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Case ACCC/C/2010/48 Austria

Comments to the draft findings and recommendations

General remarks

1. The communicant welcomes the draft findings and recommendations of the Compliance Committee.

2. The ultimate aim of this communication was to raise pressure on the Austrian legislator and jurisprudence to improve access to justice in Austria. There is heavy resistance from all but one political party, the administration including the influential and decisive nine Austrian provinces (Bundesländer) and jurisprudence to make improvements on access to justice. Leading Austrian academics speak about unbelievable „fear and persistency tendencies“ in Austria in the context as we referred to in para 5 of our communication. The so called „Milieu study” of the European Commission (2007) and following this a study of the MoE (2009) concluded that Art 9/3 is not implemented, but nothing happened in Austria (both studies are part of the supporting material we submitted to the Committee). It is therefore the final hope of the Austrian civil society that the Compliance Mechanism of the Aarhus Convention would make Austria change its legal position.

3. We disagree with some parts of the draft findings and recommendations or find them too general in order to bring a change to the Austrian system. Aspects of the summary of facts, legal framework and issues are not complete or correct. This lead to some to unclear or incorrect conclusions. The issues are addressed below.

4. The objective of this case was to deal with Austrian access to justice in a strategic

manner by addressing various aspects of it. We considered this as more effective in terms of time and resources than submitting different communications for each specific aspect. We also aimed to not „flood“ the Committee with unnecessary supporting information and appendixes. We confess that we overestimated what can be dealt with in a single procedure and were too vague for certain allegations.

5. The Committee focuses in its draft findings and recommendations on Article 9 par 3 as to NGOs. This is welcomed by us since this is currently the most „burning issue” in Austria. Only if access to justice is provided other problems can occur. However, we do not understand why some issues were not taken up at all even though they were addressed in the Committees questions in writing and in the public hearing (such as effective remedies in infrastructure projects or EIA-screening procedures). In other parts the draft findings and recommendations lack reference to cases, facts or evidence that would be better explain the legal matters discussed.

6. Finally, we want to stress in this introductory statement that we have not invoked anything regarding NGO standing rights in the framework of EIA (with the exception of EIA-screening), IPPC and environmental liability procedures since this caused, from our perception, constant confusion during compliance process. The three procedures cover major environmental issues, but are exceptional compared to day to day procedures, acts and omissions in the field of environment. Until today not a single environmental liability case occurred in Austria, it is therefore „dead law“. And there are only 20 EIA procedures a year, compared to 10.000s of other procedures, acts and omissions without access to justice, including EIA screening procedures where according to the official MoE report to parliament 81 % deny a need for an EIA procedure (paragraph 28 of our communication).

Comments to specific paragraphs of the draft findings and recommendations

II: Summary of facts, legal framework and issues

A. Legal framework

7. Paragraph 14: It could be mentioned that the Environmental Ombudsman has standing in EIA, IPPC, nature conservation, environmental liability and EIA-screening procedures (but not in other procedures) as this is reflected in the joint submission of the communicant and the party concerned of February 2011.

8. Paragraph 16: A party involved has no standing rights. Citizen's groups standing is limited to regular EIA-procedures, but excluded in the simplified EIA procedures (only party involved) as reflected in the joint table submitted by the communicant and the party concerned in February 2011. The simplified procedure is highly relevant in practice since 200 of 250 Annex projects of the EIA act and any project change lead (only) to the simplified procedure.

B. Substantive issues and arguments of the parties

9. Paragraph 19: We disagree with what the Committee considers as too broad and general particularly as to not considering effective remedies in transport projects. It is not understandable for us why the Committee did not assess the issue of injunctive relief with regard to the S1 and A5 motorway cases, though it was demonstrated the court needed five months (in both cases) to decide on the injunction request and it takes 12 to 24 months until the courts decides in the substance of the case. Furthermore the court refuses injunctions with the argument that constructions are already on-going. The same counts for the anti-injunction (paragraph 68 of communication) that was not disputed by the party concerned. Respective allegations are very specific and concise as referred to in paragraphs 58 to 66 of the communication as well as paragraphs 13 to 31 of our submission of 8. October 2010.

10. The party concerned defended the legal position on injunctions by an Administrative Court decision of September 2010 that created competence for the Environmental Senate, a court where injunctions are granted as general rule by the law. In the public hearing and in our submission of 6. April 2011 we argued that this verdict is weak since it breaches the Austrian constitution in a multiple manner and might be changed in near future. This became true in July 2011 when the Constitutional Court clarified that the Administrative Court remains the only competent court. In the meanwhile the Administrative Court followed this interpretation in a judgement of last week (regarding the A5 motorway case that was finally decided after 21 months with valid construction permit in that period of time.

