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"Revised Communication to the Aarhus Convention's Compliance Committee" on Access to Justice in Austria

Vienna, 2. June 2010

In its letter dated 8. April 2010 the Compliance Committee requested the communicant to re-arrange the communication in a way that all facts and allegations relating to a specific provision of article 9 of the Convention are under the same section. To facilitate this exercise the Committee added a list of questions to this letter.

The approach of the communication was to demonstrate the alleged non compliances issues in the framework of a general analysis of the Austrian legal system with regard to access to justice in environmental matters. Therefore the communication coverd both aspects of compliance and non compliance. However, the result was, as the Compliance Committee correctly stated, that the communication was not sufficiently clear on what infringements we actually invoke.

Therefore we have reorganized the communication as the Committee requested. The original communication dated 13. March 2010 can be ignored in the further procedure since this revised document contains all allegations we had raised in March. We would fully agree if the deadline for the party concerned to comment on the communication would be extended since we caused this delay by sending the communication in an inappropriate manner.

Content

I. Information on correspondent submitting the communication

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This communication has been prepared under the mandate of the OEKOBUERO member organizations, in particular GLOBAL 2000 (FoE Austria), Greenpeace CEE and WWF Austria.

II. State concerned

AUSTRIA

III. Facts of the communication

1. Reasons that lead to this communication

1. Article 9 of the UN-ECE Aarhus Convention provides for Access to Justice in environmental matters. Paragraph one of Article 9 regulates Access to Justice regarding environmental information requests. Paragraph 2 of Article 9 enables members of the public concerned, including environmental organizations, to legally review specific acts, omissions and decisions that are taken in the framework of permitting certain activities that could be harmful to the environment (listed in Annex I of the Convention), including public participation rights in such permitting procedures. This provision has been implemented by European Directive 2003/35/EC on public participation amending in particular the EIA and IPPC Directives and its national transposition respectively.

2. Article 9 par 3 of the Convention provides that *"…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.*" In contrast to the former two articles of Article 9 paragraph 3 has not been transposed by European secondary legislation yet. Only the 2004 adopted directive on

Environmental Liability (2004/35/EC) contains a provision (Article 13) that was directly derived from Article 9 par 3 of the Convention.

3. Finally paragraph 4 of Article 9 is of crucial importance: "*4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide* ***adequate and effective remedies****, including* ***injunctive*** *relief as appropriate, and be* ***fair, equitable, timely*** *and not prohibitively expensive*."

4. According to our experience Article 9 par 3 and 4 are most critical in practice. This communication will therefore focus on these aspects particularly, but also refer to Article 9/2 and 9/1 if appropriate.

5. Whereas Austria implemented those provisions of the Aarhus Convention that are reflected in European legislation to a large extent (in particular Directive 2003/35/EC on public participation, Directive 2001/42/EC on SEA or Directive 2003/4/EC on environmental information), **Article 9 par 3 of the Convention has neither been transposed nor implemented yet (in practice)**. Austria can be regarded as one of the most restrictive European countries with regard to Access to Justice for the public in environmental matters.[1]

6. Austria ratified the Aarhus Convention in January 2005.[2] In the explanatory notes to the parliament's ratification act the legislator stated that the Convention is **not open for direct applicability.**[3] Austria confirmed this position in the Aarhus Convention Compliance Committee procedure in Case ACCC/C/2008/26.[4] However, direct applicability is formally possible since Austria did not make use of the constitutional provision that prohibits self execution of international treaties (Article 50 par 2 and 3 B-VG).[5]

7. Furthermore the **explanatory notes to ratification** state there is **no legislative need** for implementing Article 9 par 3 of the Convention. Austria repeated this position in its implementation report submitted to the last Meeting of the Aarhus Convention Parties in Riga (2008)[6]. Until now the Austrian administration and **jurisprudence** do not refer to the

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[1] *Kerschner/Raschauer*, RdU 2008, 145, the editors of the Austrian environmental law journal, raise the question how deep „fear and persistancy tendences" Austria appear to be that Austria continues to ignore any case law of the European Court of Justice requesting access to justice such as *Janecek* ECJ C-237/07.

[2] See http://www.unece.org/env/pp/ctreaty.htm (December 2009);. It is interesting to note that it appears ratification was reported earlier to the UN than the formal adoption in Austria. Ratifcation was published in Austrian OJ only in June 2005 (BGBl III 2005/88.

[3] 654 der Beilagen XXII.

[4] http://www.unece.org/env/pp/compliance/Compliance%20Committee/26TableAustria.htm. The case was closed with decision FINDINGS OF THE COMPLIANCE COMMITTEE WITH REGARD TO COMMUNICATION ACCC/C/2008/26 CONCERNING COMPLIANCE BY AUSTRIA WITH ITS OBLIGATIONS UNDER THE CONVENTION as adopted on 25 September 2009 by the Compliance Committee
at its twenty-fifth meeting, held in Geneva from 22 to 25 September 2009

[5] Please read below for further details

[6] IMPLEMENTATION REPORT SUBMITTED BY AUSTRIA ECE/MP.PP/IR/2008/AUS; http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_AUS_e.pdf

Convention in general,[7] ignore respective arguments[8], or put down both implementation gap and/or direct applicability, in particular by referring to the explanatory note on ratification.[9] Furthermore the Aarhus Convention is more or less not reflected in Austria in legal literature. Only recently the Aarhus Convention was subject to selected reference in literature.[10] There are however prominent voices in literature stating that Austria appears aiming to undermine the **Aarhus Convention** until it "**degenerates into meaninglessness**".[11]

8. In the meanwhile Austria appears to concede that there are implementation gaps as to Article 9 par 3 of the Convention. A 2007 published study of the European Commission (executed by **Milieu** Ltd) found Austria as **one of the worst countries in the EU** regarding Access to Justice, in particular due to the complete failure to implement Article 9 par 3 of the Convention.[12] Based on these findings the **Austrian MoE** commissioned an Austrian University to compile a study on implementation gaps and legislative needs regarding Article 9 par 3 of the Convention. This study[13] was published in November 2009 in a stakeholder workshop in Vienna. A legislative process might be initiated during 2010, but political resistance against this idea is very strong.

9. A group of Austrian NGOs therefore decided to submit a communication to the Compliance Committee in order to enable the public concerned exercise the Access to Justice Rights granted by the Convention as soon as possible.

