Case ACCC/C/2010-48 Austria

Ten arguments by the communicant at the public hearing on 15. December 2010, Geneva

Austria defended our communication regarding Article 9 par 3 by three key argumention lines:
a) Private lawsuits are sufficient to comply with Article 9 par 3
b) The adminstrative standing concept plays a minor role for access to justice in Austria
c) EIA, IPPC, env. liability (and some other excpetions) are constantly demonstrated as standard cases
Furthermore many elements of the Austrian response are just not correct or complete.

This statement aims to demonstrate the arguments brought by Austria are not significant or correct and to underline our core allegations.

1. **Typcial Austrian cases without access to justice for the public, based on real cases**

Case A – Air quality plans
Legislation provides for certain air quality immission standards. If they are not met, authorities are obliged to enact effective plans and programmes to lower air emissions. The immission standards are constantly exceeded. No effective plans and programmes exist. No or insufficient SEA and public participation procedure were carried out. The NGO requests the authority to act and revise the air quality programme and to carry out an SEA and public participation procedure. The authority refuses to do so. The NGO and no other member of the public can initiate a legal review procedure with regard to the air quality programme.

Case B – ACDC concert
The rock band ACDC plans a concert in a designated SPA for birds during the breeding season. The competent authority issues a nature conservation permit. An NGO intervenes, claims an EIA would be necessary and wants to legally challenge the nature conservation permit, but it can't due to lack of standing for NGOs and other members of the public. (similar as case para 19 and 20 of our revised communication)

Case C – Water pollution
At least three industrial facilites pollute a river with various emmissions. This leads to scum on the surface of the river floating to Hungary. The water quality is low, but there are no imminent health risks for the local population. There are no neighbours or property owners close to the facilities. NGOs want the authority to review the water permits and control compliance of the existing permits. The authority does not act as requested. Neither the NGO and nor any other member of the public can take legal actions against the operator or the authority.

2. **Reasons for this communication**

Recent national and international studies claim Austria has not implemented Article 9 par 3. But Austria sees not reason to react.

..Statement in ratification
The legislative materials regarding the relevant provision state: “Article 9(3) is very vague and has

to be developed by the States. The provision is subject to different interpretations; for Austria there is no imperative need to react and the system of protecting individual interests and other remedies (e.g., ombudsman) could be used".

..2007 Milieu-Study, page 13, conclusions
„Article 9(3) of the Aarhus Convention cannot be said to have been implemented when members of the public have no participatory rights in administrative procedures. The public's ability to inform authorities of violations that could result in supervisory control proceedings, immediate administrative action or criminal proceedings is obviously insufficient."

..2008 RdU editorial of the leading Austrian env. law journal
Kerschner/Raschauer, RdU 2008, 145, the editors of the Austrian environmental law journal, raise the question how deep „fear and persistency 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.

..2009 MoE Study, executed by Prof. Schulev-Steindl
Page 17 and 18 "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."
"Overall the Austrian concept of standing displays a giant barrier for members of the public with regard to gaining access to reconsideration proceedings" (quoting the Milieu study)
Page 30: "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."

..2010 Draft second Austrian Aarhus Convention implementation report
„This study from Prof. Schulev-Steindl [...] confirmed in principle the compliance of the Austrian legal situation with Art. 9 para 3 and provided an overview on potential improvements with regard to this provision. The BMLFUW is currently in the process of assessing the results."

3. The issue of public vs private law: different jurisdiction

Austria has two jurisdictions:
a) civil and criminal law, and respective courts
b) public and adminstrative law, and respective authorities and courts

Environmenal law is to large extent public law. Civil law courts can not deal with public and adminstrative law. Therefore civil legal actions are possible only in exceptional environmental cases.

„Violations of environmental law are administrative law issues, as long as they are not criminal offences or cause harm subject to compensation. The power of judicial review regarding administrative decisions or rulings belongs to the administrative authorities, the Administrative Court and the Constitutional Court." (Milieu, page 5)

„Civil courts or criminal courts do not have the power of judicial review regarding decisions or rulings issued by administrative authorities. The Austrian Constitution assigns this power to the Administrative Court, which is also a Supreme Court". (Milieu, page 7)

The Constitutional Court has no power to review the judgements of the Administrative Court or the Supreme Court for Civil and Criminal Affairs. According to the Constitution, Austria has three supreme courts**.** (Mileu, page 9)

Private law is not effective remedey as to Art 9 par 3 by its nature in Austria
Paragraph 39 of our revised communication
"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)."
And case example (Graz, air quality), paragraph 78 to 81

