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Vienna, 2. December 2010

Case ACCC/C/2010/48, Austria

Explanatory note by the communicant to the Annex 12 added to our submission of 8. October 2010

Summary and quotations from the study „Rechtliche Umsetzungsoptionen zur Verbesserung des Zugangs zu Gerichten im österreichischen Umweltrecht gemäß der Aarhus Konvention (Artikel 9 Absatz 3). This study was attached as Annex 12 to our submission from 8. October 2010. The study is quoted in our communication at different occasions.

Title of the study:

“Legal options for improving access to justice in Austrian environmental law with regard to the Aarhus Convention (Art 9 par 3).

Page 4:

(IMPRESSUM) editor: Ministry of Environment

The main structure foresees the following chapters

- I. Access to Justice as to Art 9 par 3
- II. Legal options
- III. Arguments for and against certain options
- IV. Summary

The study focuses on three issues with regard to access to justice:

WHO has standing and the right to appeal respectively?

Chapter I.2.1, pages 19 to 30

Chapter II., pages 59 to 64

Access to justice against **WHAT?**

Chapter I.2.2, pages 31 to 56

Chapter II.2, pages 65 to 67

HOW to go to court

Chapter I.2.3, pages 57 to 58

Chapter II.3, pages 73 to 84

Chapter 1.1. Starting point page 15 to 19

This chapter elaborates the legal background.

Pages 17 to 18: Reference to the 2007 Milieu Study of the European Commission that found Austria as one of the worst countries with regard to AtJ in the EU.

Page 17 second paragraph:

In 2007 a study commissioned by the European Commission pointed out deficits of the implementation of Art. 9 par. 3 Aarhus Convention (AC) in EU members' law. Besides Germany, Hungary, Malta and the UK also **Austria's implementation** of "access to justice" into domestic law was evaluated as **not sufficient**.

Page 17 last paragraph, Page 18 continued (first and second paragraph):

Concretely, the granting of legal standing in Austria was criticized because the claimant has to prove her/his infringement of certain protected interests by a certain ruling. This means in fact that members of the public (except from permitting procedures of waste treatment- or ipcc-plants) have hardly any other option than to inspire the administration to reconsider its decision. The installation of environmental Ombudsmen in every state of Austria could be seen as an alternative way of granting access to justice and comes closest of all member states of the EU to the approach of “letting the environment speak for itself and bring a case to court”; though it does not really effect the evaluation, because the study focused on judicial and public administrative remedies. Overall the **Austrian concept of standing** displays a **giant barrier for members of the public** with regard to gaining access to reconsideration proceedings.

So it has to be the aim to work out different options for an improved access to justice in environmental matters. It seems appropriate to investigate the requirements of art.9 par.3 AC, divided in different issues according to the regulation:

- who (“claimant”)
- against what (“infringements of environmental law”)
- how (“remedies”)

Chapter 2.1. (Who, claimant)

This chapter lists different groups that could be seen as the public under Art 9 par 3.

c) NGOs (page 21)

Last paragraph:

Therefore any correct implementation of Article 9 Abs 3 has to consider and include NGOs.

d) ”members of the public” (page 21 to 23)

An indication for what “the public” in terms of the AC stands for, can also be found in teleologic as well as in thoughts regarding political science: Despite the fact that Art. 2 nr. 4 AC also refers to legal persons, such as local authorities or legal bodies with a proximity to

the state, as members of the public, these legal bodies can only under strict conditions be seen as members of the public in terms of the AC. One goal of the AC is the so called “**citizen enforcement**”, a concept which **ensures individuals and NGO’s** in environmental matters to **take part in implementing proceedings** concerning environmental law in order to guard against enforcement deficits of the state.

So “the public” in terms of the AC is not “state represented”, it is more a **civil society** that is characterized by the separation of State and society, which is also in compliance with the liberal principle of the Austrian constitution. That is why **organs with a proximity to the state cannot or only under strict conditions can be members of the public.**

e) Environmental Ombudsman (page 23 to 30)

sub chapter ee) Ombudsman as members of the public?

The investigation whether environmental ombudsmen are members of the public in terms of the AC proofed a certain proximity to the state:

It is their duty to **serve public interests** and not certain subjective interests of individuals or of their own. That is why (as an organ of the state) they are **lacking an own sphere of interests** (as often referred to in doctrine or judicature). (In organizatorial respects they are mostly integrated in the public administration of state and normally are appointed for only a certain amount of time.) weglassen???. Because environmental ombudsmen are not representing interests of members of civil society organisations and their lacking of independence from the state, they **cannot or only under strict conditions** can be seen as **members of the public** in terms of the Aarhus convention.

ÜBERSETZEN..

f) Transposition options (page 30)

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- Because of their favoured status (by the AC), **environmental associations have to be provided with appropriate remedies as well as appropriate competence to take legal actions.**

C. “Against what” (violations of environmental law) (page 92-93)

Page 92 first paragraph

1. Benchmarks of appeals: against infringements in terms of Art. 9 par. 3 AC are **all domestic regulations in environmental matters**, meaning national as well as supranational (esp. European) law. So general-abstract regulations, such as laws, statutory ordinances and self executing regulations based on treaties or European law and basically also individual-concrete standards, such as official notifications or court decisions have to be considered.

Page 93 second paragraph

2. Possible subjects of appeals in terms of Art. 9 par. 3 AC are **all infringements of domestic environmental related regulations executed by individuals or public authorities:**

Acts or omissions of **individuals** that violate

- Unconditioned anti pollution obligations or prohibitions , such as destruction or interference prohibitions, conservation or precaution obligations, monitoring or information or reporting obligations

or

- anti pollution related prohibitions subject to the possibility of authorization, such as obligations to obtain permits related to the construction, operating or modification of environmental damaging installations, the bringing in circulation of environmental damaging products, interferences of environmental matrices or other environmental damaging activities.

Secondary acts or omissions of **public authorities** that violate

- **obligations of public authorities relevant to environment concerning factual acts** such as control obligations, data collection or report or information or planning or programming obligations

or

- **obligations of public authorities relevant to environment concerning normative acts** (official notifications, administrative acts without proceedings, legal ordinances) with regard to permissions and admissions of environmental damaging installations or products, interferences of environmental matrices or other environmental damaging activities, furthermore with regard to conservation obligations, obligations to give order to establish legal conditions, punishing as well as planning and programming obligations.

Best wishes

Markus Piringer