6.10.2010

Austrian Response

Case ACCC/C/2010/48
Compliance with access to justice provisions; communication of Ökobüro

General remarks

The questions of the compliance committee of 23 June 2010 concern to a large extent the functioning of our legal system on environmental law in general and encompass also the question on who is given the right to participate in environmental procedures as well as given the right to challenge environmental decisions. Before answering these questions separately in Section I.B., we will briefly explain the specific approach of the Austrian legal system to participation and access to justice in environmental matters in Section I.A. This may also serve to correct the somewhat biased view presented in the communication submitted by the Ökobüro.

I.A.: Introduction: Austrian Environmental Law, Locus Standi, Authorities and Courts

1. General: Overview of the AT legal system on environmental law

It has to be noted that Austria has **not one single legislative act on environmental law nor a separate individual competent authority** being responsible for proceedings concerning environmental law. Austrian provisions concerning environmental protection can rather be found in **several legal acts** concerning the area of civil law (especially the so called environmental private law), criminal law and – in most cases - administrative law. This legal system is in accordance with the Aarhus Convention since Art 9 para 3 of the Convention offers a certain discretion to the Parties for the implementation of the Convention, ranging from systems dominated by civil law or administrative law approaches stressing rights of individuals up to complaint procedures involving e.g.. an ombudsperson.

1.1. Administrative Law

The **most significant share** of Austrian provisions on the protection of the environment exists in the area of **administrative law**. Austrian administrative law is part of public law which governs the relationship between individuals (citizens, companies) and the state. It has to be stressed that the Republic of Austria is a **federal state**. This means that the legislation and the execution of laws are distributed between the federal government and the nine federal provinces ("*Länder*") according to their respective assigned competences. The Austrian Federal Constitutional Law (B-VG) regulates the legislative and executive competences assigned to the federal government on the one hand and to the federal provinces on the other hand.

Constitutional Law

According to the **Austrian Federal Constitutional Law (B-VG**) **environmental protection is a cross-sectoral issue** which is distributed between the federal government and the federal provinces. Thus, federal legislation (e.g. Waste Management Act, Industry Code 1994, Environmental Impact Assessment Act 2000, Water Act, Forestry Act) exists next to provincial legislation (e.g. acts concerning nature protection or construction law) to regulate environmental protection.

1.2. Civil Law

It has to be remarked that the **procedures concerning civil law and administrative law**

are separate. Both systems function independently. However, **their legal remedies supplement and support one another.** For instance, in case there is no possibility for neighbours to claim protection rights in the context of administrative proceedings neighbours can do so on the basis of private law.

With regard to **environmental private law**, the **Austrian Civil Code (ABGB)** provides for a set of general and specific rules. In general, **anybody** who is or fears to be endangered by pollution is entitled to file a lawsuit against the polluter and to seek an injunction – this **right to preventive action against pollution detrimental to health** has been expressly acknowledged by courts as an integral "innate" right of every natural person under **Art 16 of the Civil Code** (a cornerstone-provision entirely neglected in the communication), neither requiring participation in administrative proceedings nor ownership of private property in the proximity of the polluter. The Appellate Court of Salzburg famously stated that this right entitles all natural persons to seek protective measures in environmental cases against potentially detrimental pollution[1]. The Supreme Court ruled to the same effect[2]. Ever since, this is regarded as a standard line of jurisdiction. Apart from that, there are **more extensive rights to preventive action against any pollutant input ("immission") beyond the locally accepted and prevailing level** for natural persons owning land and/or living in the proximity of the polluter which they may exert in addition to rights in administrative proceedings (Art 364 et seqq., see case law references in answer to question 4 below). In particular, Art 364 et seq. of the Austrian Civil Code (ABGB) provide the possibility for **neighbours** to file a claim concerning the defence against **inadmissible immissions** coming from adjacent properties. Furthermore neighbours are entitled to prohibit immissions exceeding a certain level. In this context direct or indirect immissions having an impact from one property to another (e.g. waste water, smell, noise, light and radiation) are deemed as impairments.

Art 364a Austrian Civil Code (ABGB) states that neighbours are not entitled to file a claim for preventive measures concerning impairments from a **plant** which was approved by a competent administrative authority. In this case, the neighbours are restricted to claiming financial compensation for the given damage. However, in case they were not involved as parties in the administrative approval procedure, neighbours are entitled to file a claim for preventive measures. This is settled case law of the Supreme Court for civil and criminal affairs and has been considerably expanded to the benefit of neighbours: In the **landmark "*Sandstrahl*"-decision[3]** the Supreme Court ruled that such **claims for preventive measures may even be raised in cases where the polluting plant has a full permit under the Industrial Code and thus is not in violation of any provision but the administrative authority is in delay of issuing further restrictions**.

In addition, private entities in violation of these laws may also be sued by **competitors** and **special interest groups**, since producing goods in violation of environmental laws is regarded by courts to be unfair business practice[4].

Administrative Law context

Next to the general concept of neigbours' rights in the Civil Code and the possibility to file a claim on this basis, neighbours and their given rights as parties in the procedure are often explicitly included in the separate administrative environment laws (e.g.. EIA Act, Waste Management Act, Industrial Code). A brief overview is attached in the Annex.

[1] Case 54 R 139/00f; Prof. Klicka applauded this decision in his comments in JBl 2000, 802.
[2] In 1 Ob 16/95 and recently again in 2 Ob 57/09k.
[3] OGH 11.10.1995, 3 Ob508/93
[4] See the recent decision of the Supreme Court for civil and criminal affairs 4 Ob 40/09z.

2. Locus Standi – Parties' rights

2.1. General Administrative Procedure Act

As a general principle in Austrian administrative procedures parties may claim their *legal interests* meaning *their given rights*. It is therefore a **criterion for participating** in the administrative procedure **to have legal interests**. In this context the **General Administrative Procedure Act** 1991 (AVG) is relevant. Art 8 AVG generally states that *persons who are involved in the matter on the grounds of a legal title or a legal interest are parties* who in the end can also file a complaint. To answer the question of who has a legal title or legal interest in a procedure the respective law, which regulates the relevant areas and administrative procedure, has to be considered.

NGOs/environmental organisations that fulfil certain criteria (see below especially EIA legislation) provided for in national legislation are also given "locus standi" and can excercise the rights given to parties in various administrative environmental proceedings (most relevant e.g. EIA, IPPC, Waste Management Act, Industrial Code).

For example, concerning Austrian EIA development consent procedures the legal standing of parties is defined in the Federal Act on Environmental Impact Assessment (EIA Act 2000), especially in Art 19. The *legal interests* of parties are defined partly in the EIA Act 2000 itself but also in several other laws (e.g. the Industry Code 1994, Waste Management Act, Forestry Act) which have to be taken into account in an EIA development consent procedure if relevant for the respective development consent.

2.2. Federal Act on Environmental Impact Assessment (EIA Act 2000)

The EIA Act 2000 considers public participation as highly important. It is important to know that within the **EIA development consent procedure** for a specific project all other relevant environmental laws have to be applied as well. The final development consent encompasses all applicable requirements of all relevant environment legislation. In that sense an EIA procedure is cross cutting and opens a procedural platform where direct and indirect effects and impacts of the specific project on the environment are publicly and transparently discussed, examined and assessed under all applicable environmental legislation – giving the public ample means and opportunity to actively participate in various ways.

Therefore, the EIA Act 2000 contains extensive provisions for the protection against harmful impacts and for the participation of the general public in EIA development consent procedures. Art 9 para 5 of the EIA Act 2000 determines that **anybody** may submit written comments on the project and on the environmental impact statement within the public inspection period of at least six weeks. There are no restrictions by citizenship, nationality, domicile or seat.

The **following parties have "*locus standi*" in EIA development consent procedures** according to Art 19 of the EIA Act 2000:

- neighbours: neighbours are persons who might be threatened or disturbed or whose *rights in rem* might be harmed at home or abroad by the construction, operation or existence of the project as well as the owners of facilities in which persons stay temporarily on a regular basis with regard to the protection of such persons; neighbours are not persons who stay temporarily in the vicinity of the project and do not have *rights in rem*; with regard to neighbours abroad, the principle of reciprocity applies to states not parties to the Agreement on the European Economic Area
- the parties stipulated in the applicable administrative provisions
- the ombudsman for the environment

- the water management planning body to protect the interests of water management
- the host municipality and the directly adjoining Austrian municipalities which may be affected by significant effects of the project on the environment
- citizens' groups
- environmental organisations (from Austria and from abroad)

Having "*locus standi*" means to **have all procedural rights to enforce given rights**. Thus, neighbours, the Ombudsman for the environment, environmental organisations (or other parties mentioned in Art 19 of the EIA Act 2000) who have *locus standi* have, inter alia, the right to inspect the files and to participate in the hearing. They have the opportunity to take notice of the result of the evidence taken and to comment on it. They also have the right to appeal.

The given rights of **neighbours** (meaning their *legal interests*) are defined in the relevant administrative laws (as mentioned above) and are generally dependent on personal concernment (e.g. risk of personal health by air pollution emissions). However, this criterion of "personal concernment" involves a rather broad scope. While undoubtedly the person´s individual rights to be protected against health risks and against intolerable nuisance as well as to have property and legal assets protected against detrimental influence is in the center of "legal interest", the scope of protection extends beyond the individual. The specific criteria provided for in legislation – namely the standards referring to "*the actual local situation*" (for instance in Art 74 para 2, Art 75 para 2 and Art 77 para 2 of the Industrial Code) – **effectively entitle the party to claim a certain level of environmental quality pertaining to the area of living, of the work place or the business place**.

