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"Communication to the Aarhus Convention's Compliance Committee"

Vienna, 13. March 2010

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II. State concerned

AUSTRIA

Austrian background

1. 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]

2. 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]

3. Furthermore the **explanatory notes to ratification** state there is **no legislative need** for implementing Article 9 par 3 of the Convention. Austria confirmed this position in its implementation report submitted to the last Meeting of the Aarhus Convention Parties in Riga (2008)[6]. The Austrian administration and **jurisprudence** do not refer to the Convention in general,[7] ignore respective arguments[8], or put down both implementation gap and/or direct applicability 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

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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 furthre 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

[7]

[8] VwGH 2006/10/0206 of 26. Feb 2007 (Highest Adminstrative Court)

[9] Decision UVS-327-006/E10-2006, 30.08.2006

literature.[10] There are prominent voices in literature stating that Austria appears aiming to undermine the **Aarhus Convention** until it "**degenerates into meaninglessness**".[11]

4. In the meanwhile Austria appears to concede that Article 9 par 3 of the Convention is not implemented. 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 was published at end of 2009 in a stakeholder workshop in Vienna.[13] A legislative process might be initiated during 2010, but political resistance against this idea is very strong.

Standing and access to review conditions for members of the public in Austrian environmental matters

The impairment of rights doctrine

5. Access to Justice in environmental matters in Austria is closely related to **standing** (locus standi) requirements in adminstrative procedures. The general rule is that only "parties" to an administrative proceeding have standing. And the latter implies access to review 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 person. In Austrian literature and jurisprudence this is labelled as "Schutznormtheorie" (literal translation would mean "protective provision doctrine").

6. It is therefore crucial 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** (to protect the individual, Schutznormtheorie). In fact, legislation expressly defines which specific rights could be impaired with respect to certain 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

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[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* L*td.* 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*

[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.

general administrative rules and constitutional principles.[16] To avoid the latter some acts, such as the Federal Road Act (Bundesstraßengesetz), state explicitly that no subjective rights can be derived from this act.

The issue of individual vs public interest

7. As stated above Article 9 par 3 (par 2 is similar) enables members of the public concerned to *challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.* The impairment of rights doctrine would only compatible with Article 9 par 3 of the Convention when the impairment of environmental rights would be "subjective rights" and "legal interests" respectively that provide for standing and respective access to justice. We therefore assess whether this is the case in Austria.

8. The 2007 *Milieu* study[17] of the ***European Commission*** concluded that, in general the public (consisting of individual citizens, local groups and NGOs) does not have legal standing in administrative procedures regarding public environmental interests. We can confirm this view for the following reasons:

9. The Austrian laws only provide for locus standi regarding individual (protection) rights (Schutznormtheorie) that are basically not related to "public interests" such as environmental law. Only sometimes the **individual and public interest might overlap** (e.g aspects of nuisance from noise, air quality). 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.

10. 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 issue, take the threat to health due to noise emissions as an example. **Water or noise** quality standards and laws that serve for public environmental protection are **not** subject to neighbour's standing rights. The same is true for **air quality standards** that are reflected in Austrian and European legislation.

Court case Example: Enforcing air quality standards in Graz

11. 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. After a

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

[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

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.

12. 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.

13. 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.

14. 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]

15. Furthermore **limiting standing** provisions can be found in **EIA and IPPC proceedings**, where neighbours standing rights are limited to their individual concern, but are not open for public interests such as nature protection, water and air quality standards.[20] This appears to be in conflict not only with Article 9 par 3 but also with **Article 9 par 2** of the Aarhus Convention providing for review procedures on "***substantive*** *and procedural legality of any decision, act or omission*" subject to Article 6 of the Convention. A provision limiting access to Justice to **health and property** impairments appears to be incompatible with paragraph 2 of Article 9.

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

[20] *Bergthaler/Paliege-Barfuß*, in *Stolzlechner/Wendl/Bergthaler* (editors), Die gewerbliche Betriebsanlage[3] (2008), recital 270 consider it as possible that neighbours standing positon might need be needed to extended if public participation directive (and the Aarhus Convention) would be interpreted wider.

