thus, if such a local recognition of an NGO exists in an area affected by the offense, it can be used as an indicator of special concern.

The problem, however, is the first requirement: The specific environmental offense must also affect an individual right or an individual legal interest, which is at least partly protected by the transgressed norm. This requirement

is a result of the rights-based approach. A large part of environmental crimes does not only protect the environment itself, but also, at least secondarily, other people's property and financial interests. However, not every financial interest is protected, as shown earlier most financial damage is not included in the scope of protection of the transgressed norm. It is undisputed that environmental criminal law also protects the interests of humans in an intact environment (Kienapfel and Schmoller 2009: 56). In a civil law decision of 2016, the Austrian Supreme Court of Justice also explicitly stated that the "idealistic interest of the general public in the conservation of animal species" is protected by Sec. 181f Austrian Criminal Code (OGH 6 Ob 229/16v). However, those are not individual interests but interests of the public.

Presently, courts do not recognize environmental NGOs as concretely and personally affected by environmental crimes. With regard to a violation of the Species Trafficking Act, the Vienna Higher Regional Court stated that not every person or environmental NGO working in the field of animal protection is to be considered a victim by impairment of their interests protected by criminal law. The mere ideological interest in animal protection is not sufficient to justify the victim status (OLG Wien 18 Bs 244/11f).

To conclude, participation of NGOs in criminal proceedings is not impossible but tied to the suffering of a specific financial loss, which is not present in most cases. In the findings for C63, the ACCC, in response to a submission by an environmental NGO regarding the non-recognition of its status as a victim in judicial criminal proceedings, concluded that Austria violates Art. 9 (3) AC due to this lack of access for environmental NGOs to these proceedings. In this case, there was also no other possibility to challenge the act of the offender.

#### **4. Possibilities of Aarhus-compliant structuring of criminal procedure law**

Art. 9 (3) AC does not require NGOs to be able to challenge breaches of environmental law via criminal law, if alternative ways are available to attain administrative and/or judicial review. Accordingly, the participation of NGOs in judicial criminal proceedings is in principle not a mandatory requirement of Art. 9 (3) AC. If a violation of environmental criminal law can be challenged by environmental NGOs via alternative channels, e.g., via environmental liability, it is not necessary for NGOs to be able to participate in criminal proceedings for this violation (cf. ACCC C18 findings, paragraph 32). However, if an act or an omission can only be challenged through criminal proceedings, then access to courts for NGOs in these proceedings must be ensured (ACCC C36

findings, paragraphs 63-64; Ökobüro 2018: 6; Wagner, Fasching and Bergthaler 2018: 35; Weichsel-Goby 2018: 29

In Austria, access to justice for environmental NGOs in administrative proceedings is mainly implemented by granting them the right to challenge certain decisions by administrative bodies (e.g., permits) in waste law, water law and nature conservation law and the right to file an environmental complaint in the framework of environmental liability. The scope of environmental criminal law is far broader than the scope of these rights. The right to challenge permits only covers the conduct of the administrative authority, if an offender pollutes the environment without a permit or contrary to a lawful permit, therefore violating norms of environmental criminal law, NGOs have no access to justice. Access to justice in the framework of environmental liability is limited to polluting conduct caused by specific professional activities e.g., the operation of a plant (Sec. 2 Environmental Liability Act) and NGOs only have the right to file an environmental complaint if the polluting conduct has already occurred (Sec. 11 Environmental Liability Act). Many environmental crimes are endangerment crimes and therefore also cover potentially polluting conduct before any actual damage occurs. Furthermore, the Environmental Liability Act does not cover the pollution of air, which environmental criminal law does.