Locus standi for individuals to challenge decisions subject to article 6 and scope of the reviewable claims (Art 9 par 2)

11. Paragraph 30: After paragraph 30 a new paragraph 30a has to be added reflecting paragraphs 8 to 12 of our submission of April 2011 and our arguments in the public hearing. Firstly, we argued in the public hearing - and the party concerned conceded after request of the Committee - that any party could argue general interests, but there is no obligation of the court to take up the arguments and there is no right to legally enforce such public interests. This legal position became even worse after the public hearing when the Administrative Court (Decision 2010/06/0262-10, ATC Voitsberg) put down the arguments raised by the party concerned in its written answer to the communication and in the public hearing. The Court judged that that neighbours are not entitled to invoke environmental provisions that go beyond the „Schutznormtheorie“ (as the Committee refers to in Article 13 of the draft findings and recommendations). Secondly the court clarified that courts and public authorities are not supposed to consider public environmental interests unless an NGO or other party with full scope of standing had invoked this during the procedure AND in the appeal. This judgement including explanation and translation of the core parts were submitted to the Committee in April 2011 as mentioned above.

12. Paragraph 31: The last sentence regarding citizen's groups needs a reference that this applies only in the regular EIA procedure (see paragraph 8 of this submission). Even though this paragraph refers to the statement of the party concerned it has to be mentioned that the communicant disagreed. We constantly argued during the procedure that citizen’s groups do only exist in regular EIA-procedure, but not in the simplified and not in IPPC procedures.

Locus standi for individuals (natural persons) to challenge acts by public authorities (Art 9 par 3)

13. Paragraph 35: As above this only applies for regular EIA procedures. Furthermore EIA refers to Article 9 par 2 of the Convention. It is unclear why this is relevant under a chapter addressing Article 9 par 3. The Environmental Ombudsman has only standing rights in selected procedures as mentioned above and demonstrated in the joint submission of with the party concerned in of February 2011.

Locus standi for NGOs to challenge acts by public authorities (Art 9 par 3)

14. Paragraph 37 and 38: Here a reference to EIA-screening procedures is missing. EIA-screening procedures are a crucial issue in Austria as mentioned above (paragraphs 5 and 6) and argued in paragraphs 28 to 33 and 49 to 53 of the communication. It is undisputed that NGOs have no standing in EIA screening procedures as demonstrated in the joint statement of the communicant and the party concerned in its submission of February 2011. It would be very important for the communicant, particularly for the upcoming process implementing the recommendations in Austria the EIA-screening procedures are specifically mentioned.

15. Paragraphs 40: This is again confusing since EIA and the rule of concentration refer to the rather exceptional EIA/IPPC procedures (see above paragraph 6) and by the same time to Article 9 par 2 that his not disputed with regard to NGO standing rights. The communicant agrees that there is no conflict with standing for NGOs with regard Article 9 par 2 and par 3 in cases EIA and IPPC procedures are applied.

Reviewability of acts and omissions of public authorities (Art 9 par 3)

16. Paragraph 41 to 43: Both in the communication and in the public hearing we argued that civil lawsuits are not suitable for public interest litigation. Firstly, NGOs can never litigate that way because they have no legitimate legal interest to do so. Private lawsuits aim to reduce (environmental) immissions (such as noise or smell) and to protect private property/health. An NGO can never have such an interest since it is not personally concerned. This was not disputed by the party concerned in the public hearing after request of the Committee. Nobody can make a civil lawsuit to protect endangered species unless there is a health and property damage or other individual concern.

17. In our communication we addressed in paragraphs 78 to 81 how difficult (and respectively impossible) it is to litigate under private law (with regard to air quality standards). In such cases it is not sufficient to claim that the law is breached, but (very costly and complex) technical expertise is needed that demonstrates how this would affect health of the claimant and what would be the exact causality between the breach of law and the concrete health/property threat. From our perspective such a procedure is neither compatible with Article 9 par 3 nor with par 4. It is not understandable for us why this case brought forward in the communication is not mentioned in the draft findings and recommendations.

III. Consideration and evalutation by the Committee

18. Paragraph 49: As above we do not agree with the Committee as to what was too broad and general and with the decision to exclude key allegations regarding 9 paragraph 4.

Time allowed for responding to a reqeust for information and providing notice of a refusal (Art 4 par 2 and 7)

19. Paragraph 50 to 53: There seems to be a misunderstanding of the legal position. Authorities are obliged to answer in writing if the request was in writing. But the problem is not whether there is a written document, but the legal format of it. Only the legal format of an "official notification" (=individual administrative decision) is open for access to justice.

20. In Annex 1 and 5 of our submission from 21. October 2010 the Committee finds written documents of public bodies that deny access to information requests. But these documents have no legal value. It is just a letter. In order to appeal against the refusal the same authority has to issue an "official notification". This notification can only be requested after the (non-legal letter) deny of the request was received. Then the authority has six months to issue this official notification. After the six months a devolution request is possible and the higher authority has additional six months to issue the official notification.