Environmental organizations are excluded from Austrian access to justice

16. Whereas neighbours have at least and in certain cases some limited possibilities for access to justice, **NGOs** (and other "members of the public") **do not have legal** standing in any cases relating to the environment because the Austrian legal position and jurisprudence follows a very formalistic **impairment of rights doctrine**.[21] The legislator would need to expressly designate[22] the right to protect the environment to NGOs. This was done in case of EIA and IPPC procedure (please read below) when implementing Directive 2003/35/EC on public participation and - in a vaguer way - with regard to environmental liability cases referring to Directive 2004/35/EC.[23] This legal position can be illustrated by the following case.

Court case example skiing region Mellau/Damüls: No standing regarding nature conservation procedures, no direct applicability of the Convention

17. Two ski resorts in the western province of Austria (province *Vorarlberg*) should be united by major investments (such as new pistes and ski-lifts; the project was finalized during 2009). 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 has not sufficient environmental impact. In Austria the screening decision can not be legally reviewed by NGOs or any other members of the public according to the prevailing Austrian case law.[24]

18. 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 provincial administrative court dismissed (Decision UVS-327-006/E10-2006, 30.08.2006) the claim. The court ceded that in principle the Aarhus Convention is open for direct application since the parliament adopted the treaty under the constitutional legislative procedure that does not prohibit treaties being self executing (Art 50 par 2 B-VG).

19. According to the prevailing case law of the Austrian constitutional court (V 78/90 of 30.11.1990) provisions of international treaties can be directly applied if they are not too vague and if it is not obvious that the signatories of an international agreement aimed to avoid direct application. However, the court referred to this judgment, but put down the argument of direct applicability because this is stated in the parliamentary notes to ratification, secondly that the wording of Article 9 par 3 of the Convention that "each Party shall ensure" implies that it is not directly applicable and thirdly Article 9 par 3 is not sufficiently precise.[25]

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[21] 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.

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

[23] Please read below in this.

[24] Please read below on the problematic legal position as to EIA screening procedures

[25] In this case the NGO did not makes us of the right to submit and extraordinary appeal to the federal highest administrative court due to unlikely success chances and the cost risk.

20. This case demonstrates that not even an NGO specialized in nature protection (that is registered in the some province as the location of the case) has standing in nature conservation permitting procedures. With regard to **direct applicability** the view of the court (and parliamentary materials) is in **conflict** with the interpretation of the Convention by the Aarhus **Compliance Committee** that stated at different occasions that major provisions of the Convention are directly applicable. This concerns in particular the decision on Article 9/3 in a case concerning Belgium. Furthermore many parties such as Hungary or Estonia[26] apply Article 9 of the Convention directly. In line with Article 31 par 3a) und b) of the Vienna Treaty Convention parties are obliged to consider any later agreement regarding interpretation of international agreements as well as its application. It is therefore evident that provisions of Article 9 par 3 could be directly applicable when applying principle of international law.

Latest development: NGO-standing in environmental liability cases - and limiting implications

21. In June 2009 the **Federal Environmental Liability Act** (B-UHG**)**[27] entered into force. Since then neighbours and certain NGOs have standing and access to justice in respective procedures. This legislation was necessary in order to comply with Directive 2004/35/EC. This directive on environmental liability contains a provision (Article 13) transposing Article 9 par 3 of the Convention. In Austria the standing position of **neighbours** is – in line with the impairment or rights doctrine – limited to **property**, **health** and individual water rights (Article 11 par 2 B-UHG). Furthermore certain[28] environmental organizations have standing and access to justice (Article 12 and 13 B-UHG).