2. Alleged non compliance with Article 9 par 3

10. With regard to non compliance of Art 9 par 3 we see two major shortcomings that are to a large extent interrelated. The first issue concerns the (too limited) scope of standing in case access to justice is granted. The other issue relates to the fact that most environment related acts and omissions can not be legally reviewed at all.

2.1. Limited scope of standing

11. Access to Justice in environmental matters in Austria is closely related to **standing** (locus standi) requirements in administrative procedures. The general rule is that only "parties" to an administrative proceeding have standing. And the latter implies access to review

[7] Only 3 decisions with Aarhus reference exist..
[8] VwGH 2006/10/0206 of 26. Feb 2007 (Highest Adminstrative Court)
[9] Decision UVS-327-006/E10-2006, 30.08.2006
[10] Next to some references in literature some master theses of University have been published.
[11] *Kerschner/Raschauer*, RdU 2008, 145;
[12] Country Report Austria in "Measures on access to justice in environmental matters (Art 9(3))" *Milieu* Ltd. 2008
[13] Rechtliche Optionen zur Verbesserung des Zugang zu Gerichten im österreichischen Umweltrecht gemäß Art 9 Abs 3 der Aarhus Konvention, *Schulev-Steindl, Goby (2009); Download* *http://www.wiso.boku.ac.at/fileadmin/_/H73/H736/Schulev-Steindl/Endb-AarhusKV_Adobe.pdf*

procedures in specific issues.[14] It is thus important to be aware who is eligible as administrative party, who has standing. A "party" to the proceeding is defined as a legal subject taking part in the proceedings on the basis of a **legal interest** or a legal title. Such a legal interest aims to protect the rights of a subject and limits by the same time scope of legal review in appeal procedures.

12. It is therefore crucial to understand what the term "legal interest" means. To have legal interest a "**subjective right**" needs to be **impaired** or at risk (impairment of rights doctrine). What is a subjective or **individual right** is determined by **legislation** (in order to protect the individual). In fact, legislation expressly defines which specific rights could be impaired with respect to certain procedural parties (e.g usually neighbours concerning noise, smell, property; municipalities concerning their finances)[15]. Sometimes standing rights are derived by legal interpretation of sectoral legislation (e.g waste, forestry, soil) in line with general administrative rules and constitutional principles.[16]

13. This legal position has to be compared with the provisions of the Aarhus Convention that aims to provide for proper enforcement measures (Art 3 par 1) in order to protect, among others, future generations to live in an adequate environment (Art 1) and protect the environment as such (see for example reference to Stockholm declaration as well as other recital clauses to the Convention). Article 9 par 3 reads as follows:

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

14. The Convention enables the "members of the public" to legally challenge acts and omission that contravene provisions of environmental law. From that regard only "neighbours" can be consider as "members of the public" in the sense of the Convention, since other subjects such as an NGO do not have access to legal review procedures at all. However, the impairment of rights doctrine would only be compatible with Article 9 par 3 of the Convention when the impairment of "provisions of environmental law" would be "subjective rights" and "legal interests" respectively that provide for standing and thus

[14] See *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 86 et seqq. for further details and references

[15] e.g Art 42 AWG (Federal Waste Management Act): This provision clearly defines who has standing in waste permit proceedings (the applicant, neighbours, the industrial site owner etc. Its however not clear what is the „subjetive" right conderned defining the scope of their standing rights.

[16] *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 88

access to justice. We claim that this is not the case in Austria. The 2007 *Milieu* study[17] of the ***European Commission*** came to the same conclusion.

15. The Austrian laws only provide for locus standi regarding individual, personal (protection) rights (Schutznormtheorie) that are basically not related to "public interests" such as environmental law or protection of the environment as such. Only sometimes **individual and public interests do overlap** (e.g aspects of nuisance from noise, dust). However, they **do not overlap** regarding the vast majority of environmental laws. In principle[18] only individuals directly and personally affected (**neighbours**) by an activity or emission would be granted standing rights. Neighbours do typically have standing in permitting procedures for industrial installations according to the **Industry** Act (GewO); the Federal **Waste** Management Act (AWG), certain aspect of the Federal **Forestry** Act (ForstG), as well as in some **local building and construction permit** procedures (regulated by provinces) or the Federal **Water** Management Act (AWG).

16. This legal position limits standing rights to a group of persons (neighbours) that's standing rights hardly relate to "public" environmental interests as stated in the Aarhus Convention, but to the protection of **property and health** of the persons concerned. Environmental concerns can only be addressed regarding a concrete personal issue, take the threat to health due to noise emissions as an example. **Water or noise** quality standards and other laws that serve for environmental protection, like climate **change** or **nature conservation are not** subject to neighbour's standing rights at all. The same is true for **air quality standards** that are reflected in Austrian and European legislation. Another example is **water quality.** A neighbour of an industrial facility may address water quality issues concerning the polluting of his private well (in particular owner of private water use rights such as small fountains; but may not refer to general water quality considerations (eg those based on the Water Framework Directive) in the context of the proceedings.[19]

17. We therefore claim that Austria fails to comply with Article 9 par 3 of the Convention since the scope of standing in environment related procedures is too limited in case standing rights are granted at all.

2.2. No access to justice for environmental organizations

18. Whereas neighbours have at least and in certain cases possibilities for access to justice (to protect their individual rights), **NGOs** (and other "members of the public") **do not have**

[17] Please read for details the European Commission mandated study: Country Report Austria in "Measures on access to justice in environmental matters (Art 9(3))" *Milieu* L*td.* 2008, p. 9. http://ec.europa.eu/environment/aarhus/study_access.htm

[18] See *Berger* in *Ennöckl/N.Raschauer*, UVP-Verfahren vor dem Umweltsenat (2008), page 85 for further details

[19] For details and jurisprudence see *Wendl*, in *Stolzlechner/Wendl/Bergthaler* (editors), Die gewerbliche Betriebsanlage[3] (2008), recital 249

legal standing in any cases relating to the environment because the Austrian legal position and jurisprudence follows a very formalistic **impairment of rights doctrine**.[20] The legislator would need to expressly designate[21] the right to protect the environment to NGOs. This was done with regard to EIA[22] and IPPC procedures when Austria transposed EU-Directive 2003/35/EC on public participation (transposing Article 9 par 2 as well as Art 6 and 7 to EU law) and - in a vaguer way - with regard to environmental liability cases referring to Directive 2004/35/EC. This legal position can be illustrated by the following case:

Case example: No access to justice in nature conservation procedures

19. Two ski resorts in the western province of Austria (province Vorarlberg) were to be united by major investments (such as new pistes and ski-lifts). The project is located in the alpine regions and covers a construction site of almost 20 hectare. An EIA-screening procedure (case by case examination) ended with the decision (Decision IVe-415.13 from 17.08.2004) that no EIA is necessary since the project doesn't have sufficient environmental impact. It was not possibly to legally challenge the screening decision.