What is even more important in cases concerning projects in the meaning of the Aarhus Convention: The **"rule of concentration"** (see answer to question 4 below) leads to an **extension of neighbours' procedural participation from individual to general environmental matters** – thus enabling neighbours to gain information on and instigate an investigation into environmental matters even beyond the scope of their legal interest. This has been highlighted in a recent decision of the Environmental Senate[5] concerning the Automobile Testing – Centre in Voitsberg, in which an appeal by neighbours[6] effectively led to the denial of the project permit due to general interests of forest preservation.

In addition to the legal position of neighbours, the EIA Act 2000 itself defines special *legal interests* for some parties.

For participating in an Austrian EIA development consent procedure an Austrian **environmental organisation** has to meet the **following criteria** defined in Art 19 para 6 of the EIA Act 2000:

"(6) An environmental organisation is an association or a foundation:

1. *whose primary objective is the protection of the environment according to the association's statutes or the foundation's charter,*
2. *that is non-profit oriented under the terms of Art 35 and Art 36 Bundesabgabenordnung—BAO (Federal Fiscal Code), BGBl. No. 194/1961, and*
3. *that has existed and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7."*

[5] US 4B/2007/6-48

[6] The reasoning of the Environmental Senate was neither based on nor limited to the scope of legal interest of the appealing neighbours, but on the Senate's extended cognizance and jurisdiction over all environmental laws applicable through the rule of concentration. Thus – in effect – the neighbours' appeal caused the Environmental Senate to an extended investigation on the project's effects on the local forest.

Pursuant to Art 19 para 7 of the EIA Act 2000 the Federal Minister of Agriculture, Forestry, Environment and Water Management decides upon request by administrative order in agreement with the Federal Ministry of Economy, Family and Youth whether an environmental organisation meets the above mentioned criteria of paragraph 6 and in which "*Länder"* the environmental organisation is entitled to exercise the rights related to "*locus standi"*. The rights related to "*locus standi"* can be exercised in procedures on projects to be implemented in this "*Land"*/in these "*Länder"* or in directly neighbouring "*Länder*" (conf. Art 19 para 8 of the EIA Act 2000).

According to Art 19 para 10 of the EIA Act 2000 a recognised Austrian environmental organisation has "*locus standi"* and is **entitled to claim the observance of environmental provisions** in the procedure insofar as it has filed written complaints during the period for public inspection according to Art 9 para 1. of the EIA Act 2000. It is also **entitled to lodge a complaint to the Administrative Court.**

An **environmental organisation from abroad** does not have to be specially recognised. According to Art 19 para 11 an environmental organisation from a foreign state does **have *locus standi*** if that state has been notified pursuant to Art 10 para 1 no. 1 of the EIA Act 2000 (*transboundary impacts*). Given that the effects impact on that part of the environment in the foreign state whose protection is pursued by the environmental organisation and that the environmental organisation would be entitled to participate in an EIA and a development consent procedure if the project was implemented in this foreign state.

The Aarhus Convention allows to establish criteria according to national legislation as long as they are reasonable and comply with the principles of the Convention [**conf. Art 9 para 3**: "(….) each Party shall ensure that, *where they meet the criteria*, if any, *laid down in its national law*, members of the public have access to administrative or judicial procedure (…)"]. In this context see also similar phrases which can be found at several instances in the Convention. Among them are **Art 2 para 4** ["(…) *in accordance with national legislation or practices* (…)"] and **Art 6 para 1b** ["(…) *in accordance with its national law* (…)"]. The Convention does not pre-define certain criteria.

The Austrian criteria are therefore reasonable and in accordance with the Aarhus Convention.

2.3. Cost of administrative procedures

As a general principle **participation in administrative procedures is free of cost** in Austria.

Since the communicant argues (conf. point 4.4. of the communication) that EIA and IPPC administrative procedures are expensive for the public, Austria would like to reply as follows:

Participation in EIA and IPPC administrative procedures is **cost-free** both for neighbours and NGOs. Referring to EIA development consent procedures in detail, Austria stresses that the competent EIA authority has to commission technical experts of the relevant areas (e.g. air, water, noise, nature protection) to prepare an environmental impact expertise. Pursuant to Art 12 para 5 of the EIA Act this environmental impact expertise has to evaluate, inter alia, from a technical perspective, and, if necessary, complement the environmental impact statement submitted for the assessment of the project's impacts as well as other documents provided by the project applicant in accordance with the state of the art and other relevant scientific knowledge in a comprehensive and summary overall review. Within the context of the environmental impact expertise comments submitted by authorities, neighbours and NGOs or other parties of the procedure (pursuant to Art 19 of the EIA Act 2000) as well as comments submitted by anybody within the public inspection period have to be discussed.

It has to be noted, that the public is neither obliged to employ a lawyer nor to provide technical expertise in the EIA development consent procedure. The communicant states that a technical expertise can only be countered by another technical expertise. In fact this is only the case when a neighbour/NGO files a complaint to the Administrative Court to contest the technical expertise even though this expertise meets all requirements. According to the jurisdiction of the Administrative Court[7] there is no need for another technical expertise in cases where the technical expertises commissioned by administrative authorities were not coherent and consistent. Apart from that, the procedure at the Administrative Court offers additional legal protection after a final decision has been taken at second instance which goes beyond the requirements of the Aarhus Convention (extraordinary remedy).

2.4. Civil Law

Regarding the rights of "locus standi" of **private persons, i.e. neighbours,** see above the explanation on possibilities provided for in civil law.

3. Competent authorities/Courts

Depending on the various relevant areas of law, Austria has several **competent authorities/courts** which are responsible for the procedures on environmental matters. Permits issued by administrative authorities are prevailing in environmental administrative law.

3.1. Civil and criminal law

Regarding **civil and criminal law**, jurisprudence is shared between district courts ("*Bezirksgerichte"*), regional courts (*Landesgerichte*), courts of appeal ("*Oberlandesgerichte"*) and the Supreme Court for civil and criminal affairs ("*Oberster Gerichtshof*").

3.2. Administrative law

Administrative law is firstly dealt within the hierarchy of the responsible administrative bodies. The application and administration is organised locally, i.e. via the federal provinces or the district administration and municipal authorities. **Independent Administrative Tribunals** ("Unabhängige Verwaltungssenate") **in the provinces serve as second instance** in several matters.

For **matters regarding environmental impact assessment (EIA),** a **special tribunal**, the **Environmental Senate ("Umweltsenat")**, was established. It is hosted at the Federal Ministry of Agriculture, Forestry, Environment and Water Management **as the authority of appeal** against decisions made by the provincial governments as competent EIA authorities at first instance (apart from projects concerning federal roads and high-speed railway lines). The Environmental Senate is the relevant superior authority with substantive jurisdiction. The members of the Environmental Senate perform their activities independently and are not bound by instructions.

Against administrative orders or permits of administrative authorities (including the Independent Administrative Tribunals and the Environmental Senate) complaints may be lodged by certain parties to the **Administrative Court** ("Verwaltungsgerichtshof"; VwGH) **and/or the Constitutional Court** ("Verfassungsgerichtshof"; VfGH**) as supreme courts.**

[7] Conf. for example VwGH 20.02.2003, Zl. 2001/06/0055.

These courts usually serve as additional legal protection bodies which may be addressed after having exhausted the normal two instances procedures.

I.B.: Answers to Questions 1 to 6

1. *If a natural person wishes to file a lawsuit against a private party on account of pollution, is it correct as a general matter that the natural person must first participate in an administrative proceeding, as maintained in paragraph 11 of the communication?*

No, the allegation raised in paragraph 11 of the communication whereas only "Parties" to an administrative proceeding have standing, is not correct – neither as a general rule nor as a specific prerequisite for legal actions to be taken by natural persons against polluters.

The entire system of **remedies under private environmental** law is completely **independent from standing or even participation in administrative proceedings**. Anybody who is or fears to be endangered by pollution is entitled to file a lawsuit against the polluter and to seek an injunction – this **right to preventive action against pollution detrimental to health** has been expressly acknowledged by courts as an integral "innate" right of every natural person under Art 16 of the Civil Code (see also above under 1.2.) neither requiring participation in administrative proceedings nor ownership of private property in the proximity of the polluter. This has been clarified by the Supreme Court in a series of decisions since 1990, has been applauded by legal literature and has been confirmed and upheld ever since. Apart from that, there are **more extensive rights to preventive action against any pollutant input ("immission") beyond the locally accepted and prevailing level** for natural persons owning land and/or living in the proximity of the polluter which they may exert in addition to rights in administrative proceedings (Art 364 et seq., see case law references in answer to question 4 below).

The allegation is not even true for **public environmental law**. There are several provisions (e.g. Art 79a para 3 Industrial Code, Art 138 Federal Water Act) entitling natural persons affected by pollution to directly file a claim for administrative action to be taken by the competent authority against the polluter and – nota bene – there is no legal prerequisite that these natural persons have participated in an administrative proceeding beforehand. Quite to the contrary: The **administrative proceedings are initiated by the natural person´s claim** – meaning that the natural person becomes "party" to the proceeding by filing the claim.