22. However, the NGO standing position is not further defined in B-UHG. This might lead to problems in practice. Whereas the Austrian EIA and IPPC legislation define explicitly that NGOs can "maintain environmental legislation" in the procedure, it is - from formalistic perspective - not clear what rights NGOs can claim with regard to B-UHG. This problem derives from another aspect of the (Austrian) impairment of rights doctrine. It was mentioned above that neighbours standing rights are derived from a "legal interest" defined in legislation that aims to "protect" interests of legal subjects (Schutznormtheorie). Such rights focus on protection of health and property in particular. But there is also another group of procedural parties that's rights are not derived from a rule that aims to protect their personal interest (Schutznorm), but for other reasons. Standing positions or rights that go beyond "individual concern" are labelled as "**formal parties**" in Austrian literature and judiciary. Formal parties are established by legislation only (no other principles can be applied). Typically certain public authorities or municipalities have "**formal standing**", but also the environmental Ombudsman and NGOs in EIA and IPPC procedures are formal parties.

23. For formal parties it is crucial the legislator determines which are the specific rights each formal party can maintain (e.g according to Article 19 par 1 No 4 Austrian EIA-act the "water management planning organ" has the right to maintain water-management

[26] *Černý,* Practical application of Article 9 of the Aarhus Convention in EU countries: Some comparative remarks, elni review 2/2009, page 74 (75)

[27] Bundes-Umwelthaftungsgesetz BGBl I 2009/55

[28] NGOs that have registered at MoE to be eligible for public participation and access to justice in accordance with the Austrian EIA act.

interests in accordance with Article 55 water management act"). On the other hand, since B-UHG has to be interpreted in accordance with European law it is clear that they have the right to "*review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive*" (Article 13 par 1 Directive 2004/35/EC). Since Austrian administration and jurisprudence is very conservative and restricting towards access to justice rights the danger remains that NGOs rights will interpreted as pure formal rights without substance.

Access to review omissions – and other procedures

24. From what we analyzed until now is clear that at least neighbours have (limited) standing (in some) environment related procedures. However, apart from environmental liability cases respective standing rights (of neighbours) are limited to permitting procedures and permitted industrial installations respectively. But there is no access to justice regarding acts and omissions by public authorities (and private persons) that contravene environmental law (as Article 9 par 3 Aarhus Convention provides for) outside permitted facilities. It is also not possible to initiate permitting procedures against third parties, eg against an operator of a site 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.

25. There are however some limited possibilities to review certain acts or omissions by public authorities or private persons.

a) Supplementary conditions request for a permitted facility

26. 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

27. 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.

28. 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.

29. 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.[29]

30. 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

31. A concerned person can submit a civil lawsuit to 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

32. 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.

Access to justice rights in EIA and IPPC procedures (Article 9 par 2 Aarhus Convention)

a) Introduction

33. 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."*

34. 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**"[30]. During the 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.

35. 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

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

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

environmental law related objections against the project proposal during the public inspection period that formally initiates the permitting procedure.

36. Finally it is noteworthy that Austrian executes only between 20 and 25 EIA procedures a year.[31] It is the country with the far lowest number of EIA procedures in the EU in total figures, but in particular compared to countries with similar legal systems, inhabitants and industrial development (e.g Germany has approx. 700 EIA procedures a year; 80 million inhabitants; Austria has 8 million inhabitants; Germany thus has five times more EIA procedures a year). The reason for this situation are extremely high EIA thresholds in the Annex of the Austrian EIA-act as well as screening procedure that prohibits access to justice and participation of the public concerned. This view was confirmed by the European Commission in an infringement procedure against Austria five years ago already.[32]

37. There are three different groups of the public concerned that have access to justice in EIA and IPPC procedures.

b) Environmental organizations

38. Certain registered environmental organizations have "full" environment related public interest standing. The legislator determined them as "formal party" with the right to maintain environmental law in the procedure. This means to invoke compliance with environmental law standards is their standing right expressly determined by law.