20. A major regional nature conservation NGO, *Naturschutzbund Vorarlberg*, claimed legal standing in the following nature conservation procedures by directly referring to Art 9 par 3 of the Aarhus Convention. The NGO directly referred to the Convention since legislation does standing rights to NGOs nor to other members of the public in nature conservation procedures. The provincial administrative tribunal dismissed (Decision UVS-327-006/E10-2006, 30.08.2006) the claim arguing the Convention is not open for direct applicability.

21. We therefore claim that Austria is in non compliance with Article 9 par 3 since neither environmental organizations nor other members of the public have access to justice in environmental matters, apart from acts and omissions falling under the scope of the environmental liability provisions.

2.3. Acts and omissions that are not subject to legal review at all

22. It was explained above that standing in an administrative procedure is a pre-condition to legally challenge acts and omissions. Furthermore we stated that neighbours can be seen as members of the public in the scope of Article 9 par 3, that neighbours have standing in

[20] It was already mentioned above that Austria appears to strive degenerating the Aarhus Convention into meaninglessness, as this was stated by the editors of the Austrian environmental law journal in 2008.

[21] *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 87 with further references.

[22] § 19 par 10 Austrian EIA-act reads as follows: „*(10) An environmental organisation recognised pursuant to paragraph 7 shall have locus standi and be entitled to claim the observance of environmental provisions in the procedure insofar as it has filed written complaints during the period for public inspection according to Article 9 (1). It shall also be entitled to complain to the Administrative Court."*

certain procedures to protect their individual interests, but their standing rights are too limited in scope. Finally we stated environmental organisations are excluded from any environment related procedure apart from environmental liability. However, there is an endless list of legislation where are acts and omissions are not subject to legal review.[23] The most important gaps are elaborated below:

a) Permitting procedures without access to justice

23. Neither NGOs nor neighbours have (apart from EIA and IPPC) access to justice in the following permitting procedures: **railways**, **roads**, **shipping, nature conservation** or most aspects of the **water** permitting.[24] The same counts for most procedures on local **building permits**.

b) Planning and programming procedures

24. There is no right to review decisions regarding various planning and programming procedures. This counts both for local and spatial planning procedures, but also for typical environmental planning procedures, such as **waste** management plans, **air** quality plans, strategic **noise** maps or action plans.[25] Most of the before mentioned plans and programmes are subject to an **SEA** under the European SEA-Directive 2001/42/EC or a public participation procedure in accordance with directive 2003/35/EC (both implementing aspects of **Article 7 of the Aarhus Convention**). However, there is no right for the public to legally review respective decisions.

Case example: SEA procedures on federal transport plans

25. Particular problematic are SEA procedures regarding federal transport plans. Different analyses of respective SEA procedures proved evidence for the low quality of the SEA outcome and process and that results of public participation were not taken into account.[26] However, there is, as in any other planning procedure, no right to appeal against the planning decision. The situation is worsened because the federal transport planning "decision" has the legal form of a law adopted by parliament and there is no possibility for the public to legally challenge such laws in this context. This legal position appears to be in clear contradiction to the Aarhus Convention Compliance Committee (ACCC)

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[23] An overview on most important laws that lack access to justice is provided in the Austrian MoE study 2009: Rechtliche Optionen zur Verbesserung des Zugang zu Gerichten im österreichischen Umweltrecht gemäß Art 9 Abs 3 der Aarhus Konvention, *Schulev-Steindl, Goby (2009);*

[24] *Berger* in *Ennöckl/N.Raschauer*, UVP-Verfahren vor dem Umweltsenat (2008), page 104

[25] See Rechtliche Optionen zur Verbesserung des Zugang zu Gerichten im österreichischen Umweltrecht gemäß Art 9 Abs 3 der Aarhus Konvention, *Schulev-Steindl, Goby (2009*); Download http://www.wiso.boku.ac.at/fileadmin/_/H73/H736/Schulev-Steindl/Endb-AarhusKV_Adobe.pdf

[26] Different contributions in *Mittendorfer*, Die Strategische Umweltprüfung im Verkehrsbereich (2008) (SEA in transport projects); Justice and Environment: Legal analysis and case study on SEA directive implementation in Austrian transport sector (2007)

interpretation of the Convention in its decisions regarding Armenia[27] and Belgium[28] where the ACCC stated that parties to the Convention are obliged to chose a legal format for decisions falling under Article 6 and 7 of the Convention that enable the public to challenge respective decisions either under Article 9 par 2 or par 3 of the Convention.

c) **Environmental quality standards**

26. Whereas neighbours have the right to protect their property, health as well as nuisance of noise, smell or dust in certain permitting procedures, there is no is no right to address infringements of **water**, **air, noise** or other **environmental quality standards** at courts. On general European environmental law level the most advanced process regarding access to justice can be found regarding air quality standards (that also aim to protect health of the public). However, even recent decisions of the European Court of Justice regarding access to justice (such as *Janecek*[29]) are ignored[30] in Austria.

d) **Acts and omissions of public authorities and private persons outside permitting procedures**

27. Omissions of public authorities that contravene environmental law are not subject to legal review by the public.[31] The same counts for various violations of environmental law by public authorities or private persons.[32]

e) **EIA-screening vs Article 9 par 3 of the Aarhus Convention**

28. A particular but crucial problem, falling somehow between Article 9 par 2 and par 3 of the Convention are EIA screening procedures. It needs to be stressed that Austria conducts compared to other EU countries with similar size and legal systems only a fraction of annual EIA procedures a year (20 to 25 procedures). We see two major reasons for this shortcoming: Firstly, EIA-thresholds in the Annex of the Austrian EIA-act are too high (e.g Skiing sites threshold in Austria is 20 hectare, in Italy 5 hectare, in Switzerland 5.000 square metre; shopping centres in Austria 10 hectare, in Germany 5.000 square meters etc). Secondly, EIA screening procedures are carried out without public participation and