The legislator could amend administrative law to include a general type of environmental complaint which can be filed by NGOs to request action from administrative authorities in all cases of violations of environmental law by individuals or legal entities. However, regardless of how this environmental complaint is structured, it would not cover the full scope of environmental criminal law. An environmental complaint that aims at rehabilitation and prevention measures (like the current environmental complaint in the Environmental Liability Act) is not applicable for some environmental crimes. For an offender who intentionally kills one specimen of wild fauna listed in Annex IV of the Habitats Directive (Directive 92/43/EEC) and is therefore punishable under Sec. 181f Austrian Criminal Code, there is no sensible rehabilitation measure an administrative authority could order. If the environmental complaint aims at the imposition of a fine by the administrative authority the explicit subsidiarity of many administrative offenses to judicial criminal law is a hinderance, e.g., Sec. 79 Waste Management Act explicitly states that administrative fines can only be imposed if the conduct in question does not constitute a criminal offense within the jurisdiction of the courts. Therefore, even if NGOs were able to request the administrative authority to impose a fine, they would factually be excluded from the proceedings since judicial criminal proceedings would have to be initiated instead of imposing an administrative fine due to the subsidiarity. Therefore, the introduction of general participation of NGOs in the

judicial criminal proceedings, in addition to the existing participatory rights in administrative proceedings, would be the better option.

Furthermore, if the EC's proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC (COM (2021) 851 final) gets adopted in the proposed form, the creation of participatory rights for environmental NGOs in criminal proceedings would become mandatory for Member States.

The participation of NGOs in environmental criminal law proceedings can bring an added value and ensure better enforcement of environmental laws, as studies have shown (Sadeleer, Roller and Dross 2002: 14; Germani, Gerstetter and Stefes 2015: 59). Since most environmental criminal proceedings in Austria are discontinued at the prosecutorial investigation stage (BMJ 2012: 44; BMJ 2019: 65), the mere possibility to challenge the discontinuation of investigation could have a great practical impact.

It should also be noted, that the ACCC has advocated for the juxtaposition of multiple proceedings in which acts and omissions can be challenged (C86 findings, paragraph 78). Even in cases where NGOs can challenge acts and omissions through administrative proceedings and access to justice via judicial criminal proceedings is therefore not required by Art. 9 (3) AC, it would nevertheless be in the spirit of the AC and also of the EU (COM (2017) 2616 final, n. 34) to provide environmental NGOs with multiple ways to challenge acts or omissions.

#### **4.1. Ways to integrate environmental NGOs as victims/private parties**

##### **4.1.1. Interest in compliance with environmental protection regulations as a protected individual legal interest**

It is worth considering whether a victim position and, consequently, involvement of environmental NGOs as a private party might result from a broader interpretation of the scope of protection of environmental criminal norms, which includes the interest in compliance with environmental protection regulations as a protected individual legal interest. This would be compatible with the rights-based approach because standing would still be dependent on the encroachment of a subjective right.

Since the problem with environmental law provisions is often that they are not aimed at granting subjective rights, the ECJ stated in the *Brown Bear I* case that the plaintiff environmental NGO can assert the right to compliance with the provisions of the Habitats Directive in the administrative proceedings in

question as a subjective right (ECJ C-240/09 *Brown Bear I* paragraph 47; COM (2017) 2616 final, n. 40).

For criminal proceedings, Austrian NGOs also propose that they should be able to claim compliance with environmental protection regulations as subjective rights and thus have a private party position (Ökobüro 2018: 6). Should the scope of protection of the environmental crimes in the criminal code be interpreted in such a way that the interest of NGOs in compliance with environmental protection regulations is at least also protected, environmental NGOs could be considered victims according to Sec. 65 point 1 lit c Code of Criminal Procedure if the environmental NGO in question has been concretely affected by the crime. However, in these cases, the NGO will probably not have any civil law claim against the perpetrator arising from the crime, so they would not be able to join the proceedings as a private party.

This proposed comprehensive interpretation is not covered by the wording, telos or systematics of environmental offenses. To regard the interest in compliance with regulations as a legal interest protected by criminal law is not found anywhere in the criminal code and would be too far-reaching. This would result in offenses with no protected legal interest, since the purpose of the norm would then be, as it were, compliance with the norm. As shown above, in the current legal framework, the protected legal interest of environmental criminal law is mainly an intact environment (as the basis for human life) and not the compliance with administrative norms. It would be incompatible with the *ultima ratio* principle to justify the criminalization of conduct solely with the need to ensure compliance with administrative norms. Judicial criminal law in general – as opposed to administrative criminal law – protects the underlying legal interest, e.g., the legal interest protected by the norm criminalizing negligent bodily injury is not the compliance with road traffic regulations but a person's bodily integrity.

