

SPECIES PROTECTION

Austrian Report by Verena Madner*

I. General background

Austria is a federal state in which both the federation and the nine states (*Laender*) have legislative competences regarding environmental matters. Species protection, as part of nature conservation, however, is considered a matter falling within the competence of the *Laender*. Consequently, the species protection provisions of the Habitats Directive and the Birds Directive¹ were implemented separately by each of the nine *Laender*.

In doing so, the *Laender* have chosen to incorporate the provisions of the Directive into their respective sectoral laws; these are mainly nature conservations acts, fisheries acts and hunting acts, and accompanying regulations ('administrative ordinances').² We thus find a complex patchwork of laws regulating species protection within the Austrian territory.

II. Introductory questions

In its First Environmental Assessment Report (EAR), the European Commission found that in 2013 only 16% of protected species in Austria were in a favourable conservation status (EU27: 23%).³ For those species in an unfavourable conservation status, a slight positive trend was identified compared to 2007. Yet still, 47 % of species were assessed at unfavourable-

* I thank Birgit Hollaus and Lisa Maria Grob for excellent research assistance.

¹ The report will focus on implementation of the Habitats Directive, in particular the application and enforcement of the national laws transposing this Directive.

² Within a *Laend* parallel application of these individual sectoral laws, potentially by different authorities, is possible depending on the species at stake and can lead to different results (e.g. in Vienna, for example, *Iutra Iutra* [Eurasian otter] is covered by the nature conservation and the hunting act).

³ Commission Staff Working Document, 'The EU Environmental Implementation Review Country Report – AUSTRIA', SWD(2017) 33 final, p. 10.

inadequate (EU27: 42%) and 34% at unfavourable-bad status (EU27: 18%) in 2013.⁴ Overall, the Commission suggests a general negative trend in species conservation in Austria when it highlights a 2–3% net deterioration of the conservation status of species, compared to the previous reporting period 2001-2006 under the Convention on Biological Diversity (CBD).⁵