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[27] ECE/MP.PP/C.1/2006/2/Add.1

[28] ECE/MP.PP/C.1/2006/4/Add.2

[29] Case C-237/07, Dieter *Janecek* vs. Freistaat Bayern), on the right of EU citizens with regard to public's enforcement rights of limit values for particulate matter after a reference for preliminary ruling by the German Federal Administrative Court. The underlying legal act is the Ambient Air Quality Directive (96/62/EC). Where there is a risk for the exceedance of limit values or alert thresholds, citizens directly concerned by this exceedance must be in a position to legally require the competent national authorities to draw up an action plan. They should therefore be granted the right to enforce air quality plans as their individual interest. Its unclear if Austrian court would follow this judgment. Even in this case the legal base would not be the Aarhus Convention and its objectives, but human health protection for individuals, without direct relationship to public interested oriented environmental law. This view is confirmed by *Schulev-Steindl*, page 62

[30] Critical *Kerschner/Raschauer*, RdU 2008, 145,

[31] Read above the chapter on omissions

[32] An overview of potential violations can be found in *Schulev-Steindl*, page 44 et sqq

access to justice. This assumption is confirmed by statistics. The 2009 report of the Austrian Ministry of Environment (MoE) shows that **81 % of screening decisions** neglected the need for an EIA in the period January 2000 to March 2009.[33] In contrast to 20 to 25 EIA permitting procedures a year with public participation and access to justice, Austria conducts between **60 and 80 EIA** screening procedures a year, without public participation and access to justice.

29. An OEKOBUERO complaint to the European Commission on this issue was not further followed by the EC in the year 2006. Recent case law of the European Commission (*Delena Wells* ECJ C-201/02, 7.1.2004 – *Christopher Melor* ECJ C-75/08, 30.4. 2009) was discussed and criticized in Austrian literature[34], by advocacy groups and certain political parties, but not followed at all in the Austrian legislation process (EIA-act review 2009).

30. A negative screening decision has the result, that the question whether an EIA would be necessary for a certain project can not be invoked any more in subsequent permitting procedures because it is a "res iudicata"that can not be challenged anymore. This counts even for administrative parties that had no right to participate the EIA-screening. This legal position on exclusion of the public from EIA-screening and res iudicata is "covered with concrete" by the jurisprudence[35] of the Highest Administrative Court (and other courts) that sees no need to change its case law even when it is confronted with the before mentioned ECJ jurisprudence[36], directive 2003/35/EC or directly the Aarhus Convention[37]. The courts argue that access to justice in EIA-screening is not needed since – in case not EIA permitting procedure is pursued - there are other permitting procedures (e.g in accordance with the waste management act) that will be carried out in order to permit the project and in respective procedures the public concerned could protect its rights (e.g neighbours could protect their water interest in the water permitting procedure, nuisance from noise or smell in the industrial permitting procedure etc).

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[33] Bericht des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft gemäß § 44 UVP-G 2000 über die Vollziehung der Umweltverträglichkeitsprüfung.
http://www.parlament.gv.at/PG/DE/XXIV/III/III_00077/imfname_161268.pdf

[34] E.g. *Mauerhofer*, NGOs und Einzelpersonen im UVP-Feststellungsverfahren, RdU 2006, 3; *Berger* in *Ennöckl/N.Raschauer*, UVP-Verfahren vor dem Umweltsenat (2008), page 97

[35] ZI. 2004/05/0032 und ZI. 2006/07/0066

[36] *Delena Wells* ECJ C-201/02, 7.1.2004 – *Christopher Melor* ECJ C-75/08, 30.4. 2009

[37] In judgement VwGH 2006/10/0206 of 26.02.2007 the Highest Adminstrative Court does not follow arguments that aim to apply the Aarhus Convention directly. In judgement US 7B/2007/20-4 (Pyra II) of 20.12.2007 the court (environmental senate) the court maintains the prevaling case law that directive 2003/35/EC fully implements Article 9 par 2 of the Aarhus Convention and the Article 9 par 3 is not relevant for EIA screening procedures. Furthermore the court understands that Article 9 par 3 would implemented by the standing rigths of the Environmental Ombudsman, and leads to no rights for the public concerned.

31. This view is incorrect for different reasons. Firstly, there are permitting procedures where neighbours don't have standing at all (see above). Secondly, the courts view is closely related to the Austrian understanding of the impairment of rights doctrine that aims to protect private well of neighbours, but not the (public interest) environment, as the Aarhus Convention does. Furthermore, environmental organizations don't have the right to participate in any subsequent procedure if no EIA is carried out.

32. However, since EIA screening decisions are "acts" of a public authority that could "contravene national (including European) environmental law" such decisions need to be subject to legal review by members of the public. The Austrian legal position is thus a clear contradiction to Article 9 par 3 of the Aarhus Convention.

33. We therefore claim that Austria fails to comply with Article 9 par 3 since the vast majority of environment related acts and omissions are not legally reviewable by members of the public concerned.

2.4. No right to review omissions of public authorities and private persons

34. Even though the issue is covered indirectly by what was said above, we want to stress the lack of legal enforcement rights in case an authority fails to comply with environmental law. It is also not possible to initiate permitting procedures against third parties, eg against an operator of an industrial facility without permit. To be more specific, there is no right to initiate administrative or judicial review procedures on acts and omissions of private persons and public authorities. The only possibility is to inform the authority about the situation. If there is a breach of law the authority would be obliged to act, but there is no legal possibility to enforce this for members of the public. This legal position will be demonstrated by showing the limited possibilities that exists to act against omissions:

a) Supplementary conditions request for a permitted facility

35. Neighbours (not NGOs) can request the authority to determine additional conditions for a permitted facility if their interests (property, health, smell, noise etc) are not sufficiently protected under the existing permit (Article 79 GewO, industrial code). However, neighbours are only enabled to request additional conditions if they are not sufficiently protected **when operator complies with the permitted conditions** (because the conditions were not sufficient to protect neighbours). In case the **operator does not comply with the permit** (e.g capacities and emissions are higher than permitted) **neighbours have no right to protect** themselves. In this case neighbours can inform the authority about the situation and the authority would be obliged to act. But there is no right to enforce this and no right to initiate a procedure. This is a constant problem in practice.

b) Cease and desist order under civil law

36. Neighbours (not NGOs) have the right to protect themselves from certain immissions under the civil law code (§ 364 par 2 ABGB). **Direct pollution** (from whoever) is not allowed without legal title (e.g contract, permit). Indirect immissions (e.g noise, smell) are **prohibited** if they exceed the customary level in the local area AND if they seriously derogate what is customary at this location.

