

Executive Summary

Environmental Governance and Environmental Agreements

1. Environmental Agreements vs Voluntary Agreements

There is a wide fragmentation in the use of definitions to describe the instrument related to “*agreements concluded among public administration and private entities in the field of environmental policy*”. Therefore the authors of this study preliminary distinguish between two different terms to specify two (different) types of these agreements:

a). **Environmental Agreements** differ from **Voluntary Agreements** in meeting several **material and procedural minimum requirements** like quantified and ambitious **targets**, **transparency**, **public participation**, independent and reliable **monitoring** systems and **amendment mechanisms** in case of non compliance. Environmental Agreements can replace - at least partly – direct regulations; anyway they complement the command-and-control approach.

b) In contrast to that **Voluntary Agreements**, which do not meet the necessary minimum requirements, are used for handling new problems with still some unclearness regarding reasons and possible solutions. In that way Voluntary Agreements meet important “**soft effects**” like promotion of environmental awareness in companies, provision of information from companies for public authorities, promotion of cooperation in firms, motivation of firms to implement measures for environmental protection. However, Voluntary Agreements can not replace direct regulations.

2. Governance discussion of the European Commission

a) Governance process

The European Commission wants to reform and democratise the administration of the European Union within the scope of the “**Governance process**” (White Paper “European Governance” and its follow up papers; http://europa.eu.int/comm/governance/index_en.htm). The legislation-process should be simplified and stress on essential contents, without details. Enforcement of environmental law should be improved by **made to measure solutions through close coordination and cooperation with the relevant stakeholders**.

The European Commission intends to implement **new policy instruments** as an alternative to directives and regulations. In a very early political stage it should be examined in the framework of an impact assessment analyses which policy instrument would yield the best results.

b) Co-regulation and Self-regulation procedure

The European Commission proposes two different procedures to handle Environmental Agreements on community level: Co-regulation and Self-regulation. **Co-regulation** is aimed at combining voluntary measures of the relevant stakeholders and stringent legislative measures: A directive or a framework directive would specify targets, time limits and aspects concerning monitoring systems. However, this directive would not prescribe how to achieve the targets, as this decision is left to industry.

In addition to Co-regulation the European Commission proposes **Self-regulation** as a second new policy instrument: After an early and comprehensive consultation of the public an Environmental Agreement is fostered by a non-binding but official recommendation of the European Commission.

3. Environmental Agreements in the EU and in Austria

Voluntary Agreements and Environmental Agreements are widely used throughout Europe, especially in the Netherlands, **Germany**, **Great Britain** and **Denmark**. There are also Agreements on Community Level. The **Netherlands**, where in the majority of cases environmental targets are met through (legally binding) Environmental Agreements, appear to have the **most mature** system. In Europe Voluntary Agreements and Environmental Agreements are used mainly in the area of **waste management** and for **reduction of greenhouse gases**.

In **Austria Environmental Agreements** – according to the definition used in this study - are **not implemented** by now, **but** there are **some Voluntary Agreements**. The authors of this study identified, supported by the Austrian Federal Economic Chamber and the Federation of Austrian Industry, **18 Voluntary Agreements**. These Voluntary Agreements are not binding but they encompass – partly - quantified objectives and aspects of monitoring. Transparency of the conclusion and execution of Voluntary Agreements has improved especially regarding recent Voluntary Agreements.

4. Chances and Risks

There are the following **chances** due to Environmental Agreements as well as Voluntary Agreements a.o.:

- Faster and **more economical achievement** of objectives
- Cooperative and progressive approach of industry
- **Simplification** of public administration (deregulation)
- **Cost-reduction** for private entities as compared to direct regulations (economic effectiveness)
- More effective execution of duties due to more motivated actors
- **Public-relations** effects for the concerned companies.

and the following **risks**:

- Lack of **transparency** and **public participation** while concluding agreements and lack of communication and information of the public
- Concerns regarding constitutional law: lack of **parliamentary control**, **transparency**, and **rule of law**
- **“Regulatory capture”**: environmental targets in agreements are low due to an information and knowledge deficit of public participation about the actual abatement potential of companies and industrial plants (no change compared to business-as-usual scenario)
- Non quantified and **unclear targets** which make an agreement non-revisable
- **Non-performance** of non binding agreements without consequences
- **Free-rider** problems
- **High costs**: Administration of Environmental Agreements.