Thirdly, there is a set of **institutions acting as representatives for the concerned public** who may be addressed by any natural person interested in the matter, namely the ombudsman for the environment and the local municipality. These institutions have privileged standing.

Finally, the **instrument of "*environmental complaint*"** under federal and provincial Environmental Liability Acts has further extended this set of remedies and claims; again, filing an "*environmental complaint*" does not require to have participated in an administrative proceeding.

2. *Is such access to justice (locus standi) limited in an administrative proceeding to only "parties" who have a legal interest or legal title, as maintained in paragraph 11 of the Communication?*

Again, the assertion underlying this question is oversimplified. While it is true that within the scope of administrative proceedings (please note: this does not apply to private law proceedings – see answer to question 1), natural persons who wish to gain the status of a "*party*" have to claim a "*legal title or interest*" (please note the broad understanding of this term – see answer to question 3), there are **alternative ways to gain legal standing through a representative.**

For instance according to the EIA-Act 2000, founding or joining an **ad hoc citizen group**, which has full, even privileged standing in EIA-procedures, does not require any legal title or interest (200 signatures are necessary); the fact of living in the local or neighboring municipality is enough. Also the citizen group as such is not required to have legal title or interest; the fact that it has been founded is enough.

Secondly, the **ombudsman for the environment** can be addressed by anybody to represent his/her environmental interests (which need not be of a legal nature) in the proceedings. The ombudsman for the environment is entitled to put forward the environmental concerns of the public in relevant administrative proceedings and has the rights and full legal standing of a party. This is not just a gratuitous service; the ombudsman would be liable under criminal and cilvil law if he or she neglects such claims by a citizen and thus causes danger or even pollution to the environment[8].

Thirdly, environmental **NGOs** have legal standing in EIA and IPPC-procedures; this form of representation is open to everybody.

3. *For natural persons, does "legal interest" include only impairment of the natural person's individual, personal rights, as determined by sectoral legislation?*

"*Legal interest*" within the meaning of Art 8 General Administrative Procedure Act (AVG) and the provisions regulating the status of "neighbours" in sectoral legislation cover a wide scope. While undoubtedly the person´s individual rights to be protected against health risks and against intolerable nuisance as well as to have property and legal assets protected against detrimental influence is in the center of "legal interest", the scope of protection extends beyond the individual. The specific criteria provided for in legislation – namely the standards referring to **"*the actual local situation***" (for instance in Art 74 para 2, Art 75 para 2 and Art 77 para 2 of the Industrial Code) – effectively entitle the party to claim a certain level of environmental quality pertaining to the area of living, of the work place or the business place (see also above under 2.2.).

What is even more important in cases concerning projects in the meaning of the Aarhus Convention: The **"rule of concentration"** (see answer to question 4 below) **leads to an extension of the natural persons' procedural participation from individual to general environmental matters** – even beyond the scope of legal interest (see also above under 2.2. as well as the reference to the Automobile Testing-Centre case).

Apart from these rights which are granted to parties within the meaning of Art 8 General Administrative Procedure Act (AVG), further environmental rights are granted under Federal Environmental Liability Act and private environmental law (see answer to question 1).

4. *Do natural persons who own property nearby or whose health is affected, have standing to file a lawsuit against a private entity (or participate in an administrative proceeding regarding such a private entity) for violation of each of the following laws:*

   - *Industry Act (GewO)?*
   - *Federal Waste Management Act (AWG)?*
   - *Certain aspects of the Federal Forestry Act (ForstG)?*
   - *Federal Water Management Act (WRG)?*
   - *The local building and construction permit procedures of some provinces?*
   - *Federal Environmental Liability Act (B-UHG)*
   - *Climate change legislation?*

[8] In a recent case, the Public Prosecutor's Department opened preliminary investigations against an Ombudsman for the Environment on the basis of the allegation that he had not taken adequate measures to enforce an EIA-procedure on the expansion of an airport.

- *Nature conservation law?*

Please reply separately for each law.

Apart from those who own property nearby or whose health is affected, does any broader class of natural persons have standing to file a lawsuit against a private entity alleged to be in violation of each of the preceding laws?

Please specify the answer for each law.

Yes, persons who own property nearby or whose health is affected do have **full legal standing in a private lawsuit and/or under public law.**

Under private law, their legal standing is granted in particular by Art 16 and Art 364 of the Austrian Civil Code (ABGB). In addition, under public law such natural persons have legal standing as parties and/or through representatives (see answer to question 2).

Apart from that, a **broader class of persons has standing** to file a lawsuit or to bring administrative action against a private entity alleged to be in violation of each of the preceding laws – this is true for private as well as for public environmental law.

Before dealing with the sectoral provisions quoted separately, some general comments have to be made to avoid misunderstandings:

- First, it has to be made clear that – with regard to projects covered by the Aarhus Convention – these **sectoral laws are not applied separately** in proceedings. Rather, Austrian administrative procedural law provides for a **rule of concentration and coordination which integrates all sectoral laws into a single procedure**. In effect, procedures under EIA and IPPC-law but also under the Industrial Act and the Federal Waste Management Act cover and integrate all other sectoral laws quoted above[9]. Thus, the **parties' legal standing granted under EIA, IPPC, Industrial Act or Federal Waste Management Act proceedings effectively leads to their participation in all sectoral law matters** and – as highlighted in the decision of the Environmental Senate concerning the Automobile Testing – Centre in Voitsberg - **to an extension of participation rights from individual to general environmental matters** – even beyond the scope of legal interest.

- Further, with regard to **public** environmental law, the **EIA and IPPC permitting systems grant standing also to the ombudsman for the environment, NGOs and – in the case of EIAs – to ad hoc citizen groups** as well.

- With regard to **private** environmental law, standing has been continuously expanded in jurisdiction over the last 20 years: **Not only owners of property** but **also tenants** and persons entitled to **specific rights (e.g. fishing rights)** may file under Art 364 para 2 of the Austrian Civil Code (ABGB). **Not only effects detrimental to health** justify injunctive measures but also **any nuisance beyond the locally accepted and prevailing level**. In addition, private entities in violation of these laws may also be sued by **competitors** and **special interest groups** since producing goods in violation of environmental laws is regarded by courts to be unfair business (see also above under 1.2.).

With regard to the laws quoted in the question, standing under private law respectively participation under public law is granted as follows:

[9] cf. Art 3 para 3 in connection with Art 17 EIA Act 2000, Art 24 EIA Act 2000 concerning highways and highspeed railways, Art 356b Industrial Code as well as Art 38 Federal Waste Management Act

- Industrial Code 1994: The Industrial Code which belongs to public law, grants legal standing and full participation to all persons living in or regularly attending a place in the proximity of the project – to be more specific: in the area of influence with respect to the plant (which regularly streches as far as pollutant inputs or noise resulting from the plant is detectable). These persons are regarded as "**neighbours**" and have full legal standing in permitting procedures. Apart from permitting procedures, they may also claim (and thus initiate a separate proceeding under Art 79a para 3 Industrial Code) that in addition to an amendment of an existing permit, further environmental restrictions are issued against the polluter.

  In addition, IPPC-provisions of the Industrial Code provide for legal standing of the environmental **NGOs**.

  Under private environmental law, natural persons are entitled to preventive actions against anybody building or operating a plant without a permit under the Industrial Code or in violation of the conditions of such a permit. Even more so: In the **landmark "*Sandstrahl*"-decision** (already mentioned above), the Supreme Court ruled that such **claims may even be raised in cases where the polluting plant has a full permit under the Industrial Code and thus is not in violation of any provision but the administrative authority is in delay of issuing further restrictions under Art 79 Industrial Code**.

- Federal Waste Management Act: This law follows the legal model established by the Industrial Code. Actually it fully integrates the provisions of the Industrial Code expressly in its rule of concentration in Art 38 para 1a Federal Waste Management Act. Thus, the explanation given to the Industrial Code above applies *mutatis mutandis*. In addition, the Ombudsman for the Environment has legal standing.

- Federal Forestry Act: This law is covered to a wide extent by the rule of concentration of the Industrial Code and – to an even wider extent – by the Federal Waste Management Act. Again reference is made to the explanations above.

  Apart from that, the Forestry Act provides for **additional parties** having legal standing.

  Even more importantly, the provision of Art 56 Para 1 Federal Forestry Act expressly states that **any pollutant input exceeding the limits stated in Forestry Law** is to be **regarded as exceeding the locally accepted and prevailing level** within the meaning of Art 364 para 2 of the Austrian Civil Code (ABGB), which in effect means that – without further burden of proof – **all natural persons living in the area affected may file a private lawsuit for preventive action**. This has been confirmed by several Supreme Court decisions.

- Federal Water Management Act (WRG): This law is covered to a wide extent by the rule of concentration of the Industrial Code and – to an even wider extent – by the Federal Waste Management Act. Thus, reference is made to the explanations above.

  Apart from that, the Federal Water Management Act provides for **additional parties** having legal standing.