37. Article 364a ABGB specifically protects neighbours from installations without permit. According to the Highest Civl Court case law permitted facilities are those that went through a procedure with procedural guarantees in accordance with Article 6 ECHR. This means permitting procedures where neighbours had not right to protect their rights (Art 6 ECHR) enable neighbours to claim compensation under Article 364 and 364a ABGB.

38. With regard to **public roads the** situation is worse. Public roads are permitted without procedure in accordance with Article 6 ECHR, but the Highest Court neglects the right to request a cease and desist order under civil law and sees a public road as permitted facility in accordance with § 364a ABGB. This is heavily disputed in academic discussions.[38]

39. Please note that civil law only protects damages to property and health by compensation payments or cease and desist orders. Respective procedures are lengthy and costly and with regard to environmental issues it is hard to prove evidence on damage (see above examples on air pollution case in Graz). Environmental organizations are excluded from such procedure by its nature (property or health would need to be impaired).

c) Official liability

40. A concerned person can submit a civil lawsuit to a civil court when it was subject to personal damage due to illegal (non) behaviour of civil servants. With regard to the weakness of civil law legal protection in the field of environment see above.

d) Criminal sanctions

41. A concerned person can inform the prosecutor about illegal omissions of civil servants. It is the discretion of the prosecutor to follow the case. In practice this is irrelevant (in particular) in environmental matters.

42. Austria therefore fails to comply to implement provisions to ensure legal remedies as to omissions provided by Article 9 par 3 of the Convention.

3. Non compliance with Article 9 par 2

43. Article 9 par 2 of the Aarhus Convention regulates that members of the public concerned "(…) *have access to a review procedure before a court of law and/or another independent and impartial body established by law, to* ***challenge the substantive and procedural legality*** *of any decision, act or omission subject to the provisions of article 6 (…). What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and* ***consistently with the objective of giving the public concerned wide access to justice*** *within the scope of this Convention."*

44. To understand the Austrian legal position it is important to be aware that both EIA and IPPC procedures are by the same time the permitting procedure for a proposed activity. EIA and IPPC procedures are set as „**consolidated permitting procedures**"[39]. During the

[38] See *Linder*, in *Raschauer/Wessely* (editors), Handbuch Umweltrecht (2006), page 61

[39] See legal analysis on „EIA in infrastructure projects" in Austria, *Justice and Environment* (2006)

EIA or IPPC permitting procedures any national or European environmental law has to be applied. This means any relevant environmental law such as water or waste management, air quality, noise standards or nature protection has to be applied (and permitted as to the proposed activity). Whereas for other projects than IPPC or EIA a developer needs to apply for different development consents (e.g. waste permit, water permit, forestry permit, nature protection permit), EIA- and IPPC- permits consent the full project.

45. A pre-condition for access to justice is that parties maintain their standing position during the permitting procedure. For this purpose parties have to invoke specific environmental law related objections against the project proposal during the public inspection period that formally initiates the permitting procedure.

3.1. Limited scope of standing for neighbours

46. The allegations as to limited access to justice rights for neighbours described above apply for procedures regulated under the Austrian EIA and IPPC legislation (transposing Article 6 and 9 par 2 of the Convention) as well. This means neighbours can only invoke rights to protect their private well, but not the environment as such and correct application of environmental law.

47. Even though the Convention gives some discretion to its parties to define what constitutes a sufficient interest and impairment of rights, we do not see this discretion reaching so far that neighbours can protect only their private well. It was mentioned above under Article 9 par 3 that the Convention aims to protect the environment as such and aims to provide for effective enforcement mechanism so that environmental law is correctly applied. Furthermore Article 9 par 2 expressly states that standing requirements shall be determined consistently with the objective of giving the public concerned wide access to justice.

48. In addition to this argument Article 9 par 2 expressly states that members of the public concerned shall have the right to “challenge the substantive and procedural legality” of any act, omission and decision falling under article 6. It can hardly be argued why the wrong application of provisions relating to climate change in the framework of an EIA procedure shall not be considered as decisions that should be subject “substantive” legal review.

3.2. No access to review EIA-screening decisions

49. The lack of access to justice is furthermore a breach of Article 9 par 2 of the Aarhus Convention. Article 9 par 2 of the Convention provides for access to a review procedure “to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6”. Article 6 par 1 a) obliges the parties to the Convention to provide for public participation in permitting procedures listed in Annex I. Article 6 par 1 b) regulates that parties can determine further activities that fall under Article 6. Annex I par 20 provides that Article 6 is applicable when an EIA has to be carried out under national law.

50. The Austrian EIA act is based on the European EIA directive 85/337/EEC. In its Annex the EIA directive lists activities that are partly listed in Annex I of the Aarhus Convention, others are not. Some activities lead to an unconditioned EIA, others only if they meet additional criteria. This means the EIA directive goes beyond the Aarhus Convention for certain activities. To be more precise the EIA directive provides for EIA procedures on

Aarhus Convention Annex I activities "not covered by paragraphs 1-19" but covered by paragraph 20 of Annex I since "public participation is provided for under an EIA procedure in accordance with its national legislation. Furthermore those activities can be see as "activities not listed in Annex I which may have a significant effect to the environment", in accordance with its national law (Art 6 par 1b) of the Convention).

51. The Compliance Committee clarified in different cases (e.g Denmark)40 that European law has to be seen as "national law" of EU member states as well. EU member states have different options to assess whether an activity falls into the scope of the EIA directive. Article 4 par 2 EIA directive provides that member states could carry out case by case examinations (screening) or threshold criteria or both procedures. Austria chose the latter (combination of screening and thresholds).When assessing the need for an EIA the criteria listed in Annex III of the directive needs to be applied.