39. A prerequisite for being granted these rights is the prior registration of an NGO at the Ministry of the Environment which is linked to a variety of particular requirements (e.g. the organisation has to exist for 3 years already pursuing the aim of environmental protection, working pro bono and on non profit base). According to our experience the registration process lasts a few weeks. An NGO needs to be registered before the EIA/IPPC -procedure starts. An ad hoc registration for NGOs is not possible. Until now 30 organisations have registered and are enabled to participate in EIA and IPPC-procedures in Austria.[33]

40. However, regional and local NGOs do only have the right to review decisions located in certain provinces. This appears to be **not compatible with Article 3 par 9 of the Aarhus Convention** since legal persons should not be discriminated "as to where it has its registered seat or an effective centre of its activities".

c) Local groups in (selected) EIA procedures

41. Access to Justice rights for local groups is a peculiarity for certain EIA procedures. Standing for local groups used to be the standard in Austria, but has evolved to the exemption in the last year be legislative amendments and court decisions. A „citizen's

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[31] See vor evidence: report of the Austrian MoE to parliament from March 2009: 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

[32] See Justice and Environment, Aarhus Convention in Austria (2006) for references.

[33] The list is published on the Website of the Austrian MoE:

http://www.lebensministerium.at/article/articleview/27824/1/7237/

group“ is defined by the Austrian EIA-act as at least 200 individuals living in the (surrounding) municipalities of the location submitting a „joint statement“ referring to the project within the six weeks EIA public inspection period. If they do so they have similar standing rights as NGOs, namely the possibility to invoke any environmental law as their individual interest.

42. As stated above this counts only for a limited number of EIA-procedures (but not at all in IPPC procedures), whereas in the majority of EIA procedures such groups have no standing. Local groups have access to justice only in „regular“ EIA procedures, meaning projects that are listed in the Austrian EIA act Annex I column 1. There are approximately 50 EIA thresholds in this column, whereas column 2 and 3 of Annex I refer to 200 thresholds (simplified procedure). Furthermore any project that needs to undergo an EIA after a positive screening decision (e.g due to cummulative aspects, salami slicing, extension of existing installations) is executed under the simplified procedures and thus without local groups.

43. To worsen the situation recent jurisprudence of the Austrian Constitutional Court (Verfassungsgerichtshof, VfGH) has introduced very strict formal criteria for the establishment process of local groups.[34] The Court set very high and casuistic standards local groups have to fulfil when they sign the “joint statement”. There were cases where the Court accepted only few of 2.000 signatures, whereas only 200 would be necessary according to EIA act. These requirements make it very hard for citizens to use the instrument “local group” to achieve legal standing in EIA proceedings and lead to the situation that until now approximately 80 % of the citizens groups were rejected by courts and could not maintain their standing rights. This excessively formalistic interpretation by the Court is not compatible Article 9/2 of the Convention providing for “*the objective of giving the public concerned wide access to justice within the scope of the Convention*”.

d) Neighbours (impairment of rights doctrine)

44. Neighours have standing to protect their health and property in accordance with the impairment of rights doctrine both in EIA and IPPC procedures. This means they are not enabled to claim correct application of environmental law in court procedures.

e) Environmental Ombudsman

45. Environmental Ombudsman (Umweltanwaltschaft, http://www.umweltanwaltschaft.gv.at/) are bodies established in the (nine) regional governments (and administration) for the purpose of protecting the environment on regional level.[35] The system and approach differs from region to region (Bundesländer). Ombudsman staff constantly has the same labour contacts as civil servants. Most of Ombudsmen are formally independent. In some regions there is heavy political pressure on Ombudsman and they should not act against the political will of a regional government. On

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[34] See VfGH 14.12.2006, V 14/06 (A 5 NORD Autobahn; Abschnitt Eibesbrunn – Schrick); VfGH 02.03.2007, V66/06 (S 2 Wiener Nordrand Schnellstraße, Abschnitt Umfahrung Süßenbrunn, im Bereich der Gemeinden Wien und Aderklaa); VfGH 01.10.2007, V14/07 (S 33 Kremser Schnellstraße und S 5 Stockerauer Schnellstraße); VfGH 13.03.2008, B743/07(380 kV-Steiermarkleitung) and others.

[35] Please read Justice and Environment legal analysis on Aarhus Convention in Austria (2006) for more information: http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Aarhuslegalanalysis.pdf

the other hand the majority of them are very ambitious. Ombudsmen have standing and access to justice in EIA proceedings, even in the screening procedures.