  Under private environmental law, operators of installations built in violation of the Federal Water Management Act have been successfully sued by parties threatened by the effects thereof. The Supreme Court has confirmed and upheld **injunctions against hydropower plants[10].**

[10] cf 1 Ob 16/95

- The local building and construction permit procedures vary concerning the scope of "neighbourhood" (some are equivalent to the Industrial Code); what is more important – the rights under building and construction laws supplement and extend the neighbours legal position under other laws, enabling them to challenge the project's conformity with local zoning and planning and – beyond that – to challenge the conformity of zoning and planning acts with environmental law principles protecting neighbours.

- Federal Environmental Liability Act (B-UHG) provides for effective legal standing through the environmental complaint.

- Climate change legislation: Climate change legislation in Austria is a cross-sectoral matter, with the legislative competence for the issue being split between the federal government ("Bund") and the nine provinces ("Länder"). Legislation is covered to a wide extent by the rule of concentration (e.g. of the Industrial Code or the EIA-Act); thus, reference is made to the explanatory remarks above.

- Nature conservation legislation: Nature protection lies in the competence of the provinces in Austria and is thus regulated in various regional laws (e.g. nature protection laws, environmental liability laws). The legislation is covered to a wide extent by the rules of concentration under EIA and the Federal Waste Management Act. Thus, reference is made to the explanatory remarks above.

5. *Do natural persons who own property nearby or whose health is affected have standing to file a lawsuit against a private entity (or participate in an administrative proceeding regarding such a private entity) for violation of each of the following standards:*

   - *Water quality standards?*
   - *Noise quality standards?*
   - *Air quality standards reflected in Austrian and European legislation?*

   Please reply separately for each type of quality standard.

   Apart from those who own property nearby or whose health is affected, does any broader class of natural persons have standing to file a lawsuit against a private entity alleged to be in violation of each of preceding standards?

   Please specify the answer for each standard.

Again, **the answer is affirmative.**

As stated above, persons who own property nearby or whose health is affected have standing to file a lawsuit against a private entity for violation of water, noise and air quality standards under private environmental law, since Art 364 para 2 of the Austrian Civil Code (ABGB) entitles natural persons to enforce their right not to be affected by any project beyond the **locally accepted and prevailing level**. This term is understood to reflect **not only administrative law regulations, but also general environmental standards**, including, but not limited to

- Water quality standards

- Noise quality standards

- Air quality standards reflected in Austrian and European legislation

This has been reiterated by the Supreme Court in a series of decisions[11].

As regards standing of a broader class of natural persons, reference is made to the answer to question 4, where the continuous expansion of standing has been documented.

6. *Is the position of the Austria that article 9, paragraph 3, of the Aarhus Convention allows Austria to restrict the standing of natural persons to only those who own property or have impairment of health?*

No, this is neither the position of Austria nor the legal situation in Austria. As documented above, Austrian public and private environmental law provide for a **variety of procedures** open not only with regard to natural persons to only those who own property or have impairment of health, but extending – by providing legal claims and remedies in the form of preventive actions, injunctions and rights to participation and appeal -

under specific public environmental laws (in particular, those implementing the EIA- and IPPC-Directive) applicable to projects within the scope of the Aarhus Convention

- to **any person living in or regularly attending a place in the proximity of the project** – to be more specific: in the area of influence with respect to the plant (which regularly stretches as far as pollutant inputs or noise resulting from the plant is detectable); i.e. the concept of "neighbour";

- to any person whose **legal interest or title is affected**;

- to any person seeking **representation by**

  - **an ad hoc citizen group** (EIA),

  - **the ombudsman for the environment** (EIA, Waste Management Law, Nature Protection Laws) **or**

  - **environmental NGOs** (EIA, IPPC, ELD)

and under private environmental law

- to any person **affected beyond the locally accepted and prevailing level** by the emissions of the plant (not restricted to health but also encompassing general conditions of living, working and recreation).

- to competitors and special interest groups.

As already stated in the beginning **the Aarhus Convention allows to establish criteria according to national legislation** as long as they are reasonable and comply with the principles of the Convention [**conf. Art 9 para 3**: "(….) each Party shall ensure that, *where they meet the criteria*, if any, *laid down in its national law*, members of the public have access to administrative or judicial procedure (…)"]. In this context see also similar phrases which can be found at several instances in the Convention. Among them are **Art 2 para 4** ["(…) *in accordance with national legislation or practices* (…)"] and **Art 6 para 1b** ["(…) *in accordance with its national law* (…)"]. The Convention does not pre-define certain criteria. The Austrian criteria are therefore reasonable and in accordance with the Aarhus Convention.

[11] For instance in 1 Ob 596/83 and 6 Ob 720/82.

II: Questions 7/8/9:

II.1. Acts and omissions/breach of law by private persons or authorities – General explanation/background

Generally anybody may complain to an authority who consequently is obliged to deal with the request. A breach of law by an authority may trigger the liability of the public body (see below).

1.1. General Administrative Procedure Act

In addition to the general rule of Art 8 AVG of the **General Administrative Procedure Act** laying down the **criteria for participating** in the administrative procedure **as a party** some other relevant provisions of this act containing rights and duties of parties/authorities need to be mentioned.

In this context Art 13 of the General Administrative Procedure Act (AVG) provides that any person can file e.g. submissions, complaints with an authority who has to deal with such requests. This does not imply, however, that such persons get the rights of a party. Partys rights are determined in the various administrative acts as already explained above. Art 73 AVG provides for the duty of the authority to decide upon submissions of parties.

Art 18 paras 1 and 2 AVG provides that the main content of the acting of the authority and executive acts need to be documented in writing, if laid down in the respective administrative rule or asked for by the party.

In addition there are some acts concerning administrative law which state the **right for individuals** to file a civil claim for damages which are related to environmental matters: Art 26 of the Austrian Water Act, Art 53 of the Austrian Forestry Act, Art 79a et seq. of the Austrian Genetic Engineering Act and Art 11 of the Austrian Nuclear Liability Act.

1.2. Federal Constitutional Law

According to the **Federal Constitutional Law** (Art 148 a B-VG) in case of misconduct of an authority anybody can lodge complaints with a special commission established for this purpose ("Volksanwaltschaft"). This commission acts independently, examines such complaints and informs the complainant of the results and of any steps taken.

1.3. Liability of Public Bodies Act and Government Liability Act

Furthermore the **Liability of Public Bodies Act** (AHG) provides for the liability of public bodies in case damage to a citizen was caused unlawfully and on their fault. The Government Liability Act provides for the liability of Austria for damage caused to citizens due to bad application of EU law. Such claims generally follow the applicable rules of the Liability of Public Bodies' Act.

1.4. Ombudsmen for the environment („Umweltanwaltschaften")

Ombudsmen for the environment are established at provincial level in Austria. Their main tasks are observing the compliance with environmental interests in the application of regional laws, advising and informing the public in environmental matters. The Ombudsmen are entitled to put forward the environmental concerns of the public in relevant administrative procedures and get the rights of a party (acc to Art 8 AVG). E.g. in Vienna the ombudsman is party – including the right to appeal – in almost all nature protection procedures.

Additionally some Federal Laws provide the rights of a party to the ombudsmen of the environment (e.g. EIA Act 2000, Waste Management Act, Environment Management Law/EMAS).

2. Who is entitled to challenge acts/omissions

2.1. EIA/IPPC

Environmental **NGOs** have "*locus standi"* in EIA development consent procedures as well as in EIA acceptance inspection procedures (see Art 20 EIA Act 2000: *a final check up before the installation is entitled to go into operation*). NGOs (or other members of the public concerned) do not have the right to participate in EIA follow-up inspections – the so called post project analysis (conf. point 3.3 of the communication) - because this analysis is no decision on whether to permit the proposed activity (*see in detail under **question 10***). The post project analysis is rather an instrument for the authority to inspect whether the project complies with the issued EIA development consent and to verify whether the assumptions and forecasts of the environmental impact assessment correspond to the actual effects of the project on the environment.

Austrian environmental organisations which are recognised pursuant to Art 19 para 7 of the EIA Act 2000 (see above) are also guaranteed the right to challenge acts of governmental bodies pursuant to the Federal Environmental Liability Act (B-UHG) and - in transposition of the Integrated Pollution Prevention and Control (IPPC) Directive 2008/1/EC – pursuant to Art 356b para 7 of the Industry Code 1994 (GewO), Art 7 para 3 of the Act on Emission Control of Steam Boilers (EG-K), Art 42 para 1 subparas 13 and 14 of the Federal Waste Management Act (AWG) and Art 121 para 11 of the Mineral Raw Materials Act (MinroG).

2.2. Environmental Liability

The Federal **Environmental Liability Act** („Bundes-Umwelthaftungsgesetz" – Austrian Federal Law Gazette I 2009/55), in force since 20th June 2009, was enacted to transpose the Environmental Liability Directive (ELD) 2004/35/EC into national law. The ELD imposes a strict or fault-based liability – depending on the type of activity involved – for damage to protected species and habitats, for contamination of land and for damage to waters covered by the Water Framework Directive. Operators who undertake an activity listed in Annex III of the ELD (respectively Annex 1 of the Federal Environmental Liability Act) can be held strictly liable for these three types of harm. Operators of non-listed occupational activities can only be held liable for damage to protected species and natural habitats, but not for damage to the waters covered by the Water Framework Directive or for the contamination of land. Damage caused to protected species and natural habitats and part of the land damage are implemented on provincial level in Austria.