52. If an EU member state incorrectly applies the procedures of EIA directive to assess whether an activity falls under the EIA directive this is clearly a "decision" subject to Article 6 of the Aarhus Convention. Such decisions should be subject to legal review by the public concerned under the conditions listed in Article 9 par 2 of the Aarhus Convention. The Austrian practice shows that under the current legal position public authorities can breach the EIA directive and prevent public participation procedures under Article 6 of the Aarhus Convention by screening decisions that decide an EIA is not necessary and such decisions are not subject to legal review.

53. <u>This means the lack of access to justice against EIA screening decision is in contradiction to Article 9 par 2 of the Aarhus Convention as well (next to Art 9 par 3 claimed above).</u>

3.3. EIA final inspections

54. Article 22 of the Austrian EIA act provides for a final inspection five years after an activity started operation to control whether the operator complies with the EIA permit. The public concerned can not review such decisions falling under Article 6 of the Convention. This contradicts Article 9 par 2 of the Aarhus Convention.

4. Non compliance with Article 9 par 4

55. Article 9 par 4 aims to make access to justice rights effective to avoid the situation that such rights exist only on paper. It reads as follows: "*4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide* ***adequate and effective remedies****, including* ***injunctive*** *relief as appropriate, and be* ***fair, equitable, timely*** *and not prohibitively expensive*."

[40] ECE/MP.PP/2008/5/Add.4

4.1. Adequate and effective remedies; including injunctions

56. In regular cases the independent provincial administrative tribunals of the federal provinces ("Unabhängiger Verwaltungssenat", UVS) are the competent redress bodies against decisions of first instance. With regard to EIA procedures (but not federal motorway and rail projects) the redress body is the Federal Indepentent Environmental Senate (Unabhängiger Umweltsenat). Both courts are adequate bodies and in line with Article 6 of the ECHR. Injunctive relief is the legal rule in almost all administrative appeal procedures.[41] Furthermore both courts decide in the subject matter and are able to completely review decisions by amending the decisions (e.g. to cancel certain stipulations and add others).

57. Only in some areas non independent authorities decide on appeals (e.g MoE on certain water permits). And in some areas, such as EIA procedures on road and rail projects, there is no right to appeal to second instance at all (see below).

a) No injunctions when highest courts are the only independent tribunal

58. Most standing parties have the right to appeal to the Highest Administrative (VwGH)and Constitutional Courts (VfGH) against decisions of the before mentioned second instance tribunals and authorities. Injunctions are not granted in environmental procedures. This is problematic in cases where no independent tribunal decided before. Such a legal position is not in line with Article 9 par 4 of the Convention.

59. This counts in particular for EIA procedures with regard to federal motorway and railway projects that are permitted according to the Austrian EIA-act. In such cases the permitting authority is the Federal Minister of Transport (BMVIT). In contrast to all other EIA procedure the independent federal Environmental Senate is not competent as appeal body. The only redress bodies are the Highest Administrative or Constitutional Courts. Appeal procedures at these courts take in average between 8 to 24 months. At the time of the decision respective projects are already in the implementing status with irreversible environmental and financial effects. This problematic issue can be illustrated by the following case:

60. The EIA permit was issued in May 2006. A citizen's group (that had standing in the procedure) appealed to the Highest Constitutional Court after the decision was issued. In January 2007 constructions started (actual it should have started in summer 2006 - but there were problems and disputes of the project tendering process). In July 2007 the Court abolished the EIA-permit decisions due to serious procedural problems in the case. However, since the project was already under heavy constructions, the Court set a timeframe until 31. Dec 2007 to issue a new EIA permit. In the meanwhile constructions could proceed.[42] The minister of transport (BMVIT) pursued the new EIA permit

[41] § 64 Abs 1 AVG; this counts also for procedures regarding EIA appeal procedures at the Independent Environemntal Senate (§ 12 Abs 1 US-G)

[42] For further details on references to the case and its legal base ready *Alge/Altenburger*, elni review 2/2007, page 9 et seqq

procedure within three months. The public hearing was held just before Christmas and the decision was issued few days after Christmas 2007. The citizen's group appealed to the Highest Administrative Court in February 2008. The court refused to grant an injunction since the project was already under construction and that the road could be abolished in case the plaintiff succeeds (VwGH AW 2008/06/0029, 1. July 2008). The Court squashed the appeal in December 2008 (VwGH 2008/06/0026). The motorway will be opened for traffic in January 2010.

61. In another motorway case OEKOBUERO submitted an appeal on 3. January 2010 and requested an injunction by referring directly to the Aarhus Convention. Until now the court has decided neither on the injunction nor on the case.

b) **Reasons for not granting injunctions in environmental court cases**

62. The legal position regarding injunctions in appeal procedures at the Highest Administrative Court would in theory be open for injunctions in environmental matters. However, in practice injunctions are never granted. Article 30 par 2 VwGG (Act regulating the Highest Adminstrative Court) provides that injunctive relief shall be granted when "no coercive public interests" are opposed to this AND if the applicant would be faced with "disproportional harm" when the injunction is not granted.

63. The problem lies in the interpretation of this provision by the court. The latter constantly sees coercive public interests that make injunctions impossible in the case of infrastructure projects. In a decision regarding a railroad tunnel through the Alps the court argued (VwGH AW 2009/03/0013, 8. July 2009) that the project is in overriding public interest since it is a TEN-T[43] project and thus no injunctions can be granted, even though no independent tribunal examined this EIA-permit of the Federal Minister of Transport (BMVIT).[44] In the case of a comprehensive electric power line the court saw a coercive public interest that this power line is constructed as soon as possible and thus an injunction is not appropriate (VwGH AW 2008/05/0042, 30. Sept 2008). In this judgement the court clarified that no injunctions can be granted at all if overriding public interests prevail.