In the selected administrative proceedings, that NGOs have standing in, they are regarded as mere formal parties, which receive procedural rights solely on the basis of the legal prescription of such and not on the basis of the impairment of a subjective right (ErläutRV 648 BlGNR 22. GP 12). Similarly, no proof of impairment of the NGOs' subjective rights is necessary for environmental NGOs to challenge certain administrative decisions in water, waste and nature conservation law (Sec.102 (2) Water Law Act, Sec. 42 (1) point 13 AWG Waste Management Act).

#### 4.1.2. Expansion of civil compensation obligations

In 2016, the Council of the EU invited Member States to “consider the introduction of a regime whereby an offender convicted of an environmental crime

would have to pay for the costs of the environmental authority that uncovered the facts that led to the prosecution” (CoE Doc. 15412/16). In many cases, the costs of investigation are borne by NGOs,<sup>4</sup> so it would be worth considering introducing such compensability not only for environmental authorities, but also for NGOs.

If a civil right of compensation for investigation costs is explicitly provided for, private participation via Sec. 65 point 1 lit c Code of Criminal Procedure would be possible. Although these damages would still be third-party damages, the explicit compensability and the claim under private law against the perpetrator resulting from the crime would make it possible to establish a position as victim and private party for the NGO in question.

The main problem of this proposed solution is that such an extension of the compensation obligations would not meet the requirements of Art. 9 (3) AC. This would not create a general access to courts for NGOs, but they would have to be individually affected again. Such a restriction would not be in line with the AC’s objective of creating broad access to courts for members of the public, as the restrictive criteria would be too narrow.

#### 4.1.3. Aarhus-compliant interpretation of the concept of victim

The interpretation of the concept of victim in the scope of the AC must be carried out consistent with the AC’s aim to give the public wide access to justice (cf. ACCC C48 findings, paragraph 63; C11 findings, paragraph 33). As shown above the current interpretation of the concept of victim is so narrow that environmental NGOs are factually excluded from the position as victims or private parties in criminal proceedings (Weichsel-Goby 2018: 42).

Before the reform of some administrative procedures, Sec. 8 Administrative Procedure Act regulated the standing of parties in administrative proceedings. The standing was (and still is, apart from the exceptions for NGOs) only granted if a subjective right of the party has been impaired (rights-based approach). In the *Protect* judgement, the ECJ granted environmental NGOs the right to challenge official decisions in which the environmental law of the EU is applied with reference to Art. 9 (3) AC and Art. 47 CFR. The ECJ stated that the Austrian courts could meet the requirements of Art. 9 (3) AC by giving

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<sup>4</sup> This can be seen on the basis of the following case: The environmental NGO GLOBAL 2000 uncovered a pesticide contamination of groundwater caused by a pesticide manufacturer and notified the police about it. Global 2000 was excluded from participating in the criminal proceedings despite the incurred investigation costs. Read more under: [https://www.ots.at/presseaussendung/OTS\\_20141126\\_OTSS0042/ausschluss-von-global-2000-vom-kwizda-prozess-verstoest-gegen-aarhus-konvention](https://www.ots.at/presseaussendung/OTS_20141126_OTSS0042/ausschluss-von-global-2000-vom-kwizda-prozess-verstoest-gegen-aarhus-konvention) (last accessed 30.03.2022).



NGOs party status through an adapted interpretation of Sec. 8 Administrative Procedure Act which does not require impairment of a subjective right. The procedural law, which regulates the prerequisites of a review procedure, must be interpreted by national courts in accordance with the objectives of Art. 9(3) AC (ECJ C-664/15 *Protect*, paragraphs 53-54; cf. also ECJ C-240/09 *Brown Bear I*, paragraph 50). The Austrian Supreme Administrative Court also took this view into account and repeatedly ruled that Sec. 8 Administrative Procedure Act must be interpreted in a way that grants environmental NGOs party status (VwGH Ra 2015/07/005; VwGH Ra 2015/07/0152).