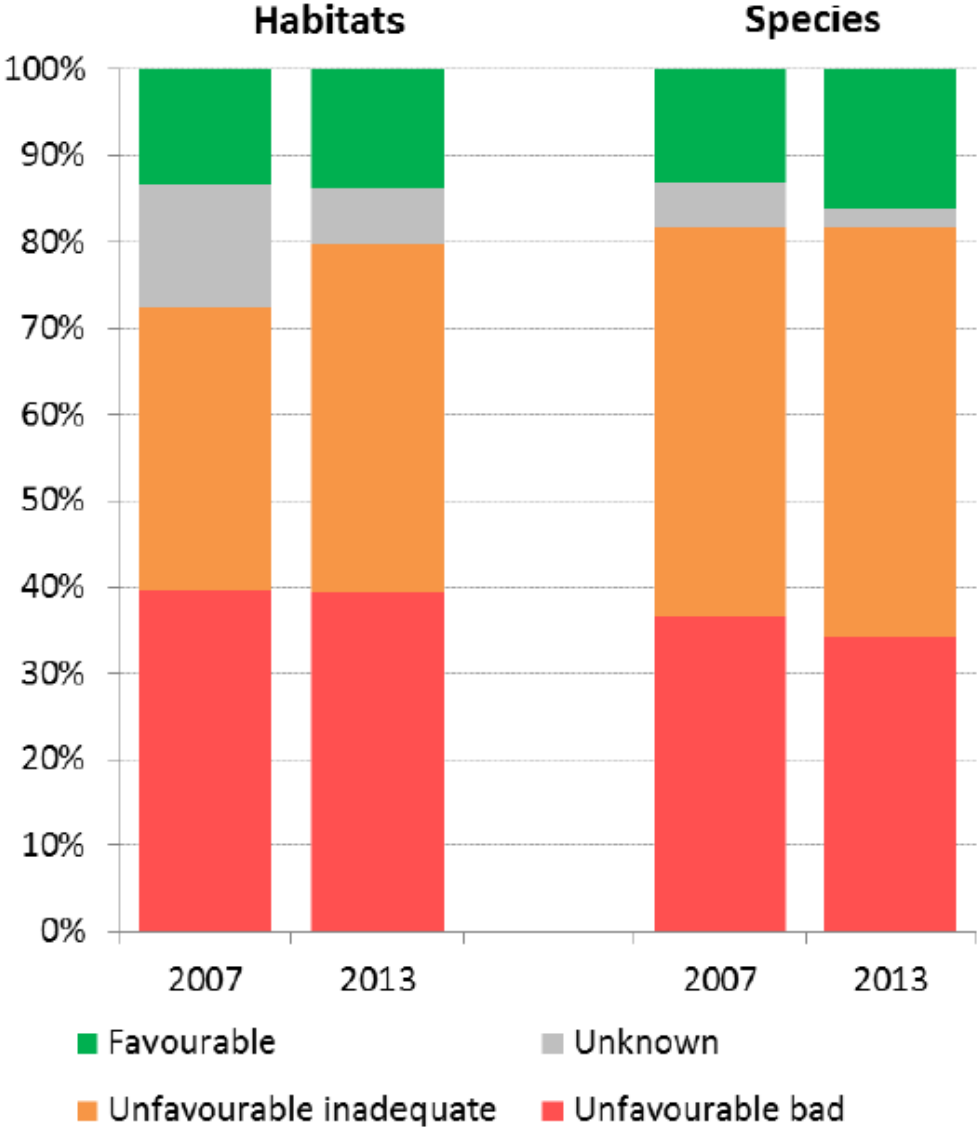


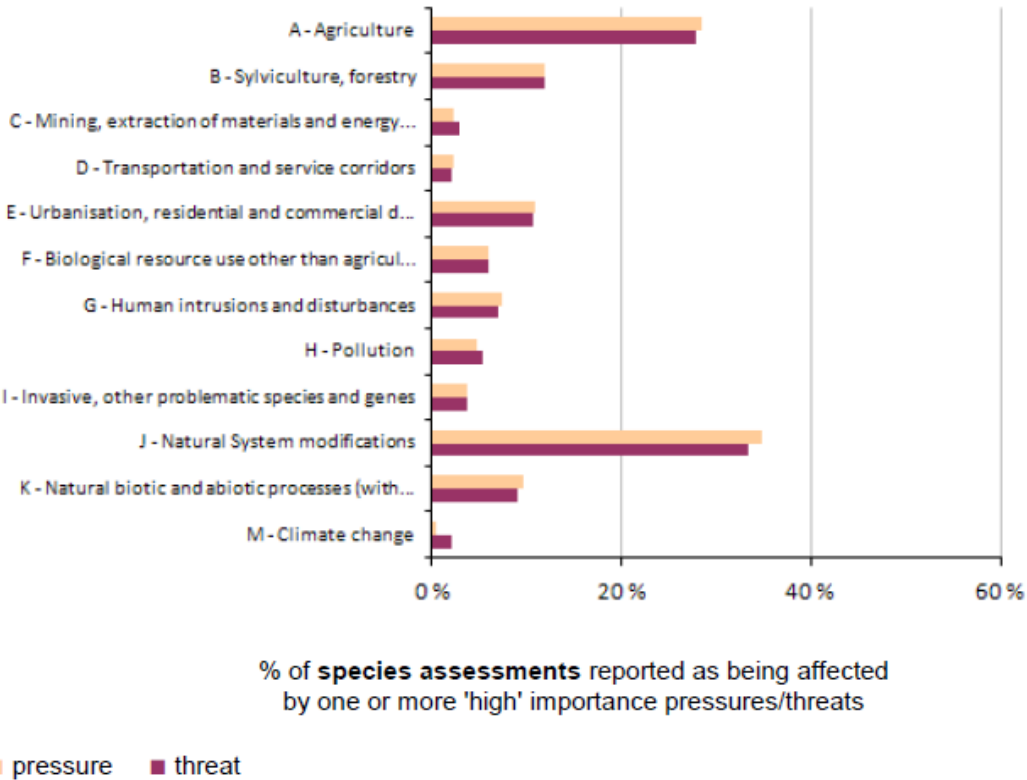
Figure 1: Conservation status of habitats and species in Austria 2007/2013⁶

⁴ National reports paint a similar picture for the period of 2013–2016, see Federal Environmental Agency (UBA), ‘Elfter Umweltkontrollbericht’, 2016, p. 153.

⁵ SWD(2017) 33 final, p. 11.

⁶ SWD(2017) 33 final, p. 10.