64. In other cases the court does not see disproportional harm for the applicant when the injunction is not granted. As mentioned above in the S1 west case the court (VwGH AW 2008/06/0029, 1. July 2008) argued that the motorway is already under construction and thus not granting the injunction would not further worsen the existing situation. In this decision the court furthermore pointed out that the sealing and concretion of the soil by asphalt coating could be re-installed, however with considerable efforts. Therefore the plaintiff is not burdened with disproportional harm (VwGH AW 2006/05/0057 of 21. Nov 2006). In another case, again an electric power line, the court did not see the applicant as disproportionally harmed. Among others the court argued that the impacts of the project (construction of electric power line) are not irreversible. In another case relating to a

[43] Trans European Network: http://ec.europa.eu/transport/infrastructure/index_en.htm

[44] See above for the legal position regarding access to justice in EIA procedures relating to federal motorway and rail projects.

mining project the court does not see the uprooting as irreversible damage (VwGH AW 2008/04/0062 of 16.03.2009).

65. We could not detect a single case where the Highest Adminstrative Court granted an injunction in an environment related procedure.

66. This legal position appears to be in clear contradiction Article 9 par 4 that injunctive relief should be granted as appropriate and legal remedies should be effective. The Compliance Committee stated in a decision (Lithuania)[45] regarding the effectiveness of public participation as follows (par 54): *"Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure."* Even though the case refers to Article 6 of the Convention it becomes apparent that in order to ensure „effectivness" of the public's rights it is not sufficient that certain options, such as other alternatives, are possible in theory only, but also in practice. If the „facts on the ground"[46] forclose certain options, including due to commerical and political pressure, this is non compatible with the Convention. In case motorways, railroad tunnels or electric power lines are under construction for one or two years, commercial and political pressure is definetively too high, that such investments would be stopped. Access to justice is therefore not effective in Austria.

c) **Scope of legal review at the Highest Court**

67. The legal position regarding is not only problematic regarding injunctions but also regarding scope of legal review. The Highest Courts are pure courts of cassation. They can only abolish decisions in cases they find severe legal errors, whereas other courts decide in the subject matter and have the possibility to amend the decision without abolishing it. In practice this leads to the situation that almost any EIA permit of the minister of transport has been confirmed until now by the Highest Court, whereas the Environmental Senate that is competent for all other procedures amends almost any decision of first instance. Such limiting access to justice is therefore not effective.

d) The new "anti-injunction" in EIA appeal procedures

68. A strange provision has been added to the EIA act in its 2009 review. Article 42a EIA-act enables the operator to proceed the activity for one more year in case the Highest Court abolishes the EIA decision. This concept of an "anti-injunction" follows the same approach as demonstrated in S1 motorway case above. Even if the Highest Courts abolishes a permit, this has no consequences on the ground. The same concept is used regarding permitting other industrial facilities. We don't see such an approach as compatible with Article 9 par 4 of the Aarhus Convention. However, this rule only counts for cases where the Environmental Senate has decided already in second instance, whereas in cases regarding motorways and railroads, where the Highest Courts are the only appeal bodies, the anti-injunction rule does not apply. However, the jurisprudence of the Highest

[45] ECE/MP.PP/2008/5/Add.6

[46] ECE/MP.PP/2008/5/Add.6, para 74

Courts lead to the same effect in practice since injunctions are never granted in environmental cases.

4.2. Fair and equitable procedures

69. In general access to justice appears to be fair and equitable in Austria, in particular when independent tribunals decide and injunctions are granted.

70. We see the legal position regarding NGOs in IPPC and Environmental Liability procedures as problematic. NGOs have the right to appeal to the independent administrative tribunals of the provinces in environmental liability and IPPC cases. The developer, neighbours and other parties have the right to appeal to the highest courts against the decision of the independent administrative tribunals, whereas NGOs do not. This means an NGO could succeed in IPPC or environmental liability appeal procedure, but the developer could reverse the decision at the highest court, whereas NGO can not refer to this court. This legal position does not provide for a fair and equitable procedure.

71. The legislator would need to expressly designate the right to appeal to the highest courts to NGOs. This was done only in EIA procedures, but not with regard to IPPC and environmental liability.

4.3. Timely procedures

72. With regard to Article 9/1 the review procedure is not timely and efficient. If an authority does not respond to an environmental information request after two months the applicant has to legally request the authority to issue an administrative decision on the refusal. In most cases this takes some months as practice shows. This legal (refusal) decision is necessary to initiate an appeal procedure. In case the authority does not issue the refusal decision within six months, the applicant can go to court and make a “devolution request” in accordance with Article 73 AVG (general administrative procedure code). Then the court becomes competent to issue the refusal decision. In practice this means it can take up to one year until a person requesting environmental information gets a legal decision that the environmental information request is refused and this is in compliance with Austrian legislation. We see a clear breach of A**rticle 4 par 2 in connection with Article 9 par 1 and par 4** of the Aarhus Convention in this legal position and practice.

73. This problem can easily be solved by reducing the six month period for a devolution request down to two months and by deleting the provision that only enables to request for a refusal decision two month after the original environmental information request has been submitted.

4.4. Prohibitively expensive procedures

74. In general Austrian administrative procedures are not expensive. Neither the loser pays principle is a problem, nor is legal representation by an attorney mandatory (apart from procedures at the highest courts).

75. Problems occur in EIA and IPPC procedures and these are until today the only procedures where the public concerned has the right to challenge environment related decisions. The few Austrian EIA procedures that take place a year are very complex, permitting any legal

aspect of a planned activity. In particular regarding infrastructure activities project documentation is very comprehensive and constantly fills a full room with documents. A big part of the documents are environmental expertise for different aspects of the projects consisting of thousands of pages.

76. If the public concerned makes comments and wants its comments to be taken into account by the authority, its statements need to be accompanied by an environmental expertise. Otherwise the authority can not take it fully into account. In Austrian environmental procedures arguments that are based on technical expertise can only be countered by another expertise. In order to participate effectively in EIA procedures and to have any chance of success in access to justice procedures the public concerned therefore needs environmental expertise issued by authorized experts; and this is expensive. An EIA appeal procedure without representation by an attorney is furthermore more or less useless due to the complexity of respective procedures. According to reported experience costs for an EIA procedure for the public concerned range from 10.000 to 30.000 EUR.

77. This is prohibitively expensive and critical not only as to Article 9 par 4, but also Article 9 par 5 of the Convention.

4.5. Case example demonstrating the issues raised

78. In March 2005 a citizen of the second largest Austrian city, Graz, filed a civil lawsuit against the Austrian province of Styria (Steiermark) and the Republic of Austria. The lawsuit aimed at the determination that the Province and the Republic were to be held responsible for damages to health resulting from not undertaking measures against exceedances of PM10 limit values as provided under European and national laws. The civil lawsuit was submitted since there is no access to review acts and omissions of public authorities that contravene environmental law by the public concerned.