21. The cases presented in our communication and in our October 2010 and April 2011 submissions are not mentioned in the draft findings and recommendations. They could be used to demonstrate what specifically a breach of the Convention is. We are still waiting for an official notification of the information requests regarding traffic figures from April 2010. And we have no possibility to legally challenge this.

22. The correct wording of paragraph 53 would be: "… the Committee finds that the party concerned by allowing public authorities not to respond in the legal format of an official notification (or to respond well beyond the time frames set by the Convention)...."

Access to justice for failure to respond to a request for information (Art 9 par 1 and 4)

23. Paragraph 57: Here the case examples could be mentioned in order to demonstrate what a clear breach of the Convention is.

Locus standi for individuals (Art 9 par 2)

24. Paragraph 61: We agree that the criteria are appropriate to define WHO has standing. However, this paragraph could be misunderstood since the Austrian standing criteria define by the same time the scope of standing (WHAT) that is assessed by the Committee below.

Scope of reviewable claims by individuals (Art 9 par 2)

25. Paragraph 62: After the opinion of the party concerned the one of the communicant has to follow since the argument of the party concerned is legally wrong after a judgement of the Administrative Court (see above paragraph 11): Individuals are not supposed to bring any argument of general interest and the court must not take into consideration any such argument.

26. Paragraph 64: As argued in the paragraph above and paragraph 11 individuals are not

supposed to bring any argument of general interest and the court must not take into consideration any such argument. The conclusion of the Committee is therefore based on wrong assumptions. We still disagree that the protection of property and health serves the some aims as this Convention on environmental protection (Art 1 and 3).

Locus standi for NGOs (Art 9 par 3)

27. Paragraph 65 to 70: These paragraphs have little reference to the Austrian system. This could lead to misunderstanding (and therefore limited added value) when Austria aims to implement the findings and recommendations of the Committee. Here better explanation and more specific references to paragraphs 36 to 40 including EIA screening procedures would be crucial in order to make clear what the subject matter is.

28. Paragraph 65: The reference of the party concerned to NGO standing as justification is not suitable since the headline refers to locus standi for NGOs. Either there is NGO standing or not. We reiterate that we have not invoked a breach of the Convention when Article 9 par 2 is applied and that the Environmental Ombudsman has only standing rights in limited procedures.

29. Paragraph 66: The first sentence could contain a reference to Article 9 par 1 and 2. Otherwise it is not clear what is meant by “more flexibility”.

30. Paragraph 69: The footnote should contain a reference to EIA-screening procedures.

31. Paragraph 70: The wording is misleading: The issue is not the setting of standing criteria but not setting them. Standing criteria for NGO are set in EIA and IPPC procedures and in vaguer way in environmental liability procedures. It can be said that criteria, when they exist, are fine. But if they do not exist, there is no standing. The correct wording would be “the committee finds the party concerned by failing to set standing criteria for NGOs...”.

32. We underline once more that we fear paragraphs 65 to 70 could be too vague in order to bring effective changes to the Austrian system. There should be more references to the Austrian legal position and to the chapter on the facts and legal issues of these findings and recommendations

Scope of claims against private persons under article 9 par 3

33. Paragraph 71: Again, the perception that individuals can bring forward general environmental matter is not correct. (see above paragraph 3 and respective comments to different paragraphs in this submission).

34. A reference could be made to air quality case of Graz (see above paragraph 17). We do not agree we the substance of this paragraph as such (see above paragraph 17).

IV. Conclusions and recommendations

A.) Main findings with regard to non compliance

35. Paragraph 73: As explained in paragraph 22 the correct wording of paragraph 53 would be: "... the Committee finds that the party concerned by allowing public authorities not to respond in the legal format of an official notification (or to respond well beyond the time frames set by the Convention)...."

36. Paragraph 75: As described in paragraph 31 the correct wording would be "… the committee finds the party concerned by failing to set standing criteria for NGOs..."

B.) Recommendations

37. Paragraph 76 a) i: As mentioned above the recommendation should refer to the legal format of an official notification that is needed for access to justice.

38. Paragraph 76 a) ii: Here should be a clearer reference that access to justice has to be possible in any case after the deadline for answering the request expired, irrespective for what reason the request is not or not sufficiently answered (e.g. tacit refusal that enables immediate access to justice).

39. Paragraph 76 a) iii: Here should be a reference that standing criteria have to be introduced (and not reviewed). A clarification that this recommendation refers to all laws mentioned in the findings and recommendations and similar laws, including planning and programming procedures would facilitate the implementing process in Austria.

40. Paragraph 76 b): This is highly welcome and needed.

41. Austria should develop a strategy and propose a schedule how and when the recommendations are implemented including reporting requirements on this and the progress to the Committee.