46. Austrian officials had constantly maintained that the Environmental Ombudsmem's rights are sufficient to comply with Aarhus Convention and no further standing for environmental organisations or other members of the public is needed.[36] However, we clearly disagree with this position and this view is confirmed by the two major access to justice study from the European Commission (Milieu 2007) and by the Austrian MoE (2009). Our view is that the Aarhus Convention aims to provide rights to the public concerned, to independent groups of people or organizations, and not only to an institution with close direct or indirect ties to governments that work on the payroll, in the offices and sometimes under formal supervision of the government.

f) Conclusion

47. Only some of the 30 registered environmental organizations have standing and access to justice in all Austrian EIA and IPPC procedures in accordance with Article 9 par 2 (and par 3) of the Aarhus Convention. Standing rights of citizen's group is limited to certain EIA procedures. Neighbours' standing rights aim only to protect their private well, but not the environment as the Aarhus Convention provides for. It can be doubted that this legal position enables the public concerned to challenge substantive and procedural legality of EIA and IPPC decisions in an appropriate manner, in particular when we consider that Article 9 par 2 of the Convention aims to grant "*wide access to justice".*

Access to review regarding environmental information requests (Article 9 par 1 Aarhus Convention)

48. Access to justice with regard to environmental information requests is less problematic. Any (natural or legal) person has, according to the Austrian environmental information acts, access to justice if an information request was refused. However, in practice respective access to justice procedures are frequently not timely and effective. This is further elaborated below in the last chapter.

Scope of judicial review

Which acts and/or omissions are (not) subject to the review

49. As analyzed above standing (and access to justice) is limited to certain procedures. 30 Austrian NGOs can have access to justice in EIA and IPPC permitting procedures and in cases relating to the European Environmental Liability Directive. The same counts for neighbours, but with the limitation of the impairment of rights doctrine.[37] In addition neighbours have standing in permitting procedures for industrial and other 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).

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[36] E.g the parliamentry notes to the Austrian ratification; Austrian implementation report to 3. MOP in Riga (2008).

[37] Please read above for the impairment of rights doctrine.

50. However, there is an endless list of legislation where are acts and omissions are not subject to legal review.[38] The most important gaps are elaborated below:

a) Permitting procedures without access to justice

51. 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.[39] The same counts for most procedures on local **building permits**.

b) Planning and programming procedures

52. 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.[40] 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

53. 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.[41] 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) interpretation of the Convention in its decisions regarding Armenia[42] and Belgium[43] 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**

54. Whereas neighbours have the right to protect their property and health (impairment of rights doctrine) 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 European level the most advanced process regarding access to justice can be found

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[38] 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);*

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

[40] See *Schulev-Steindl* for further evidence

[41] 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)

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

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

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*[44]) are ignored[45] in Austria.

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

55. Omissions of public authorities that contravene environmental law are not subject to legal review by the public.[46] The same counts for various violations of environmental law by public authorities or private persons.[47]

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

56. A particular problem, falling somehow between Article 9 par 2 and par 3 of the Convention are EIA screening procedures. It was mentioned above 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). As stated above 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 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.[48] 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.

57. 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

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[44] 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

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

[46] Read above the chapter on omissions

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

[48] 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

discussed and criticized in Austrian literature[49], by advocacy groups and certain political parties, but not followed at all in the Austrian legislation process (EIA-act review 2009).

58. 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 this is legal issue is a "res iudicata". 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[50] 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[51], directive 2003/35/EC or directly the Aarhus Convention[52]. The courts argue that e.g neighbours could protect their water interest in the water permitting procedure, noise or smell pollution in the industrial permitting procedure etc. 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.

59. 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 in clear contradiction to Article 9 par 3 of the Aarhus Convention.

f) EIA-screening vs Article 9 par 2 of the Aarhus Convention

60. 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.

61. 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

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

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

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

[52] 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.

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 procedures 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.

62. The Compliance Committee clarified in different cases (e.g Denmark) 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 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.