79. After a defeat in first instance, a victory in the second instance, the Highest Civil and Criminal Court (OGH, Oberster Gerichtshof) referred to case back to the first instance in order to repeat the procedure considering the highest courts legal determination (OGH 1Ob151/06x) in October 2006.

80. The Highest Court rejected the claim, but opened another opportunity. The court's dismissal was based on the view that the plaintiff would need to exactly specify the measures the province Styria should have, but has not taken and what would have been the difference as to the plaintiff's health. So the procedure re-started at the first instance. However, such evidence is hard to provide and expensive. The plaintiff finally failed to do so. Only in summer 2009 the highest court of justice finally dismissed the claim due to lack of the right to make such an appeal without providing specific evidence on damages and exact measures that should have been taken by Styria (OGH Ob 68/09w). Four years of litigation ended without any success. Costs of more than 16.000 EUR occurred for the plaintiff.

81. This case clearly shows the difficulties citizens are confronted with when they try to take legal steps to push for compliance with rules of environmental law. The administrative legal process is not open to them. In theory it is possible to file a civil lawsuit, but in this case the plaintiff has to prove that specific omissions by the authorities have led to a concrete personal damage and the plaintiff has to describe in detail the measures the authority should have taken to avoid the damage. This is very hard to prove as well as costly, timely, not effective and thus in conflict with Article 9 par 4 of the Aarhus

Convention. Furthermore such a procedure is clearly in contradiction to Article 3 par 1 of the Aarhus Convention providing for a clear, transparent and consistent framework to implement the Convention.

5. Failure to fully implement Article 3 par 1 and Article 1

82. Austria failed to set up a functioning system with regard to access to justice. We therefore claim that Austria is in non compliance with Article 3 par 1 of the Convention since necessary legislative, regulatory and other measures were not taken to implement the Convention's access to justice provisions and to ensure proper enforcement measures. Austria lacks a clear, transparent and consistent framework with regard to third pillar of the Convention and is thus not able to sufficiently contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-beeing as Article 1 of the Convention provides for.

IV. Nature of alleged non-compliance

Indicate whether the communication concerns a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of non-compliance or relates to a general failure to implement, or to implement correctly, (certain of) the provisions of the Convention by the Party concerned:

This communication relates to a general failure to correctly implement the provisions of Article 9 of the Convention.

V. Provisions of the Convention relevant for the communication

List as precisely as possible the provisions (articles, paragraphs, subparagraphs) of the Convention that the State is alleged to not comply with:

Article 9 par 1, Article 9 par 2, Article 9 par 3, Article 9 par 4, Article 9 par 5

Article 3 par 1, Article 3 par 9, Article 4 par 2

VI. Use of domestic remedies or other international procedures

Indicate if any domestic procedures have been invoked to address the particular matter of non-compliance which is the subject of the communication and specify which procedures were used, when which claims were made and what the results were:

If no domestic procedures have been invoked, indicate why not:

This communication refers to the lack of domestic remedies. Remedies can not be used if they are not available. Other aspects refer to procedural legislation that can not be invoked at courts. The communication contains examples and references to various cases. Other cases are pending.

Indicate if any other international procedures have been invoked to address the issue of non-compliance which is the subject of the communication and if so, provide details (as for domestic procedures):

No other international procedure has been invoked.

VII. Confidentiality

Unless you expressly request it, none of the information contained in your communication will be kept confidential. If you are concerned that you may be penalized, harassed or persecuted, you may request that information contained in your communication, including the information on your identity, be kept confidential. If you request any information to be kept confidential, you are invited to clearly indicate which. You may also elaborate on why you wish it to be kept confidential, though this is entirely optional.

VIII. Supporting documentation (copies, not originals)

- *Relevant national legislation, highlighting the most relevant provisions.*
- *Decisions/results of other procedures.*
- *Any other documentation substantiating the information provided under VII.*
- *Relevant pieces of correspondence with the authorities.*

Avoid including extraneous or superfluous documentation and, if it is necessary to include bulky documentation, endeavour to highlight the parts which are essential to the case.

This communication contains various references to legislation and decisions. Some reference can be downloaded by weblinks provided in the communication. We would kindly request the Compliance Committee to indicate what supporting material would be crucial for the case and should be provided by the communicant.

XI. Summary

Attach a two to three-page summary of all the relevant facts of your communication.

Basically, Article 9 par 3 of the Aarhus Convention has not been implemented yet in Austria. This view has been confirmed by various recent publications.

Problematic appears to be the so called impairment of rights doctrine that stems from the Austrian administrative and constitutional history. This doctrine provides access to justice only to individuals to protect themselves in particular regarding health and property, whereas the Aarhus Convention aims to protect the environment.

In EIA and IPPC appeal procedures (activities that fall under Article 6 and Annex I of the Aarhus Convention) environmental organisations have the right to maintain environmental legislation as rights and this appears to be in line with Article 9 par 2 of the Aarhus Convention. But other members of the public do not have such rights.

Outside EIA procedures members of the public are completely banned from access to justice regarding acts and omissions from private persons and public authorities in environmental matters. Only neighbours have some limiting rights in exceptional cases. There is however no right to appeal against acts and omissions regarding nature conservation, quality of water, air,

noise, planning, and programming or SEA decisions and any other similar issue. Particular problematic is the lack of access to justice in EIA screening decisions.

There are also conflicts regarding Article 9 par 4 of the Convention. In many cases access to justice is not adequate and effective, injunctions are not granted. This counts particularly for EIA procedures regarding federal motorway and rail projects. Such procedures are by the same time prohibitively expensive. In other procedures access to justice is not fair since the rights of members of the public are far less reaching compared to the other parties to the procedure. Finally the access to justice procedure regarding environmental information requests is not effective, but timely.

To conclude we see Austria in non compliance with major aspects of Article 9 of the Aarhus Convention and by the same time with Article 3 par 1 since the Austrian legal position lacks a clear, transparent and consistent framework to implement the access to justice provisions of this Convention.

X. Signature

The communication should be signed and dated. If the communication is submitted by an organization, a person authorized to sign on behalf of that organization must sign it.

Vienna, 2. June 2010

Markus Piringer