The Code of Criminal Procedure (in particular Sec. 65) is also to be seen as the national procedural law that regulates access to justice in proceedings in the scope of Art. (3) AC. In criminal proceedings in which environmental law of the EU is applied, Sec. 65 Code of Criminal Procedure – following the *Protect* ruling – would accordingly also have to be interpreted with regard to the victim status of NGOs in a way that corresponds to the objectives of Art. 9 (3) AC. This would be the case in particular if the act or omission of the private party directly violates the EU environmental law, but also in the case of all violations of provisions implementing the EU environmental law (Schulev-Steindl 2019: 21) which applies to a large part of the environmental criminal law provisions. Compliance with Art. 9 (3) AC could therefore be reached if the requirement of an impairment of a co-protected individual legal interest - that is not found in the law but was established in judicial practice - is waived.

#### **4.2. Creation of an autonomous right to appeal the discontinuation of investigation *de lege ferenda***

Another possible way to implement the provisions of Art. 9 (3) AC would be to amend criminal procedure law to grant environmental NGOs legal remedies against discontinuation of proceedings before the main trial that are independent of a victim or private participation position and which the NGO could exercise as a purely formal party.

Such a provision could give registered environmental NGOs, the right to file a motion for continuation according to Sec. 195 Code of Criminal Procedure against public prosecutor's discontinuation of the investigation proceedings concerning an environmental crime. The existence of further restrictive criteria such as a special spatial activity in the damaged area or investigation costs or even direct damage could be waived. Since most environmental criminal proceedings end with discontinuation of the investigation by the public prosecutor's office anyway (BMJ 2013: 44; BMJ 2019: 65) this solution would probably also have the greatest practical effect.

An autonomous right of appeal limited to discontinuation by the public prosecutor's office, which is detached from the status of a party, would only slightly decelerate the proceedings (Wagner, Fasching and Bergthaler 2018: 96) and would also not represent "fundamental changes to [the] party's criminal law system" – as feared by Austria (in ACCC C36, response from the party concerned) – since NGOs do not act as prosecutors here, they have no further rights to participate in the proceedings and the request for continuation must be substantiated. The content of a motion for continuation is bound to the requirements of Sec. 195 (1) Code of Criminal Procedure,<sup>5</sup> which prevents NGOs from willfully delaying the proceedings (ErläutRV 113 BlgNR 24. GP 37). This restriction of the content of the right of subsequent challenge is permissible in the sense of the AC (Wagner, Fasching and Bergthaler 2018: 91).

The problem with this solution is that for it to be completely compliant with the requirements of Art. 9 (3) AC, a motion for continuation must also be available in cases where the prosecutor refrains from initiating preliminary proceedings because he sees no sufficient initial suspicion. In the current system, nobody, not even a victim, can appeal such a decision and one could argue that the granting of the right of an appeal to environmental NGOs might conflict with the fundamental structure of the Austrian criminal procedure and the prosecutorial principle (Sec. 4 Code of Criminal Procedure), which states that the right to file an indictment is incumbent on the public prosecutor who also leads the investigation proceedings. However, since the decision to refrain from initiating preliminary proceedings would simply be judicially reviewed and the prosecutor could not be forced to file an indictment, the prosecutorial principle would not be violated.

### **4.3. Creation of other participatory rights in the proceedings**

In addition to the right to appeal, it should be considered whether, registered NGOs should be granted participation rights, which are detached from a victim or private party position. The rights would have to be granted at the investigation stage, and not only at the trial stage, because most environmental criminal proceedings end through discontinuation of the investigation. The participation rights must meet the requirements of Art. 9 (4) AC (ACCC C86 findings, paragraph 84), they shall therefore provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.

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<sup>5</sup> In a motion for continuation the applicant must state reasons why the proceedings should be continued e.g., a violation of the law, concerns regarding the accuracy of the material facts on which the decision to discontinue was based on or new material facts or pieces of evidence (Sec. 195 Code of Criminal Procedure).

The right to view files, the right to make an oral or written statement and the right to request evidence could prove relevant in practice. In Austrian procedural law, the right to information (Sec. 70 Code of Criminal Procedure), the right to access files (Sec. 68 Code of Criminal Procedure) and even the right to be present during the main trial, to question the defendant, witnesses and expert witnesses (Sec. 66 point 7 Code of Criminal Procedure) or the right to request the taking of evidence (Sec. 67 (6) point 1 Code of Criminal Procedure) could be granted in a new separate Sec. to environmental NGOs that are officially registered.