In its 2017 EAR, the European Commission identifies several risks for protected species, ranging from agricultural intensification and land abandonment to increased sealing of land caused by housing and infrastructure development with the related loss and fragmentation of habitats, and climate change to name only a few.⁷ For different species, these risks can be seen either as pressure or even as threat, depending on how frequently they occur for a species.



Note: Threats and pressures categories not reported are omitted.

Figure 2 Frequency of main pressures and threats (%)⁸

⁷ SWD(2017) 33 final, p. 11. A problem specific to large carnivores appears to be illegal hunting which is assumed to have caused the extinction of Austria’s brown bear population.

⁸ National Summary for Article 17 - Austria (reporting period 2007-2012), available at https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal:_id1&FormPrincipal_SUBMIT=1&id=53706c20-670d-4490-9d1f-ed6c9879cce5&javax.faces.ViewState=9RCY2GD6GWFiTnhmVPxxOT45aLEbo6Dv7tcGdNIkeeeOLzLaXAhhwZIs2FUC4tdo3zOXiwKOSP5JkT11ZVts2irRpp1EVTqZ%2BhTxSq6tucgl39SRCA4s2myiOnN1oOShud%2BJP4dk%2BiKb8TjzalXy0zu1zJA%3D.

From those risks mentioned, infrastructure projects can indeed be considered one of the main risks for protected species and their habitats, in particular in urban areas, which are quickly expanding. In Vienna, several cases illustrate the problems arising in this context:

- A major housing project (950 flats) was planned on a site in the outskirts of Vienna where a high population of *citellus citellus* (European ground squirrel) had settled. Measures were taken to provoke the individuals to leave the project site and relocate to a pre-prepared area. This has not only caused extensive delays in the permitting of the project but also in the building stage as species protection measures had to be adjusted several times.⁹
- In the course of the expansion of underground line U1, a substantial number of *cricketus cricketus* (European hamster) was relocated to a different site within the city of Vienna. An assessment several years later revealed that the relocated colonies were no longer present at that site, presumably because the site had not been suitable for the species.¹⁰

A factor contributing to the risk infrastructure projects pose to protected species is the fact that national procedures lack public participation. Indeed, Environmental Ombudsmen (*Umweltanwälte*) have been established in every *Laend* in Austria. These bodies are mandated to ensure environmental protection and nature conservation interests in administrative proceedings, and have standing in several environmental proceedings and regularly access to justice in order to do so. However, these bodies cannot be seen as a substitute for genuine public participation and access to justice. For one, they do not have standing in all environmental proceedings depending on the respective *Laend*'s legal framework. For another, they do have discretion when deciding whether to bring a case to court even in case of a request by a member of the public, including an environmental organisation.¹¹

⁹ Die Presse, 'Ziesel: Baubeginn beim Heeresspital', 5 April 2016, available at http://diepresse.com/home/panorama/wien/4960816/Ziesel_Baubeginn-beim-Heeresspital.

¹⁰ Der Standard, 'Feldhamster müssen der U1 weichen', 24 January 2012, available at <http://derstandard.at/1326503611746/Feldhamster-muessen-der-U1-weichen>.

¹¹ See also the assessment of Aarhus Convention Compliance Committee (ACCC) in ACCC/C/2010/48, para 70 et seqq.

In none of the nine *Laender* can the public or environmental organisations participate in procedures relating to species protection such as the granting of derogations. As a consequence of the right-based Austrian legal system, the lack of participation in the decision-making (as a party) also exclude the possibility of the public to challenge a decision by the authorities when it is arguably non-compliant with species protection laws. A recent example might illustrate the situation:

In some Austrian *Laender*, population sizes of *lutra lutra* (Eurasian otter) have significantly improved over the past years having caused conflicts with owners of fishery grounds where the species had found a constant food source, and fisheries associations. This culminated in a decision by the competent authority in Lower Austria granting a derogation for the selective taking, i.e. killing, of 40 individuals until summer 2018. While the number of individuals is well below what the applicants had asked for initially (70-100 per year), environmental organisations still argue that even the number of 40 individuals is too high in view of maintaining the conservation status of the species.¹² However, the environmental organisation could not voice their concerns within the proceedings as these do not provide for public participation; nor can they now bring the case before an administrative to have it reviewed.