63. 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.

64. This means the lack of access to justice against EIA screening decision is both in contradiction to Article 9 par 2 and par 3 of the Aarhus Convention.

g) EIA final inspections

65. 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. This contradicts Article 9 par 2 of the Aarhus Convention.

To what extent do courts review the acts?

66. The scope of legal review is closely related to the standing position in Austria. The implications of the impairment of rights doctrine and the (advanced) "formal standing" position of environmental organizations were elaborated above and are only summarized here.

67. Neighbours can invoke rights that aim to protect their personal interests (impairment of rights doctrine) in certain permitting procedures. Property, health and certain pollutions such as smoke or smell that disturb their private well are such legal interests that are typically protected by Austrian legislation. Neighbours can only claim such rights at courts.

68. Environmental organizations have the right to maintain (any) legislation relating to the environment in EIA and IPPC procedures because legislation expressly designates such rights to them.

69. Regarding environmental liability the legislator was not sufficiently precise. It is not clear what rights environmental organizations can maintain. However, if environmental liability legislation is interpreted in accordance with the European environmental liability directive it is clear that they can invoke everything relating to environmental damages.

70. All parties have the right to invoke procedural errors that could have affected their rights.

71. Only access to justice rights of environmental organizations in EIA procedures are in full compliance with Article 9 par 2 and 3 of the Aarhus Convention.

72. Article 9 par 2 of the Aarhus Convention enable members of the public concerned to "challenge the **substantive and procedural** legality of any **decision, act or omission** subject to the provisions of Article 6". In order to assess who are "the members of the public concerned" that have access to justice, **Article 9 par 2** regulates that they should either have "**sufficient interest"** or "**maintaining the impairment of a right**" and that the two criteria should be interpreted "consistently with the objective of giving the **public concerned wide access to justice** within the scope of this Convention".

73. The Austrian solution regarding neighbours appears to be in line with the Convention only regarding the determination who has standing. It appears appropriate to give standing to those individuals that's rights are impaired because they are located close to the project neighbourhood. However, there is no reason to limit the scope of standing and access to justice to individual rights since the Convention aims to protect the environment and to give the public concerned "wide access to justice". More precisely the Aarhus Convention does not aim to protect the individual interest of certain groups, but to protect the environment and provide for "**access to justice in environmental matters**" (Article 1). The Austrian legal position regarding neighbours is thus in breach of Article 9 par 2 of the Convention since it aims to protect personal interests of neighbours and not the environment and the legal correctness of environment related decisions.

74. Regarding Article 9 par 3 the situation is similar. Access to Justice should cover the right to challenge compliance of acts and omissions relating to environmental law. This means law that aims to protect the environment and not (only) the private well of certain persons.

Effective remedies (Article 9 par 4 Aarhus Convention)

75. 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*."

Adequate and effective remedies; including injunctions

a) Appeals to second instance

76. 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 Independent 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. 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).

77. 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)

b) Appeals to Highest Courts

78. Most standing parties have the right to appeal to the Highest Administrative and Constitutional Courts against decisions of the before mentioned tribunals and decisions. 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.

79. This is 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:

c) Case example: S1 motorway Vienna

80. The EIA permit was issued in May 2006. A citizen's group (they 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.[53] The minister of transport (BMVIT) pursued the new EIA permit 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 squashed the appeal in December 2008 8 (VwGH 2008/06/0026). The motorway will be opened for traffic in January 2010.

81. 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

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

the section 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

82. A strange provision has been added to the EIA act in its 2009 review. Article 42a EIA 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 the anti-injunction does no apply.

Fair and equitable procedures

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

84. 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 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 and abolish and IPPC or liability decision and the developer could reverse the decision at the highest court, whereas NGO can not. This legal position does not provide for a fair and equitable procedure.

85. 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.

Timely procedures

86. 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 "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 e 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.

87. 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.

Prohibitively expensive procedures

88. 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).

89. 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 procedure 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. 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.

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

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 implement correctly 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, 13. March 2010

Markus Piringer
Managing Director