Under the ELD and accordingly under the Federal Environmental Liability Act only the public authorities – the **competent authority** according to the Federal Environmental Liability Act is the district authority – have the **right to require the operator who caused significant damage** to the natural resources covered to **take the necessary remediation measures** or to recover the costs of taking such measures themselves from the operator[12]. The ELD thus empowers the public authorities to act as a sort of trustee for the natural resources concerned.

Art 12 of the ELD provides that **any natural or legal person** who see his/her rights infringed by environmental damage, **including recognised NGOs** and ombudsmen for the environment are given the **right to request the competent district authority to take action**

[12] See Art 6 (2) c, e and (3) ELD respectively Art 6 (3) Environmental Liability Act

under the Federal Environmental Liability Act. Under the ELD this instrument is called "request for action"[13], under the Federal Environmental Liability Act it is referred to as **"Environmental Complaint**" ("Umweltbeschwerde"). Rights in this context are the protection of human life and health, rights based on the Water Act and real property.

Provided the "Environmental Complaint" and the complained request for action including the accompanying information and data show in a sufficiently plausible manner that environmental damage has been caused[14], the authority has the duty to consider the requests and has to inform the persons referred to of its decisions taken[15]. By filing the "Environmental Complaint" or submitting a statement within two weeks after the announcement of the environmental damage by the competent authority **the persons referred to** in Art 11 para 1 Federal Environmental Liability Act have – in addition to the operator – **legal standing in the administrative remediation procedure.**

NGOs and private property owners on whose land or waters remediation measures need to be taken have a right to submit observations with regard to the nature of such measures[16].

The ELD has also been transposed into legislative acts at provincial level ("Länder") in Austria (e.g.. the Vienna and the Tyrol Liability Acts provide the possibility of an environmental complaint also to environmental organisations acknowledged by the EIA Act 2000; if anybody asks the authority to take appropriate action to remedy the caused damage, the authority is obliged to publish the taken measures; parties to the procedure have the right to complain to the Independent Administrative Senate/UVS). As last resort parties can appeal against decision of the UVS to the Administrative Court.

2.3. Industrial Code 1994 (GewO)

Art 79 of the Industrial Code (GewO) provides for additional conditions to a permit if it turns out after the permit was given that the interests to be protected cannot be sufficiently met.

Art 79 a of the Industrial Code (GewO) provides for the possibility for neighbours to ask for an administrative procedure concerning additional conditions if the neighbour can prove that he is not sufficiently protected from the impacts of an installation and that he was already neighbour at the time when the permit was granted. These neighbours get the right of parties to the procedure.

2.4. Liability of Public Bodies

If the **action or omission of the authority** caused harm to somebody due to culpable conduct of the authority the **liability of public bodies** ("Amtshaftung"; Liability of Public Bodies Act) can be claimed. This provision can generally be applied in cases of culpable action/inaction of an authority that caused harm to the concerned individual (see also above).

II.2 Answers to the questions

7. Do NGOs have legal standing in court cases against private parties under any laws relating to the environment (including but not limited to the Industry Act (GewO), Federal Waste Management Act (AWG), certain aspects of the Federal Forestry Act (ForstG), Federal Water Management (WRG), Federal Environmental Liability Act (B-UHG), local building and construction permit procedures of some provinces, climate change legislation, and the nature conservation law)?

[13] See Art 12 ELD
[14] See Art 12 (3) ELD respectively Art 11 (3) Environmental Liability Act
[15] See Art 12 (4) ELD
[16] See Art 7 (4) ELD respectively Art 7 (3) Federal Environmental Liability Act

Please specify for each law.
Is it possible for NGOs to bring public interest environmental cases that challenge acts or omissions of private persons under any other laws?

NGOs have "*locus standi"* in EIA development consent procedures as well as in EIA acceptance inspection procedures (see Art 20 EIA Act 2000).

They are also guaranteed the right to challenge acts of governmental bodies pursuant to the Federal Environmental Liability Act (B-UHG) and - in transposition of the Integrated Pollution Prevention and Control (IPPC) Directive 2008/1/EC – pursuant to Art 356b para 7 of the Industrial Code 1994 (GewO), Art 7 para 3 of the Act on Emission Control of Steam Boilers (EG-K), Art 42 para 1 subparas 13 and 14 of the Federal Waste Management Act (AWG) and Art 121 para 11 of the Mineral Raw Materials Act (MinroG). Through the rule of concentration (see answer to question 4), their legal standing effectively covers all legal matters quoted in the question above.

By way of the "Environmental Complaint" according to Art 11 para 1 Federal Environmental Liability Act NGOs are given the right to request the competent district authority to take action against private parties whose acts or omissions cause environmental danger or damage.

By filing the "Environmental Complaint" or submitting a statement within two weeks after the announcement of the environmental damage by the competent authority the persons referred to in Art 11 para 1 Federal Environmental Liability Act have – in addition to the operator – legal standing in the administrative remediation procedure.

As regards legal standing under the private environmental law, see answer to question 4. (conf. special interest groups).

8. If there is a breach of law by a public authority and it is obliged to act, is there a legal possibility to enforce this law for (a) individual members of the public or (b) NGOs?

Yes, both the individual as well as NGOs have effective legal rights to enforce compliance with environmental laws.

As regards the individual we refer to the answer to question 1 above where civil courts grant to any individual affected by violation of environmental law preventive action. In these cases, individuals are not restricted to claim financial compensation, but are entitled to an injunction.

Under public environmental law, reference is made to the instrument of "Environmental Complaint" - to which both the affected individual as well as the NGOs are entitled - and to special provisions under sectoral law, i.e. § 79a para 3 Industrial Code and § 138 Federal Water Act (see answer to question 1 above).

9. Under what Austrian laws, if any, are NGOs guaranteed the right to challenge acts or omissions of governmental bodies?

As mentioned above, the EIA Act and the sectoral laws issued in transposition of the IPPC Directive (see answer to question 7) guarantee full legal standing to NGOs, including the right to challenge acts or omissions of governmental bodies.

Through the rule of concentration, this privileged procedural position effectively covers all sectoral laws involved in the relevant cases.

III: Question 10 – EIA and screening decisions

1.1. Under the Austrian EIA Act 2000, the public is not allowed to participate in the EIA screening procedure but – as stated above - in the EIA development consent procedure.

In this context it must be stressed - for the purpose of a general understanding - that the Austrian implementation and application of the Aarhus Convention concerning EIA procedures is generally based on the EIA Directive[17] of the European Union. Neither the Convention nor the EIA Directive state that the public has to be entitled to participate in a **screening procedure** in which the competent authority assesses whether an EIA development consent procedure has to be conducted or not. The EIA development consent procedure is the relevant decision-making procedure for the proposed project, not the screening decision.

Art 4 of the EIA Directive - which regulates the EIA screening procedure - does only state that the Member States have to *"ensure that the determination* [on the screening procedure] *made by the competent authorities is made available to the public*" (conf. Art. 4 para 4 of the EIA Directive). Therefore the Austrian EIA Act 2000 is in line with the EIA Directive since the essential substance of the screening decisions, including the main reasons for them, have to be published (conf. Art 3. para 7 of the EIA Act 2000). Besides, Art 6 para 2 of the EIA Directive, which regulates the rights of the public to receive information and to comment on the project explicitly refers to *"environmental decision-making procedures",* meaning procedures concerning the development consent. Thus, the EIA Directive does not oblige the Member States to involve the public already in the screening procedure, which is conducted prior to the decision-making procedure. On the contrary, Art 10a of the EIA Directive - introduced to contribute to the alignment of the Directive with the Aarhus Convention - approves explicitly that Member States define "*at what stage the decisions, acts or omissions may be challenged".* This means specific administrative decisions - in other words, decisions made to permit a particular proposed project, activity or action to go forward.

The Aarhus Convention itself does not require a licensing or permitting procedure to be established, but once such a procedure is established, the public participation requirements of Art 6 have to be considered. Art 6 concerns public participation in decision-making by public authorities on "*whether to permit proposed activities*" (conf. Art 6 para 1(a) of the Convention). Art 9 of the Convention, which contains provisions on access to justice, refers in the relevant context to Art 6 (conf. Art 9 para 2 of the Convention: *"decisions, act or omission subject to the provisions of Art 6"*). As stated above a screening decision is not a decision on whether to permit the proposed activity. Therefore the Convention does not demand to provide for participation in the screening procedure.

1.2. Austria emphasizes, that an **Austrian screening decision that no EIA is necessary** means that the competent EIA authority has concluded - after a case-by-case examination - that the proposed project does not cause significant harmful, disturbing or adverse effects on the environment. The EIA authority has to consider the following criteria for its screening decision: characteristics of the project (e.g. size, cumulation with other projects, environmental pollution), location of the project (e.g. environmental sensitivity taking into account existing land use) and characteristics of the potential impact of the project on the environment as well as the change in the environmental impact resulting from the implementation of the project as compared with the situation without the implementation of the project. For this extensive examination the EIA authority has to commission several technical experts of the relevant areas (e.g. air, water, noise, nature protection etc.) and has

[17] EIA Directive: Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. In order to align the EIA Directive with the Aarhus Convention, Art 10a on public participation was added to the EIA Directive by the Directive 2003/35/EC.

to reason its findings. Therefore Austria points out that screening decisions are not arbitrary but well-founded.