4. The issue of adminstrarive standing

„Individuals are entitled to appeal only if they are a party in the procedure. Third parties do not have any legal standing; they can only report the (presumptive) violation of environmental law to the administrative authorities, and then it is largely up to the latter whether or not they modify an illegal decision. This kind of supervisory control does not provide effective access to justice for the members of the public ." (Milieu, page 5)

„Only in very specific cases are citizens entitled to an administrative procedure "based" on a violation of environmental law (e.g., a facility emits substances that harm a neighbour's health; in which case a "regular" proceeding against the private offender (e.g., the facility owner) will be initiated and can be appealed to the second instance and/or the Administrative Court) ". (Milieu, page 9)

„In general, as long as they are not directly concerned, citizens and NGOs do not have legal standing in administrative proceedings regarding environmental issues. To be a party to the administrative procedure requires having had a "subjective right" affected. As long as the law does not grant a specific right to a person, he/she is not a party to administrative procedures." (Milieu, page 9)

5. The issue of EIA, IPPC-procedures (Article 6 and Annex I Aarhus cases)

..In EIA and IPPC (=permitting procedures) procedures NGOs have full standing
..Neighbours standing rights restricted to health and property
..There are only 20 EIA procedures a year
..IPPC-procedures: no access to Supreme Courts for NGOs, but for other parties!
..No access to review EIA-screening decisions (see below)

6. The issue of of environmental liability procedures

..Scope of NGO standing is not clear
..Very limited scope of neighbour standing
..No access to Supreme Courts for NGOs, but for other parties!
..Narrow scope with high thresholds, only selected activities, fault-based liability; covers only water, soil in conection with health, nature
..No env. liability cases yet in AT, only 15 reported in EU since 2007 (!!!)

7. Key allegations as to the concept of adminstrative standing

a) No standing for NGOs outside EIA, IPPC and env. liability
b) Limited scope of standing for neighbours (property, health)
c) No standing for neither NGOs nor neighbours in most parts of env. law (certain permitting procedures, but also acts and omissions in general)

8. No standing in EIA-screening procedures

..81 % of screening decisions refuse need for EIA
..Only 20 EIA, but 80 screening procedures a year
..Developer, Ombudsman and municipalities have standing
..No possibitliy to invoke EIA in following procedures (res iudicata)
..EIA-screening falls under Article 6 of the Convention and access to justice also as to Art 9 par 2

9. Timely procedures with regard to env. information

..Only „official notification“ provides for access to justice, demonstrated in three examples in para 2 to 12 of our statement from 8. October 2010
..It can take up to 14 months until an official notification is issued and only agains this document a subject can take legal action.
..It is not possible to request an official notification at the same time as env. information request (UVS Wien, MIX/42/250/2008-3) as party concerned argues on Nov 30.
..This would furthermore not solve the issue of the six months devolution deadline

10. Effective remedies/injunctions“ at the Highest Administrative Court with regard to permits where no independent tribunal had decided before

..a recent judgement could cure the situation, but decision of other (or extended) senate expected in the next months - evidence
..legislative changes are under preparation, heavy pressure from developers - evidence
..*judgement confirms our allegation i*n para 67 of revised communciation since the court found itself not capable to fulfil Art 10 EIA directive requirement (*full legal review)*

Reasons for not granting injunctions, paragraphs 62 to 66 of our communication and paragraphs 13 to 30 of our 8. Oct submission:
..TEN-T project is in overriding public interest
..Need of energy supply (electric powerline) - overrding public interest
..Reduced accidents rate (motorway vs highway) - overrding public interest
..Already under construction – no disproportional harm if construction proceeds
..Construction of powerline is not irreversible - no disproportional harm for claimant
..Uprooting as to a mining project is not irreversible - no disproportional harm
..Motorway can be abolished once it was constructed – no disproportional harm

The following public interests are *overriding environmental protection*
..“better protection of life and health of the road users in this area,
..the considerable improvement of traffic safety of a road,
..the important function of the part of the road in question regarding the trans-European road network,
..the extensive reduction of immissions on main trough-roads,
..the economic effects of a large federal roads project”

It takes five months to decide whether injunction is granted - This alone is in conflict with Art 9/4

Regarding the arguments brought by the party concerned:
..We maintain our allegation that injunctions are hardly granted in env. procedures
..We admit the Court is more sensitive as to nature protection
..Most cases raised by the party concerned are specific (e.g. Diabas)
..No such decisions exist with regard to federal road EIA procedures
..Case law of Court makes injunctions impossible for most infrastructure and in particular for road projects