It is questionable, however, whether such procedural participation for NGOs would be compatible with the system of criminal procedure law and the requirement for acceleration (Sec. 9 Code of Criminal Procedure). Even if the right to participate is limited to NGOs that are officially recognized, there would still be 57 NGOs<sup>6</sup> that could submit a statement. Further limiting criteria (e.g., a concrete concern) could be applied to shorten the duration of the proceedings. The appropriateness of the duration of the proceedings must be assessed for each individual case. Particularly in the case of complex factual or legal issues or if it is necessary to obtain many expert opinions, a longer duration of proceedings may be legitimate (Kier 2008: n. 5). Environmental criminal proceedings are usually highly complex, and many factual issues must be clarified by experts, which means that a longer duration of proceedings may be permissible (EGMR 37591/97 *Metzger/Deutschland*). In particular, the right of NGOs to submit comments or even to request evidence could contribute to clarifying the facts of the case.

#### 4.4. NGOs as prosecutors

In criminal proceedings, private parties are entitled to maintain the indictment as subsidiary plaintiffs if the prosecutor withdraws the indictment (Sec. 72 Code of Criminal Procedure). Subsidiary prosecution serves to ensure that offenses are prosecuted even if the principle of legality is violated by the official prosecution and is thus a “counterweight to the prosecution monopoly”, because normally only the official competent prosecution authority has the right to file an indictment (Korn and Zöchbauer 2019b: n. 1). The circle of subsidiary plaintiffs was deliberately restricted by the legislator to private parties pursuing material interests in the proceedings, in order to prevent criminal proceedings

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<sup>6</sup> The full list of according to Sec. 19 (7) UVP-G officially recognized environmental NGOs in Austria can be accessed under [https://www.bmk.gv.at/dam/jcr:8bbd82cb-335d-49a8-91c7-b5a2b8a67581/iste-anerkannter-Umweltorganisationen\\_20210929.pdf](https://www.bmk.gv.at/dam/jcr:8bbd82cb-335d-49a8-91c7-b5a2b8a67581/iste-anerkannter-Umweltorganisationen_20210929.pdf) (as of 21st of March 2022).

from being conducted purely for the sake of satisfaction (ErläutRV 25 BlgNR 22. GP 103 f.)

It could be considered to achieve conformity with Art. 9 (3) AC by giving NGOs the right to act as subsidiary plaintiffs in proceedings concerning environmental crime without linking this to a private party status. NGOs could thereby ensure a challenge of the environmentally damaging conduct by maintaining the prosecution even if the official prosecutor discontinues it.

With regard to Art. 9 (3) AC, on the one hand, it is problematic that a subsidiary indictment is only possible after the indictment has been filed. If the prosecutor discontinues the preliminary proceedings or even refrains from initiating preliminary proceedings, this possibility is not available (Kirschenhofer 2015c: n. 1). Furthermore, the subsidiary indictment is of little relevance in practice anyway, since the subsidiary plaintiff is obliged to reimburse costs if the defendant is acquitted (Sec. 390 (1) Code of Criminal Procedure; Korn and Zöchbauer 2019b: n. 2).

In particular, it is questionable whether the obligation to reimburse costs is not “excessively expensive” within the meaning of Art. 9 (4) AC. Accordingly, the costs of a challenge must not be so high that NGOs are deterred from doing so, whereby the parties to the AC are relatively free to decide how to implement this obligation (Implementation Guide 2014: 203). Basically, when assessing the costs of “access to justice”, the costs compensation system as a whole is assessed (ACCC C33 findings, paragraph 128). The ACCC has further stated that the allocation of costs must take into account that the NGO is acting in the public interest (ACCC C27 findings, paragraph 45).

An obligation to reimburse costs according to the “loser pays” principle is not per se contrary to the Convention, but may in individual cases, depending on the circumstances, lead to an incompatibility with Art. 9 (4) AC. In this context, criteria such as legal aid, conditional fee agreements or protective cost orders must also be taken into account (ACCC C33 findings, paragraph 129). In Austrian criminal procedure law, the fact that the subsidiary prosecutor is exempt from court fees (Lendl 2021: n. 2) would in any case have to be taken into account in a mitigating manner.