5. Recommendations for effective Environmental Agreements

OECD and the European Commission have proposed **stringent requirements** for Environmental Agreements. These requirements form the base of this study’s “recommendations”.

- **Targets**:
 - The state (legislator or public administration) should be clear about the environmental **targets before starting negotiations** for an Environmental Agreement in order to avoid regulatory capture.

- A **transparent** procedure ensures prevention of “regulatory capture” as the public could monitor negotiations and the target setting process.
- Involvement of **environmental NGOs** increases pressure on industry and strengthens the position of the state.
- In long-term periods implementation of **sub-ordinate targets** is essential for controlling.
- **Time limits**: Time limits serve for examination of sub-ordinate targets and for prevention of industry’s delaying tactics.
- **Transparent and independent monitoring**: An **independent or state-run** monitoring system is the very pre-condition for implementation and controlling of Environmental Agreements. Furthermore the monitoring system is to be transparent and open to the public as it is stated in the **Aarhus Convention**.
- **Amendment mechanisms**: In the case of not meeting the agreements targets amendment mechanisms like sanctions should be imposed (f.e. financial penalty). Severe legislative measures should be handled as an important amendment mechanism.
- **Transparency and public participation**: Standards are necessary for ensuring transparent conclusion and execution of Environmental Agreements. Environmental NGOs and other stakeholders should be involved in negotiations of Environmental Agreements. Based on the recommendations of the European Commission the authors propose **public involvement** in the following **5 stages**:
 - Announcement of the **intention to conclude** an Environmental Agreement
 - Transparent **negotiations**
 - Announcement of the negotiated **results**
 - Announcement of the **final version** of the environmental agreement
 - Announcement of the results of the **monitoring** process.

6. Legal questions

Several legal questions concerning constitutional law, rule of law, international law and European law arise when **integrating Environmental Agreements into the existing legal system**, not only in Austria.

- The **democratic principle** demands legal and political responsibility of public administration and government towards parliament. “Informal” action of civil servants is outside these constitutional guidelines. There must be an authorisation by law for concluding Environmental Agreements to remain within the democratic principle.
- Environmental Agreements must not undermine **division of powers** within the state.
- In Austria Environmental Agreements might be classified as something between **(individual) administrative act** and **regulation** (general administrative act). However, it must be guaranteed that there is no lack of legal remedies for all partners. Unlike in Germany, the public administrative contract does actually not exist in the Austrian legal system by law, although some of these contracts are accepted by the Austrian Federal Supreme Courts under certain circumstances.
- Beside the potential interest of the contractual partners as regards to legal redress legally protected interests and legal standing of **third parties** have to be considered
- There could be conflicts with **European Law**: Environmental Agreements and Voluntary Agreements tend to be agreements that fall under **anti trust legislation**. Furthermore there are possible conflicts with European **competition law** and **state aid** legislation. Therefore it is recommended to **submit** Environmental Agreements to the competent **competition authority** before getting into force.