The European Commission identifies this lack of legal remedies for the public, which is in the Austrian right-based system linked to the lack of public participation in the preceding decision-making, as the reason why the Austrian public raises its complaints with the Commission, resulting in Austria having one of the highest number of complaints in environmental matters of the member states.¹³

III. Directive 92/43

The nine *Laender* have chosen to transpose the species protection provisions of the Habitats Directive more or less word by word. Due to the (almost) identical wording of national and EU law no specific issues with transposition can be reported.

¹² Der Standard, 'Umsiedlung statt Abschuss für Fischotter gefordert', 2 March 2017, available at <http://derstandard.at/2000053465608/Niederoesterreich-Umsiedlung-statt-Abschuss-fuer-Fischotter-gefordert>; noe.orf.at, 'Land NÖ erlaubt Tötung von 40 Fischottern', 24 February 2017, available at <http://noe.orf.at/news/stories/2827671/>.

¹³ SWD(2017) 33 final, p. 10.

In the following section, I shall thus focus on problems and challenges arising from the application of the national species protections provisions by the authorities, in particular the provisions allowing for derogations from the protection provisions in the context of infrastructure projects.

The cases used to illustrate the problematic areas are mostly not court cases but cases reported by media, environmental organisations or citizens' initiatives. This is a result of the fact that, as explained above, procedures relating to species protection such as the granting of derogations do not provide for public participation or later access to justice for the public. Hence, a positive decision in a derogation procedure is almost never reviewed by the administrative courts.¹⁴

[Article 16 HD, derogation from the provisions of Articles 12, 13 14 and 15 HD](#)

[\(Sec III.2.4 of the questionnaire\)](#)

As mentioned above, species protection in Austria is a matter regulated at *Laender* level. We thus find a slightly different legal framework and administrative practice within the nine *Laender*. To allow giving an overall idea though, I will use the example of Vienna and the laws applicable in this *Laend*. As with the preceding parts of my report, I will focus on infrastructure projects and derogations granted in this context.

[Nature of derogation provisions and data on application \(Sec III.2.4.a of the questionnaire\)](#)

In Austria, any activity that is non-compliant with the species protection provisions requires a derogation to be granted by the competent authority; the national laws do not provide for general exemptions for a field of activities such as agriculture or the like. The competent authority thus assesses in each case whether the requirements for a derogation are fulfilled, i.e. whether there is a specific reason justifying the derogation, whether no satisfactory alternative exists and whether the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status.

¹⁴ Indeed, the Environmental Ombudsmen regularly have the right to legal review in at least some environmental proceedings, dependant on the respective *Laend*'s legal framework. However, they only rarely exercise this right and at any rate have discretion when deciding whether to bring a case to court, even in case of a request by a member of the public, including an environmental organisation.

The number of derogations issued in Austria has been almost constant since 2001.¹⁵ Between 2007 and 2008, Austrian authorities have granted a total of 83 derogations which is well below the average of 214 derogations per Member State during that biennial period.¹⁶ While a large proportion of these derogations were granted for the purpose of conservation research, it is interesting to note that of the remaining derogations, most were granted for infrastructure projects or similar activities:¹⁷ 14 derogations were granted in the context of EIAs of infrastructure projects such as power stations or a large road construction project (Ennstal road B 320). Another 10 derogations were issued in the context of the construction of a barrage bridge, the construction of residential buildings, the rebuilding of a railway station and the expansion of an overground line (S 80).¹⁸

Application of the three-part-test by authorities: specific reasons

It is reported that the assessment whether there is a specific reasons justifying the derogation is regularly the first step when the competent authority conducts the three-part-test.¹⁹ In the context of infrastructure projects, I understand that the following specific reasons are regularly relied upon:

Research and education

In recent years, derogations from the species protection provisions in Austria have mostly been granted for the purposes of research and education, and in particular to carry out the assessment of population conditions of certain species and their conservation status, to

¹⁵ European Economic Interest Group, 'Composite European Commission report derogations in 2007-2008 according to Article 16 of directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)', 2011, p. 7.

¹⁶ European Economic Interest Group, 'Composite European Commission report derogations in 2007-2008 according to Article 16 of directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)', 2011, p. 6, p. 10.

¹⁷ Recent reports often indicate 'construction activities' as the 'permitted method', see http://cdr.eionet.europa.eu/Converters/run_conversion?file=at/eu/habides/envtzeiw/habides_export.xml&cnv=138&source=remote.