As a result of a negative screening decision, no concentrated EIA development consent procedure has to be conducted. The project applicant rather has to apply for several other permits pursuant to several administrative laws (e.g. Industry Code 1994, Water Act, Forestry Act, Building Laws and Natural Protection Laws etc.). The public concerned, especially neighbours, have the right to participate in these administrative procedures. It is settled case-law of the Austrian Administrative Court[18] that this legal framework is in line with European law and appropriate for the public concerned to enforce their rights.

1.3. Austrian EIA screening decisions are subject to judicial review. The project applicant, the cooperating authorities, the ombudsman for the environment and the host municipality have legal standing and therefore the right to appeal to the Environmental Senate as authority of appeal. Before the decision is taken, the water management planning body must be heard. The host municipality may also file a complaint against the decision taken with the Administrative Court (conf. Art 3. para 7 and Art 40 para 1 of the EIA Act 2000).

The Environmental Senate, however, does not act as authority of appeal concerning federal roads and high-speed railway lines. In these cases the project applicant, the cooperating authority (e.g. the other relevant concerned authorities), the ombudsman for the environment and the host municipality have the possibility to file a complaint against the decision taken with the Administrative Court (conf. Art 24 para 5 of the EIA Act 2000).

It has to be stressed that screening procedures have to be taken in the first and second instances by administrative order **within six weeks** (or eight weeks for federal roads and high-speed railway lines). In order to provide for a timely procedure, only administrative bodies like the ombudsman for the environment, cooperating authorities, the host municipality and the water management planning body are involved in the screening procedure. As stated above, these bodies are granted special legal interests concerning environmental protection. Thus, the expertise of these parties ensures in addition to the above mentioned technical experts commissioned by the authority that environmental impacts are properly scrutinized in screening procedures.

1.4. Finally, it has to be considered, that - while the screening procedure itself does not provide participatory rights for individuals from the public, but only for representatives (ombudsmen for the environment, host municipality) - the **result of a negative screening decision** (denying the obligation to submit the project to an EIA process) **may be** effectively **challenged** by individuals and – in cases where IPPC-provisions apply – NGOs in the ensuing procedures under sectoral law.

Austrian administrative and constitutional courts rule that - since NGOs and individuals have wider legal standing under the EIA Act 2000 than under sectoral law - **they may challenge and appeal against permits for installations issued under sectoral law procedures in which they participate as parties, arguing that the project should have been subjected to an EIA.**

As an example, reference is made to the **case *Trofaiach***[19] where a permit issued under the Waste Management Act for a waste incineration plant (without prior screening) was successfully challenged because this installation should have been subjected to the EIA Act

[18] Conf. for example VwGH 22.04.2009, Zl. 2009/04/0019.
[19] VwGH 20 February 2003, 2001/07/0171. In the decision of 30 July 2010, US 7B/2010/4-28, the Environmental Senate addressed the specific rights of "potential parties" to an EIA in other procedures.

2000. As a consequence, the Administrative Court quashed the permit and ordered an EIA to be undertaken.

IV: Question 11 (about injunctive relief[20])

1.1. First of all it has to be clarified that is not correct to state that "injunctive relief is not granted in environmental procedures" (conf para 58 of the communication). According to Art 64 **General Administrative Procedure Act** 1991 (AVG) appeals against decisions of first instance are as a **general rule granting injunctive relief**. The communicant also states this principle in para 56 of its communication. This general principle even goes beyond the requirements of the Aarhus Convention.

For example, as a general rule in EIA procedures the competent authority decides and the Environment Senate can be appealed to. In the case of federal roads (only highways[21]) and highspeed railway lines the competent authority is directly the Minister of Transport. The appeal possibility against decisions of Ministers in Austria is to appeal to the Administrative Court and/or the Constitutional Court.

With regard to the question of injunctive relief Art 30 (especially para 2) of the Law of the Administrative Court (VwGG) as well as Art 85[22] of the Law of the Constitutional Court (VfGG) are relevant.

Complaints before the Administrative Court (VwGH) and Constitutional Court (VfGH), however, don't have suspensive effect as a legal rule because of their character as extraordinary remedies. But the Administrative Court and Constitutional Court do have the power to grant suspensive effect to a complaint, if

- the applicant requests it,
- there are no overriding public interests contrary to such a court order,
- all affected interests have been considered and balanced,
- the execution of the contested decision or the exercise of a right given by the contested decision by a third party would cause a disproportionate disadvantage for the petitioner (see Art 30 para 2 Administrative Court Act 1985 - VwGG; Art 85 para 2 Constitutional Court Act 1953 - VfGG; full text below).

In summary this means that if the complainant asks for injunctive relief the Administrative Court (VwGH) has to grant it unless this is contrary to mandatory public interests. In addition the interests of the applicant have to be weighted against those of the complainant and there shall not be a disproportionate disadvantage for the complainant.

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[20] The term "injunctive relief" is used in the understanding of "suspensive effect" meaning that as long as the appeal has not been decided upon a permit can neither be used for construction nor for operation.

[21] Normal roads are covered by the EIA Act 2000; thus the Environment Senate can be appealed to

[22] Constitutional Court Act 1953 - VfGG, FLGF No. 85, as amended by FLG I No. 4/2008 [http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1953_85, date of the version: 1 January 2005; later technical amendments did not change it's relevant meaning]:

"§ 85. (1) The appeal has no suspensive effect.

(2) Upon request of applicant, however, the Constitutional Court is to issue a court order in favour of the suspensive effect, unless it would be contrary to mandatory public interest and after consideration of all interests affected, whether the implementation or the use of the license by a third party, as granted by a ruling, would constitute an unreasonable disadvantage for the applicant. After any considerable change in the circumstances relevant for the decision in favour of the suspensive effect of the complaint the case shall be decided anew upon request of applicant, of the authority (§ 83 para 1) or of any other party involved.

(3) Orders according to para 2 shall be served to applicant, the authority (§ 83 para 1) and to any other party involved. In case the suspensive effect is granted, the authority shall suspend execution of the ruling contested and take the necessary steps to this effect; the holder of the contested license is not allowed to practice the license.

(4) If the Constitutional Court is not in session, orders in accordance with para 2 shall be issued, upon request of the reporter, by the President of the Constitutional Court.

This is true in general and also in environmental procedures. The applicable legal provisions don't differ between environmental and other procedures.

Art 30 VwGG[23] reads as follows:

"Suspensive effect
§ 30. (1) The complaints have no suspensive effect by virtue of the law.
The same is true for a motion for reinstatement into the status quo ante because of expiry of the period of time allowed for the complaint.
(2) Upon request of petitioner, however, the Administrative Court is to issue a court order in favour of the suspensive effect, unless it would be contrary to mandatory public interest and after consideration of all interests affected, whether the implementation or the use of the license by a third party, as granted by a ruling, would constitute an unreasonable disadvantage for petitioner. After any considerable change in the circumstances relevant for the decision in favour of the suspensive effect of the complaint, the matter has to be decided anew in case of being requested by a party. The reasons for the decision in favour of the suspensive effect need only be stated if interests of third parties are affected.
(3) Court orders according to para 2 shall be served to all parties. In case the suspensive effect is granted, the authority shall suspend execution of the ruling contested and take the necessary steps to this effect; the holder of the contested license is not allowed to practice the license."

For example, in its **decision of 8 June 2010**[24], the Administrative Court (VwGH) had to deal with the question whether to grant or not the suspensive effect to a complaint in matters of building a **federal motorway**. The court examined explicitly Art 30 para 2 VwGG in the light of the Aarhus Convention and found it compatible. The court emphasized that the Convention does not interdict to consider mandatory public interests or to balance all different interests affected before granting or not granting the suspensive effect. Nevertheless the Court rejected the application for a suspensive effect in this case, because the applicant did not fulfil the procedural obligation to specify the threatening harm to environmental interests.

It cannot be deducted from Art 4 para 4 of the Aarhus Convention that the legal protection given by the Administrative Court (VwGH) is only appropriate and effective if a complaint e.g. concerning a federal highway project is in any case granted an injunctive relief. According to jurisdiction it is in any case not sufficient to complain about potential harm for the environment in general terms. The complainant can be asked to specify the suspected disadvantage. It is in line with the principles of the Convention to investigate if mandatory public interests are opposing and to weigh the public interest against granting injunctive relief.

A close examination of decisions by the Administrative Court on requests for orders **in favour of the suspensive effect** proves that the court is open for injunctions in favour of protecting the environment. As a good example reference is made to the **case *Diabas***[25] in which the court had to deal with the extension of a quarry which was located in an alpine valley. According to the EIA project the quarry was first to be extended into the valley (adjacent to the existing quarry) and was then to proceed into a protected area in the mountains. The court diligently weighed the interests involved and issued an injunction against proceeding into the protected area while he allowed the quarry to be extended in the valley. The Courts reasoning is based on the consideration that during the procedure no

[23] Administrative Court Act 1985 - VwGG, Federal Law Gazette (FLG) No. 10, as amended by FLG I No. 89/2004 [http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1985_10, date of the version: 1 January 2005]:
[24] Conf. VwGH 08.06.2010, Zl. AW 2010/06/0001.
[25] VwGH 10 May 2005, AW 2005/04/0009

irreparable damage to the environment was to be risked. It has to be added that the Court did not insist on a strict burden of proof in this and in other matters, prima facie evidence is sufficient. In the case quoted, the individuals and the ad hoc citizen group requesting the injunction simply submitted photographs and a video tape showing the area in the mountains concerned.