- Besides, aspects of **International Economic and Environmental Law** have to be kept in mind. If Environmental Agreements can be seen as a competition advantage for certain firms, a contradiction to multilateral trade regulations and WTO-law arises.
- **Important clauses for Environmental Agreements:**
 - **Entry clause:** Environmental Agreements are a public policy instrument, which must not be limited to certain private entities. Therefore it has to be open for any similar private entity. It is recommended to set up a clause into the agreement which makes it open for new entities willing to join the agreement.
 - There should be an **exit clause:** If for some reason one or more parties is not able to meet the objectives of an agreement (for example: if some private entities fail to meet its obligations the state should be able to terminate the agreement and impose binding legislation).
 - **Amendment** clauses should provide the possibility to respond to changing framework conditions (like new scientific evidence)
- There should be **time limits** for Environmental Agreements, as public administration and governments must not restrict their power of taking legislative and other measures for a long period of time (laws, acts and regulations can be changed always by parliament)
- **Environmental permitting regulations** should not be replaced but supplemented by Environmental Agreements. Legislation and competent authorities should still have the possibility to respond to arising environmental and health problems and be allowed to prescribe emission limits as well as other measures.

7. Environmental policy recommendations for the implementation of Environmental Agreements in Austria

The study finalises with a list of **recommendations**, which should be taken into account when using Environmental Agreements. These recommendations are presented in the following in a short form:

- **Establishing Environmental Agreements as a new policy instrument in Austria**

In Austria a new policy instrument “Environmental Agreements” should be established which combines self-regulating measures with the direct regulation approach. The new instrument “Environmental Agreements” should be a “quality label” compared to already existing Voluntary Agreements. As mentioned above Environmental Agreements differ from Voluntary Agreements in meeting several material and procedural minimum requirements like **quantified targets, monitoring systems, transparency, public participation** as well as **amendment mechanisms**.

- **Maintaining informal Voluntary Agreements as a policy instrument**

Whereas Environmental Agreements (quality term) can replace or supplement direct regulations, informal Voluntary Agreements can be used in other policy areas, f. e. as a policy instrument to converge to new problems and to increase confidence between state and firms.

- **Enacting an Environmental Agreements Bill**

A legislative bill should contain minimum procedural and material requirements for Environmental Agreements like transparency, clear and quantified targets and public participation provisions.

- **Concluding sectoral Environmental Agreements**

Sectoral Environmental Agreements are arranged between the state and representatives of the concerned economic sector. Sectoral Environmental Agreements are easier to handle for public administration and are more efficient in reaching environmental goals.

- **Arranging binding agreements**

As the study shows, only binding Environmental Agreements can be used as an alternative for direct regulations due to environmental and legal concerns. On the one hand the binding character can be ensured by the possible suability. On the other hand there are measures which could give non legally binding agreements an almost binding effect, like a credible threat of severe legislation, if an agreement fails to achieve the set targets. A further instrument to ensure compliance would be the possibility for the public administration or the legislator to declare an environmental agreement as legally binding by regulation or legislative act.

- **No change in environmental permitting regulations**

Environmental Agreements should not replace but amend environmental permitting regulations. Administration should still have the possibility to prescribe emission limits due to environmental reasons.

- **Examination of possibilities for the integration into laws**

The Environmental Agreements Bill has to be applied for all types of Environmental Agreements. The following approaches are possible for the implementation into Austrian law:

- **“Target-Regulation” (Zielverordnung)**

Specific Environmental Agreements for several economic sectors are arranged by the particular lobby in industry. However, these interest groups (business associations) have no possibility to commit their members. This weakness of enforceability could be mitigated through the establishment of “target-regulations”. A target-regulation is a general regulation which does not lead to legal duties for certain individuals or entities. A target-regulation just sets minimum requirements like objectives and time limits (for example “chemical industry will reduce its emission of a certain substance by 20 % until 2008) of the Environmental Agreements and make them therefore kind of binding for a certain economic sector. Furthermore a target-regulation can commit the public administration to set further measures, if the targets are not met.

- **Administrative contract**

The public administrative contract does not exist in the Austrian legal system by law, but is accepted by the Austrian Federal Supreme Courts, if certain requirements are met. Therefore the legislator should open the opportunity to conclude such contracts generally and determine the main contents of these contracts to not get into conflict with constitutional law.

- **Promotion of the application and further development of this policy instrument**

The authors see a great potential for Environmental Agreements especially in the area of integrated product policy and therefore recommend a set of follow-up activities.