¹⁸ European Economic Interest Group, 'Composite European Commission report derogations in 2007-2008 according to Article 16 of directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)', 2011, p. 10.

¹⁹ Hintermayr in Kroneder (ed.), Wiener Naturschutzrecht, 2014, § 11 Rz 5.

monitor species, to carry out genetic and radio telemetry studies, to acquire biometric data, to inventory summer and winter roosts, and to create a list of species.²⁰

Public health and public safety, or other imperative reasons of overriding public interest

With one exception, the species protection provisions of the *Laender* do not clarify or give examples for what can constitute ‘other imperative reasons of overriding public interest’:²¹

In Burgenland, the Nature Conservation Act refers to the acts’ general definition for ‘public interest’ also in the context of species protection. The referenced §6(5) of the Burgenland Nature Conservation Act gives a non-exhaustive list of what constitutes a public interest for the purpose of the act which includes reasons of national defence, tourism, public supply with food or energy, and the protection of historic monuments. However, the authority applying this provision is still required to determine whether any of those public interests listed – or others not listed – is indeed of an ‘overriding’ nature.

In the context of infrastructure projects, it regularly depends on the type of project at stake what can constitute an overriding public interest able to provide a specific reason for a derogation:

- A derogation in the context of the construction of a public hospital was granted with reference to the reason of public health;²²
- It is understood that the derogation to relocate *citellus citellus* (European ground squirrel) in the context of a housing project (950 flats) in the outskirts of Vienna was granted in the public interest of providing sufficient housing within the city of Vienna.²³

Selective taking or keeping

In Vienna, the derogation allowing for the selective taking (or keeping) of protected species is not used for derogations for the killing of species or the destruction of plants.²⁴ However,

²⁰ European Economic Interest Group, ‘Composite European Commission report derogations in 2007-2008 according to Article 16 of directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)’, 2011, p. 10;
http://cdr.eionet.europa.eu/Converters/run_conversion?file=at/eu/habides/envvsxaw/Austria_2013_und_2014_HD.xml&conv=138&source=remote

²¹ Westermann, ‘Artenschutzrecht’, 2012, p. 68.

²² Hintermayr in Kroneder (ed.), Wiener Naturschutzrecht (2014) § 11 Rz 10.

²³ Die Presse, ‘Ziesel: Baubeginn beim Heeresspital’, 5 April 2016, available at http://diepresse.com/home/panorama/wien/4960816/Ziesel_Baubeginn-beim-Heeresspital.

for non-fatal impacts on protected species, and the deliberate destruction or taking of eggs from the wild and the deterioration or destruction of breeding sites or resting places, it is highly relevant, also in the context of infrastructure projects:

V. Enforcement

The species conservation laws are enforced at *Laender* level by local authorities (district level).

Anybody can inform the competent authority about a violation of species protection provisions, however there is no right to initiate, or participate in, an administrative criminal proceeding (*ex officio* proceeding). In the context of infrastructure projects, the competent authority thus relies on regular inspections or reporting obligations of the permit holder, regularly forming part of the permit conditions, to identify a (possible) violation of the species protection provisions.

Where the laws provide so, these authorities are competent to impose administrative sanctions, usually giving some discretion to the authorities. In Vienna, for example, the (attempted) violation of any of the species protection provisions can result in a financial penalty of up to EUR 21 000 or a custodial sentence of up to 4 weeks.²⁵

VI. SEA, EIA

a) Strategic Environmental Assessment

In Austria, the SEA Directive was not transposed by one single legal act. As legislative competence are shared between the federation and the states depending on subject-matter, transposition of the SEA Directive resulted in numerous acts both at federal and at *Laender* level. While plans and programmes in waste management, for example, fall within the competence of the federation, town and country planning is regulated separately by the nine *Laender* at *Laender* level.

At both levels, however, the transposing provisions are of a rather general nature and wording, and do not detail an authority's obligations more clearly than the Directive itself.

²⁴ *Hintermayr* in *Kroneder* (ed.), *Wiener Naturschutzrecht* (2014) § 11 Rz 12.

²⁵ § 49(1) Z 3-6 Wr NaturschutzG.

The CJEU's findings in C-290/15 have to my knowledge not resulted in changes to national laws transposing the SEA Directive. In Vienna's Town and Country Planning Act, for example, § 2(1a) simply requires the authority to 'conduct an environmental assessment' for plans and programmes which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive or which, once implemented, negatively impact on Natura 2000-sites. Thus, how an authority competent to conduct a SEA for a plan or programme ought to deal with matters of species protection is not reflected in the laws.