For further decisions see answer to question 13.

1.2. **As a result,**

- contrary to the allegation *in paragraph 58 of the communication, it is not true that the Highest Administrative and the Constitutional Courts do not have power to issue an injunction with regard to federal motorways, railways, tunnels and water permits. The opposite is true: Both Courts as well as the Supreme Court (ruling over private environmental law)have the power to issue an injunction and have used it several times (see the cases concerning railways and water permits quoted in answer to question 13);*

- *contrary to the allegation in paragraph 60 of the communication, it is not true that the Highest Administrative Court refused to give an injunction because the project was under construction. The opposite is true: In cases where environmental interests prevail - as in the recent case AW 2010/03/0022 - the Highest Administrative Court has issued such injunctions;*

- *many decisions prove that the Highest Courts are "open for injunctions" in all cases where prima facie evidence on environmental risks are submitted.*

V: Question 12

Art **42a of the EIA Act 2000** concerning the possibility to continue operations reads as follows:

"If a development consent order pursuant to Section 2 of the present Federal Act is repealed by the Administrative Court the operation of the project may be continued in accordance with the administrative order repealed until the replacing administrative order becomes effective, but not longer than one year. This shall not apply to cases in which the Administrative Court had accorded suspensive effect to the complaint that resulted in the repeal of the development consent order."

This provision follows Art 359c of the Industrial Code and applies only for EIA development consent permits which were decided upon already at two instances, namely the provincial government as first instance and the Environmental Senate as second instance[26].

The **provision intends to prevent serious economic loss** in cases where the projects were legally constructed and operated according to an administrative permit, issued and effective after having passed an administrative procedure of already two instances. The Austrian EIA development consent procedures at first and second instance provide adequate and effective remedies for the public (as explained above)**.** Austria stresses, that the procedure at the Administrative Court offers additional legal protection which is not required by the Aarhus Convention. In this context Austria remarks, that Art 9 para 4 of the Aarhus Convention states that procedures shall provide injunctive relief "*as appropriate"*. In this context Art 30 para 2 of the law of the **Administrative Court** 1985 (VwGG) which defines the legal prerequisites for the Court's decision on according suspensive effects to the complaint has to be taken into account (see also above).

[26] Note: The provision is not applicable for federal roads and high-speed railway lines as these are not projects pursuant to Section 2 of the Austrian EIA Act 2000 as demanded in Art 42a of the EIA Act 2000.

Further it has to be noted, that the right to continue operations applies only for the operation but not for the construction of the project. In fact the scope of this provision is limited since an EIA project may not be constructed until the EIA development consent becomes effective[27]. In addition Austria underlines, that the public concerned has legal standing in the administrative procedure for the replacing administrative order, which has to be conducted again by the Environmental Senate.

Based on the aforesaid, Austria holds the view, that Art 42a of the EIA Act 2000 does not contravene the Aarhus Convention.

VI: Question 13: Examples where injunctive relief was granted

The Austrian government does not agree with the communicant's allegation that no injunction has been granted in environmental cases.

According to Art 64 **General Administrative Procedure Act** 1991 (AVG) appeals against decisions of first instance are as a general rule granting suspensive effect. That means e.g. that no building licence can be used until the appeal decision is taken. According to the Carinthian nature protection law (K-NSG 2002), for example, the applicant is not entitled to start works as long as the nature conservation advisory board has the possibility to appeal to the Administrative Court.

Most of the activities of Annex I of the Convention are covered by the Industrial Code, the Waste Management Act or EIA procedures. The relevant decisions taken by the competent authorities all allow for appeal to tribunals (like the Independent Administrative Senates of the provinces or the EIA Environmental Senate) and are thus causing injunctive relief.

The following cases are some **examples**, where the Administrative Court (VwGH) has **granted suspensive effect** to the respective complaint, based on article 30 para 2 VwGG: VwGH 25 June 2010, AW 2010/03/0022 (railway project: see below); VwGH 18 June 2010, AW 2010/07/0018; VwGH 27 April 2009, AW 2009/10/0013; VwGH 12 September 2005, AW 2005/07/0039; VwGH 4 June 2007, AW 2007/07/0020 (water management); VwGH 20 May 2009, AW 2009/07/0016 (waste management: concerning the operation an excavated soil landfill); VwGH 17 November 2006, AW 2001/10/0041 (ski lift).

These procedures usually concerned the authorisation or permits of projects with environmental impacts. In its decisions the Administrative Court decided to grant suspensive effect with the declared aim to protect invoked environmental rights and interests.

For example, in case AW 2010/03/0022 concerning a **railway project** the Administrative Court (VwGH) granted the suspensive effect as a result of weighing the interests of the complainant against those of the project applicant. The complainant raised the danger of excessive noise impact especially on the municipality Bad Gastein (Salzburg) which could cause serious health impacts. The court held that when finalising the project it cannot be excluded that the likely serious impacts could not be rectified afterwards.

In case AW 2005/07/0039 concerning **the removal of road- and surface waters into a ditch** the Administrative Court (VwGH) granted the suspensive effect due to the danger of a disproportionate disadvantage for the complainant i.a. unrecoverable cost and the irreversible consequences of the implementation. No contradicting mandatory public interest could be revealed.

Again, reference is made to the case *Diabas* (see above under IV 1.1.) in which the Court issued an injunction against a **quarry** proceeding into a protected alpine area. The Court´s

[27] Conf. *Baumgartner/Petek*, Kurzkommentar UVP-G (2010), page 316.

reasoning is based on the consideration that during the procedure no irreparable damage to the environment was to be risked. It has to be added that the Court did not insist on a strict burden of proof in this and in other matters, prima facie evidence is sufficient. In the case quoted, the individuals and the ad hoc citizen group requesting the injunction simply submitted photographs and a video tape showing the area in the mountains concerned.

In the field of private environmental law, the Supreme Court´s decision[28] for an injunction against two **hydro power plants** issued in favour of a neighbour is an example. The Supreme Court ruled that due to the imminent danger caused by the project such an injunction had to be issued. Again, the Court reasoned that irreparable danger must simply not be risked in such cases.

[28] 1Ob16/95

Annex: Participatory rights under sectoral administrative environmental law

Below an explanation is given about complain/appeal possibilities provided to neighbours/parties in various sectoral administrative laws.

Industrial Code 1994 ("Gewerbeordnung"/"GewO"):

According to Art 74 para 2 Industrial Code industrial installations need a permit if i.a. life or health of concerned persons are put at risk or if neighbours may be molested. According to the Industrial Code (Art 75 para 2 GewO) the definition of neighbours is broader than the one in the Civil Code. Neighbours are all persons who are endangered or disturbed by the construction, the existence or the operation of an installation or whose property or other rights in rem are endangered. This means that not only adjacent neighbours are considered "neigbours" but all persons whose protected interests are at stake independently of the location.

Art 79 para 1 Industrial Code provides for the possibility to add additional conditions in case the interests of neighbours were not sufficiently covered in the original permit. Art 79a Industrial Code provides the possibility for the neighbours to start an administrative procedure in case the neighbour can demonstrate that he/she is not sufficiently protected from the impacts of the installation. In this context the neighbour obtains the status of a party to the procedure and does not have to bear any cost in case additional requirements are necessary for the installation.

The protection of neighbours in the Industrial Code covers threats of health or nuisance caused i.a. by noise or air pollutants. Thus also relevant environmental and health standards have to be respected.

Federal Waste Act

The legal standing of parties ist defined in Art 42 of the Federal Waste Act. For example, parties are neighbours or persons with particular interests in water management. **„Neighbours" are defined as** any persons to whom the establishment, existence, operation of or modifications to a treatment plant could represent a hazard or nuisance, or whose property or property rights could thus be threatened. This does not include persons who are in the vicinity of a treatment plant temporarily and who are not owners or do not have property rights. However, the owners of establishments (e.g. hotels, hospitals, homes, schools) where other persons stay temporarily are considered neighbours with regard to the protection of such persons. The owners of property close to the border in a foreign country shall also be considered as neighbours, if Austrian neighbours enjoy the same legal or actual neighbourhood protection rights in similar cases in that country (compare Art 2 para 6 point 5 Federal Waste Act).

Furthermore the **ombudsman for the environment** has the right to assert compliance with nature conservation provisions (Art 42 para1 point 8 Federal Waste Act).

Concerning installations covered by the IPPC Directive 2008/1/EG (Directive concerning integrated pollution prevention and control) **NGOs** that fulfil certain criteria provided for in national legislation (conf EIA Act 2000) have the legal standing of parties.

In addition to Art 42 Federal Waste Act anybody may submit written comments on an application for authorisation of an IPPC-treatment plant or an incineration or co-incineration plant during a period of at least six weeks (Art 40 Federal Waste Act). When granting the

authorisation the administrative authorities shall take the comments into account (Art 43 para 3 Federal Waste Act).

Federal Forestry Act

Any natural person can report any infringement of the Forest Act to the forest authority. The latter has to institute criminal proceedings, if necessary.

The **forest authority may need to issue forest-related decrees** if it is informed of relevant facts concerning the public interest in forest conservation, forest treatment and sustainable forest management which it is obliged to safeguard.