Due to the lack of possibility to file a subsidiary complaint in the preliminary proceedings and the potential conflict of the cost reimbursement regulation with Art. 9 (4) AC, the extension of the right to file a subsidiary complaint to NGOs in the existing system is not purposeful.

It would be worth considering the creation of a right of subsidiary prosecution for environmental NGOs even if the public prosecutor’s office does not file an indictment. The procedural provisions on subsidiary prosecution could then be applied in their existing form. So far, there is no possibility for citizens or

organization to file indictments in Austrian criminal proceedings and the legislator also deliberately decided against creating one. Such a subsidiary right of prosecution for NGOs would be a fundamental change to the Austrian criminal procedure system since the right to prosecution is unlike other European states reserved for the public prosecutor who has a smaller margin of discretion and is strictly bound by the principle of legality than prosecutors in states where an *actio popularis* exists.

## 5. The role of environmental NGOs in criminal proceedings in other European countries

In some European countries like the United Kingdom and Portugal (*acción popular*), NGOs can prosecute environmental crimes themselves. NGOs often threaten to bring such a private prosecution in order to trigger an indictment by state bodies (Faure and Heine 2002: 247). In Spain, environmental NGOs can join the proceedings as a “popular accuser” and can sustain the indictment even if the public prosecutor chooses to withdraw from the proceedings (Fajardo, Fuentes, Ramos and Verdú 2015: 54).

In France, there is even the possibility for NGOs to actively participate in environmental criminal proceedings as a civil party (*partie civile*), according to Art. 142 (2) Code de l'Environnement. As a civil party the NGOs have the right to view files and to be heard by the court (Bianco, Lucifora and Vagliasindi 2015: 43). In France, criminal proceedings with NGO participation result in more convictions than those without (Sadeleer, Roller and Dross 2002: 7 and 20).

The situation in Germany is similar to that in Austria, where NGOs can only participate in criminal proceedings when they are victims; otherwise, their rights are limited (Sina 2015: 55). This is due to the fact that Germany also applies a rights-based approach and requires the encroachment of a subjective right for standing or other participatory rights (Hadjiyianni 2020: 904). Germany also relies more on administrative procedures to enforce environmental law, whereas in other European countries, e.g., the UK, criminal law plays a much bigger role (Faure and Svatikova 2012: 260).

## 6. Conclusion

The AC envisages a broad understanding of access to justice and Art. 9 (3) AC requires access to justice also in judicial criminal proceedings in the case of violations of environmental criminal law if no alternative (administrative) path is available. At the moment, many European states, and especially Austria, practically exclude NGOs from criminal proceedings, although NGOs are often

the ones to uncover environmental crime. In Austria, the biggest obstacle to access to justice for NGOs – in criminal and administrative proceedings – is the structure of the legal system, namely the rights-based approach and the protective norm theory, which always requires an encroachment of a subjective right for standing or participatory rights. Therefore, in the existing criminal procedure framework, NGOs can only participate in the proceedings as victims or private parties if they suffer damage or their individual legal interests that are covered or protected by the transgressed norm are violated.

There are many possible approaches on how to guarantee access to justice for environmental NGOs via criminal proceedings. In Austria, the best solutions would be to either interpret the existing term “victim” in accordance with Art. 9 (3) AC, which was in the past demanded by the ECJ for the corresponding norm in the administrative law (ECJ C-664/15 *Protect*, paragraphs 53-54) or to create new autonomous rights for environmental NGOs in environmental crime proceedings. Those autonomous rights could be limited to NGOs which are concretely affected by the crime to shorten the duration of the criminal trial. As regards the administrative law, the Austrian legislator decided not to resort to a changed interpretation which would deviate from the rights-based approach but rather created autonomous rights for NGOs in certain administrative procedures. As far as criminal procedures are concerned, such legislative steps are yet unavailable. The current government has explained that it wishes to strengthen the role of the private party also in the fight against environmental crime in their government program (Government Program 2020-2024: 27). It therefore remains to be seen how the role of NGOs in criminal proceedings will develop in the future.

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