Most SEAs in Austria are conducted in the field of town and country planning at *Laender* level,²⁶ which in Austria includes the adoption of zoning plans. Especially in this context, when future types of use and development options are defined, species protection can be an important matter to consider. While public participation during the preparation of these plans is considered to raise awareness for species protection, again the lack of access to justice for the public represent a considerable problem. A recent case might illustrate the concerns:²⁷

A local council in Burgenland adopted, by administrative ordinance, a zoning plan which newly designated a plot within a Natura 2000 site to allow for construction. An environmental organisation argued that this rezoning would impact on several species subject to the nationally transposed species protection provisions, and that the rezoning plan was thus unlawful. Although no such explicit right exists for environmental organisations, it then filed for legal review with the competent Austrian Constitutional Court. The right to legal review of an administrative ordinance though is limited by constitutional law to persons who are directly affected in their subjective-public rights by the non-compliance of the administrative ordinance with national laws. This turned out to be an unsurmountable obstacle for the environmental organisation. The Constitutional Court ultimately rejected the environmental organization's argument that the right to legal review – the requirement of being directly affected in subjective-public rights in particular – can be interpreted in light of Art 9(3) of the Aarhus Convention. Thus, not having had a right to

²⁶ BMLFUW, 'Liste SUP-Verfahren 2016', 2016, available at <https://www.bmlfuw.gv.at/dam/jcr:5246def8-d150-451d-a4a4-26fb1c2635e4/LISTE%20SUP-Verfahren%202016.pdf>.

²⁷ VfGH 14.12.2016, V 87/2014.

bring the case before the court in the first place, the Constitutional Court dismissed the case as inadmissible. Commentators question though whether the Court's reasoning is in compliance with the requirements of the Aarhus Convention.²⁸

b) Environmental Impact Assessment

In transposing the EIA Directive, the Austrian federal legislator conceptualised the EIA permitting procedure as a one-stop-shop. Hence, the EIA authority applies all national laws – environmental and others such as the Industrial Code – that are relevant to the implementation of the project in this one procedure;²⁹ with the resulting EIA permit, no further (sectoral) permitting is required. Species protection provisions are thus assessed as part of the EIA permitting, a derogation, if necessary, forms part of the EIA permit. Regularly EIA permit conditions also include reporting obligations by the permit holder for the duration of the construction phase and the requirement to guarantee environmental surveillance and monitoring of the construction sites ('ökologische Bauaufsicht').

Once construction is completed, the project developer is required to inform the EIA authority which then inspects the project for compliance with the EIA permit and its permit conditions,³⁰ including those regarding species protection if there are any. The authority issues a development consent order holding the project developer responsible to eliminate any deviations found; yet the authority can approve minor deviations if the parties affected have been given the opportunity to protect their interests. Environmental organisations are parties to this procedure.

Three years at the earliest and five years at the latest after the notification of construction completion, the EIA authority is required to inspect certain large-scale projects deemed to have significant effects on the environment (Annex I, column 1 to the EIA Act) for compliance with the development consent order, and to verify whether the assumptions and forecasts of the environmental impact assessment correspond to the actual effects of the

²⁸ Weber, 'Anmerkung zu VfGH 14.12.2016, V 87/2014 Keine Verordnungsanfechtung durch Umweltorganisationen', RdU 2017/69.

²⁹ § 3(3) EIA Act 'consolidated development consent procedure'.

³⁰ § 20 EIA Act 'acceptance inspection'.

project on the environment.³¹ Within this analysis, the inspecting authority is required to order remediation of any deficiencies and divergences.