This concerns a great number of provisions of the Forest Act, in particular provisions on forest devastation (Art 16), clearing (Art 17), the treatment of protection forests (Art 23 et seq) and protective forests (Art 28), the inspection of barriers by the authority (Art 35), the provisions on forest protection (Section IV), logging (Section V), use (Section VI) and the protection against torrents and avalanches (Section VII).

Involvement as a party in forest-related administrative proceedings
For the forest-relevant proceedings which do not relate to infringements of the Forest Act certain persons are involved as parties or are stakeholders in the proceeding according to Art 8 of the General Administrative Procedure Act (AVG) and the respective list[29] in the Forest Act. Thus the forest authority is able to appropriately take into account also their rights and/or assertions in its decision.

Federal Water Act

Art 102 Austrian Federal Water Act of 1959 (WRG) comprises a demonstrative enumeration of those natural and legal persons who are given party status in water rights proceedings. These are for example: the applicant, those who should be committed to do, tolerate or omit something, those who have the authorization for fishing and those whose rights are affected according to Art 12 (2) Austrian Federal Water Act like land owners.

[29] **Parties** are in particular, in
Clearing proceedings (Art 19 para 4)
- Owners or other parties entitled *in rem* to the forest area for which the application for approval of the clearing is submitted
- Owners or other parties entitled *in rem* in a 40 m distance around the area intended to be cleared

Enclosure proceedings (Art 30 para 2)
- Forest owners and persons which may be able to demonstrate a legal interest in imposing an enclosure (Art 30 para 2)

Biotope protection forests (Art 32a para 3)
- Owners of the biotope protection forest or of the endangered neighbouring forest

Approval of installations causing forest damaging atmospheric pollution (Art 50)
- Owners of the forests affected by the emission of forest damaging atmospheric pollution caused by the installations

Approval of forestry haulage installations (Art 63 para 2)
- Owners of properties whose use or productive power might be impaired by the haulage installation

Felling approval (ArtArt 88 para 4 in connection with 14 para 3)
- Forest owners and owners of the forest at a distance of 40 m near the felling area envisaged

As far as the administrative proceedings and the party status are concerned, the Austrian Water Act is based on the Austrian General Administrative Procedure Act (Art 8 AVG). It is not excluded that also other persons get the rights of a party in a water management procedure going beyond Art 102 Federal Water Act (WRG) if their protected water rights are affected by the decision.

The special water management planning organ ("wasserwirtschaftliches Planungsorgan") also has the rights of a party in order to observe public interests and to administer certain administrative rights as well as the commune in order to secure water supply. Also, water associations ("Wassergenossenschaften") and water alliances ("Wasserverbände") representing the concerned public, may become parties. With respect to fishery special fishing committees ("Fischereirevierausschüsse"; Art 108 para 2 WRG) need to be consulted in case of potential adverse impact.

According to Art 138 Federal Water Act (WRG) a concerned person can ask for re-establishment or removal of caused nuisance.

Art 31 Federal Water Act (WRG) provides for the possibility to complain to an authority in case health is endangered by adverse discharges into waters. The authority is then obliged to act ("wasserpolizeilicher Auftrag").

Art 8 para 4 Federal Water Act (WRG) allows the water authority to take dispositions ("wasserpolizeiliche Anordnungen") in relation to the public use of waters in order to maintain the public interest. Such disposition may also be initiated by anybody addressing the authority on such issues.

Building legislation

Building legislation lies in the competence of the provinces in Austria and is thus regulated in various regional building laws ("Bauordnungen"/"BO", "Baupolizeigesetze").

Generally each building measure (with few exceptions) needs a consent by the authority. Neighbours of adjacent properties are parties to the procedure (e.g. Vienna BO), in Carinthia (Art 23 para 2 K-BO) also other properties owners are parties if they are affected by the development. Parties can appeal e.g. in Vienna to the building high authority ("Bauoberbehörde"). Against such final decisions parties can appeal to the Adminstrative Court and/or the Constitutional Court.

According to the building act of Carinthia e.g. the parties have the right to appeal against the development consent decision in case the management of the works goes against the rights of the neighbours (including protection of health, against imissions, safety).

Federal Environmental Liability Act

Under the Federal Environmental Liability Act the public authorities have the **right to require the operator who caused significant damage** to the natural resources covered to **take the necessary remediation measures** or to recover the costs of taking such measures themselves from the operator[30]. The Environmental Liability Directive (ELD) thus empowers public authorities to act as a sort of trustee for the natural resources concerned.

Art 12 of the ELD provides that **any natural or legal person** that may see their rights infringed by environmental damage, **including recognised NGOs** and ombudsmen for the environment are given the **right to request the competent district authority to take action**

[30] See Art 6 (2) c, e and (3) ELD respectively Art 6 (3) Environmental Liability Act

which is also the case under the Federal Environmental Liability Act. This instrument is referred to as **"Environmental Complaint**" ("Umweltbeschwerde"). Rights in this context are the protection of human life and health, rights based on the Water Act and real property (see also above).

Provided the "Environmental Complaint" and the complained request for action including the accompanying information and data show that environmental damage has been caused[31], the authority has the duty to consider the requests and has to inform the persons referred to of its decisions taken[32]. By placing the "Environmental Complaint" or submitting a statement **the persons referred to** in Art 11 para 1 Federal Environmental Liability Act have **legal standing in the administrative remediation procedure.** NGOs and private property owners on whose land or waters remediation measures need to be taken have a right to submit observations with regard to the nature of such measures[33].

It has to be noted that the ELD has also been transposed at provincial level sometimes in the context of nature conservation legislation. They all contain the possibility of a environmental complaint.

Climate Change

Climate change legislation in Austria is a cross-sectoral matter, with the legislative competence for the issue being split between the federal government ("Bund") and the nine provinces ("Länder"). Provisions for the reduction of greenhouse gas emissions are thus, as a rule, scattered across many different laws that regulate general issues, including technical standards, taxation, environmental subsidies, etc. The one exception to this rule is the so-called "Emissionszertifikategesetz" (Emissions Trading Act) which implements EU-legislation concerning emissions trading among large emitters (mainly electricity generators and heavy industry) in Austria.

It should be noted that questions relating to "natural persons who own property nearby or whose health is affected" do not straightforwardly apply to the issue of climate change. Greenhouse gases are not local pollutants, but global ones. No single source of greenhouse gas emissions is directly responsible for specific local effects of climate change. Also, greenhouse gases as such do not pose any direct health hazards.

Nature protection

Nature protection lies in the competence of the provinces in Austria and is thus regulated in various regional laws (e.g. nature protection laws, environmental liability laws).

Examples are:

Vienna:
The ombudsman for the environment is entitled to put forward the concerns of the public in nature protection procedures. The ombusdman is party – including the right to appeal - in almost all procedures according to the Vienna nature protection law.

Tyrol:
Private persons have the possibility to draw the attention of the responsible authorities at the district level ("Bezirksverwaltungsbehörde") to breaches of nature protection law. The authority acts afterwards ex officio. Breaches of nature protection law can cause administrative criminal measures ("verwaltungsstrafrechtliche Schritte") as well as

[31] See Art 12 (3) ELD respectively Art 11 (3) Environmental Liability Act
[32] See Art 12 (4) ELD
[33] See Art 7 (4) ELD respectively Art 7 (3) Federal Environmental Liability Act

administrative police action ("verwaltungspolizeiliches Vorgehen"; e.g. Art 17 TNSchG provides for the interdiction or the re-establishment of a development proposal/undertaking by the district authority). Furthermore municipalities are parties if they are affected by a development according to nature protection legislation in order to observe their rights/interests.

Carinthia (Kärnten):
The Carinthian nature protection law (K-NSG 2002) provides for a special nature conservation advisory board ("Naturschutzbeirat") that has to be consulted before a decision relating to certain aspects of nature protection can be issued. The board consists of members from the provincial government and experts in nature protection. In case the concerns of the board were not taken into account in the decision the board can appeal to the Administrative Court.

Upper Austria (Oberösterreich) and Lower Austria (Niederösterreich)
The goal of the nature protection laws is to maintain nature and landscape in their form of appearance, to shape and to cultivate it in order to secure an appropriate and best possible conservation of nature for human beings (public interest for the protection of nature and landscape). If individuals, neighbours or environmental organisations are concerned by intended works they are entitled to use the respective rights given to them in the applicable sectoral laws (e.g. building act, Industrial Code, EIA Act). In administrative procedures the ombudsman for the environment gets the right of a party in order to observe the interests of nature and landscape protection.

Vorarlberg
The law for nature protection and landscape development (GNL) provides for a special nature protection advocate ("Naturschutzanwalt") who is entitled to participate in all procedures according to the law. He also has the right to appeal against decisions to the Administrative Court.

Salzburg
According to nature protection law (Art 46 NSchG) in case a development is carried out without a formal decision or against the conditions of the decision the authority can ask the applicant to re-establish the original situation. Such ways to proceed are followed ex officio by the authority but a violation can also be put forward to the authority by private persons. Even though the authority acts ex officio, according to the jurisprudence[34] it is, however, the authority's obligation to launch a new procedure.

Also the nature protection law (Art 54 para 2 NSchG) of Salzburg provides for a nature protection agent ("Naturschutzbeauftragter") who is responsible for observing the nature protection interests and is party to procedures.

[34] VwGH vom 11.5.1998, Zahl 94/10/0191