VII. Roles of citizens and NGOs in species protection

The public is neither involved in any proceedings establishing species protection measures or the granting of derogations; nor can it enforce the species protection provisions by challenging an authority's decision before the (administrative) courts. This situation has two main consequences:

- Due to the lack of participation, the public regularly resorts to protests in order to voice its concerns, especially in the context of infrastructure projects. This creates a particular factual challenge for public authorities and project developers.
- For the European Commission, the lack of access to justice at national level is the reason for Austria having one of the highest number of complaints by the public in environmental matters of the member states.³²

I shall briefly present two legal arguments discussed for both aspects – public participation and access to justice – discussed by legal scholars and practitioners in Austria:

The need for access to justice for the public in species protection matters: An argument based on the Aarhus Convention

The Aarhus Convention Compliance Committee (ACCC) found already in 2012 that Austria was largely³³ not in compliance with the requirements of the Aarhus Convention, in particular with its Art 9(3), which requires access to justice for members of the public with regard to acts and omissions 'which contravene provisions of [...] **national law relating to the environment**'.³⁴ Since then, Austrian environmental organisations have used this decision to substantiate their call for access to justice in all environmental matters, including species protection, yet remained unsuccessful. The Austrian legislators in the nine *Laender* did not act, until one finally did:

³¹ § 22 EIA Act 'post-project analysis'.

³² SWD(2017) 33 final, p. 10.

³³ Access to justice in environmental matters for the public exist only in EIA and IPPC-related proceedings.

³⁴ ACCC/C/2010/48.

In summer 2016, the Viennese legislator took the first step to rectify the situation for environmental organisations.³⁵ In its provincial laws relating to proceedings in the field of nature conservation, national parks, hunting and fisheries, the Viennese legislator proposed a right to legal review of administrative decisions also in the context of species protection for ‘recognised environmental organisations’ fulfilling the requirements set out in national law.³⁶

The need for public participation in species protection matters

(1) An argument based on the Aarhus Convention and national law

In view of the Viennese legislator’s proposal of a right to legal review also in species protection matters, environmental organisations argued that national law would require a different – broader – approach:³⁷ Indeed, Art 9(3) of the Aarhus Convention would only require a right to legal review after the decision was taken. However, the Austrian administrative law system generally links the right to participate and the right to legal remedies with the consequence that only those who have participated in the decision-making can then challenge the decision. Hence, according to environmental organisations, a better fit for the Austrian system would be a right to legal review as required by Art 9(3) of the Aarhus Convention but preceded by a right to participate already in the decision-making.

While the environmental organisations’ claim might be understandable also in the interest of constructive decision-making in environmental proceedings, the argument made does not appear to be well founded.

(2) An argument based on the Aarhus Convention and CJEU case law

³⁵ Draft laws available at <https://www.wien.gv.at/recht/landesrecht-wien/begutachtung/#ende>.

³⁶ These requirements, set out in §19(6) of the Austrian EIA Act, are

1. to be an association or foundation whose primary objective is the protection of the environment according to the association’s statutes or the foundation’s charter,
2. to be non-profit oriented under the terms national law, and
3. to have been in existence and has pursued the objective identified in number 1 for at least three years.

Once these requirements are fulfilled, the competent Minister issues, upon application of the environmental organisation, an administrative order ‘recognising’ the environmental organisation as such.

³⁷ Ökobüro, ‘Stellungnahme zur Änderung des Wiener Nationalparkgesetzes und des Wiener Naturschutzgesetzes’, 25 July 2016, available at http://www.oekobuero.at/images/doku/oekobuero_stgn_wrnaturschutznovelle_aarhus_2016.pdf.

Environmental organisations now hope to get new support in their argument from a recent CJEU preliminary ruling, *Slovak Brown bear II*.³⁸ The CJEU argued in *Slovak Brown bear II* that Art 6(3) of the Habitats Directive, establishing the requirements for an appropriate assessment of plans and projects likely to affect a Natura 2000 site, and requiring the competent national authority, if appropriate, to obtain the opinion of the general public must be read in conjunction with Article 6(1)(b) of the Aarhus Convention. According to the CJEU, the appropriate assessment under Article 6(3) of the Habitats Directive is a procedure falling within the scope of Art 6(1)(b) of the Aarhus Convention. Consequently, such a procedure requires participation of the ‘public concerned’ and access to justice to protect these participatory rights as provided for by Art 9(2) of the Aarhus Convention.³⁹

In view of *Slovak Brown bear II*, the discussion of necessary public participation in the context of Natura 2000 sites could indeed gain momentum in Austria. However, whether the Court’s findings can also be employed in the context of species protection is to be discussed.

³⁸ Case C-243/15 *Lesoochránárske zoskupenie VLK* (CJEU, 8 November 2016).

³⁹ Case C-243/15 *Lesoochránárske zoskupenie VLK* (CJEU, 8 November 2016) para 47 et seqq.