

22 May 2012

Austrian Response - Case ACCC/C/2011/63

Compliance with access to justice provisions in administrative penal and judicial criminal proceedings regarding contraventions of national law relating to the environment
communication of “Vier Pfoten”

1. Introduction

The core aspects of the communication in case ACCC/C/2011/63 “Vier Pfoten” and the relation to case ACCC/C/2010/48:

Before dealing with the communication in detail, the party concerned would like to point out which aspects of Austrian law – which, according to the communicant’s allegations, are deemed to be in conflict with the Aarhus Convention – have already been dealt with in case ACCC/C/2010/48 and which aspects are new.

Case ACCC/C/2010/48 covered the legal position of NGOs in Austrian environmental law not only with regard to permitting procedures but also with respect to all sectoral administrative laws as well as civil law. In the respective findings of 16 December 2011, the Committee recommended to revise and specifically lay down criteria for NGO standing to challenge acts or omissions by private persons or public authorities that contravene national law relating to the environment under Article 9, para 3 of the Convention.

Compared to the broad scope concerning the question of legal standing of NGOs dealt with in ACCC/C/2010/48, the present communication highlights another specific aspect, i.e., the alleged lack of participatory rights of NGOs in criminal and administrative penal proceedings.

In response to these allegations, the party concerned wishes to emphasize that

- insofar as the communicant interprets the Convention in a way that NGOs would have to be vested with special participatory – or even prosecuting – rights **in criminal or administrative penal proceedings**, this claim goes in our understanding beyond the rights granted under the Convention;

- insofar as the communicant criticizes standing rights for NGOs under **administrative law**, this issue has already been dealt with broadly in case ACCC/C/2010/48;
- apart from that and with regard to the cases reported and means used in his communication, the communicant has not used and employed the existing legal remedies provided by Austrian administrative law for NGOs.

2. **Obligation to implement participatory rights for NGOs in criminal or administrative penal proceedings?**

The communicant invokes rights under Article 9 para 3 and para 4 of the Convention. None of these provisions explicitly refers to criminal or administrative penal proceedings. Art 9 para 3 deals with “*administrative or judicial procedures to challenge acts and omissions by private persons and public authorities*”. By employing the term “**challenge**”, the Convention **marks a clear distinction to the notion of “penalizing”** transgressors. The focus of the Convention is on the protection of the environment; thus, the legal measures either refer to preventing private persons or public authorities from damaging the environment or obliging them to remediation of the damages caused.

By contrast, in prosecuting the individual responsible for the alleged violation (in these proceedings many non-environmental aspects such as the culpability and the financial status of the accused are of relevance), the main purpose of Austrian criminal and penal procedures is to implement **the entitlement of the state** under public penal law. These procedures do not envisage to rectifying or offsetting the act or omission which contravened environmental law.

Art 9 para 4 refers to “*the procedures referred to in paragraphs 1, 2 and 3 above*”. Paragraph 1 concerns requests for information. With regard to this aspect, Austria has established Environmental Information Acts (“Umweltinformationsgesetze”) on both national and provincial levels. Paragraph 2 concerns the right to “*challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and (...) of other relevant provisions of this Convention.*” Article 6 clearly focuses on permitting procedures; neither Article 6 nor any other provision of the Convention explicitly refers to criminal or administrative penal procedures.

Summing up, there is **no provision under the Convention asking to grant specific participatory - or even prosecuting - rights to NGOs in criminal or administrative penal proceedings**. In such proceedings, NGOs are heard in court or by the public prosecutors as witnesses, experts or private accusers.

The party concerned would like to reiterate that to its view the Austrian system of criminal and administrative penal proceedings is not in breach of any provision under the Convention.

For your information please see the **Annex** where the party concerned gives a **brief overview** of the Austrian legal situation concerning **administrative penal proceedings and judicial criminal proceedings**.

3. The administrative law provisions addressed by the communicant

The communicant refers to four sectoral laws, i.e.,

- a. Animal Protection Act
- b. Austrian Wildlife Trade Act
- c. Burgenland Nature Protection Act
- d. Vienna Nature Protection Act

which – according to his allegations – do not provide for sufficient legal standing of NGOs. The question of standing of NGOs has already been covered in case ACCC/C/2010/48. However, in the cases reported by the communicant in ACCC/C/2011/63, Austrian sectoral law is not in breach of the Convention (lit a and b below) and grants sufficient legal standing, respectively (lit e below).

a. Austrian Animal Protection Act

With regard to the scope of application of the Aarhus Convention we would like to point out that **animal welfare** in the stricter sense (eg protection against animal torture) **is not covered by the Aarhus Convention**:

Although the Aarhus Convention does not contain a definition of the term "*provisions of its national law relating to the environment*", Art 2 para 3 of the Convention allows conclusions to be drawn about the parties' environmental understanding. Art 2 para 3 of the Convention defines „*environmental information*“ as the state of elements of the

environment such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components (...) (subpara a), factors, such as substances, energy, noise and radiation and activities or measures (...), affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above (...) (subpara b), and the state of human health and safety conditions of human life, cultural sites and built structures (...) (subpara c).

This indicates that the Aarhus Convention rather focuses on an ecological understanding of the term "environment" that includes not only natural environment but also cultural landscape and the built environment. With regard to animal protection it may be assumed that animal protection in broader terms, in particular species conservation, is to be subsumed under this concept. The objectives of biodiversity conservation are the general protection and keeping of wild fauna and flora and its natural habitats. Due to the lack of ecological aspects, **animal protection** in the **stricter sense** is **not covered** by the scope of the Convention.

Art 1 of the Austrian Animal Protection Act aims at protecting life and wellbeing of animals. Art 5 determines the prohibition of cruelty towards animals, Art 6 the prohibition of the killing of animals without reasonable cause. Further prohibitions are provided in Art 7 (intervention on animals), Art 8 (passing on, disposition and purchase of animals) and Art 8a (sale of animals). The requirements of animal welfare are regulated by Art 12 et seq.

According to Art 37 of the Animal Protection Act, the competent authority is required to stop perceived violations of Art 5 to 7 of the cited law by **issuing direct orders** and **executing coercive measures** as well as by **removing an animal** which is suffering from its keeper.

b. Austrian Wildlife Trade Act

With respect to the field of application of Art 9 para 3 of the Aarhus Convention, reference is made to the reasoning in point a) above. **Provisions relating to the trade of endangered species are similarly not covered by the ecological understanding of the term "environment".** The Austrian Wildlife Trade Act implements Regulation (EC) Nr. 338/97 on the protection of species of wild fauna and flora by regulating trade therein and covers provisions of import, transit, export and trade on protected species.

With regard to criminal proceedings, Art 7 of the Austrian Wildlife Trade Act penalizes the import, export, re-export and transit of protected species without corresponding permits. In turn, Art 8 of the cited law deals with administrative financial offences in the context of trade on protected species.

According to Art 6 para 4 of the cited law the competent authorities are entitled to take **preliminary securing measures** concerning specimen that are subject to an offence under Art 7; the same applies to administrative fiscal proceedings.

c. Burgenland Nature Protection Act

The communicant addresses Art 14 to 16 of the Burgenland Nature Protection Act. These provisions regulate the protection of wild fauna and flora as well as its natural habitats and determine general protection measures (Art 14), red listed native plants and animals (Art 15), special measures for plant protection (Art 15a) as well as special measures for animal protection (Art 16).

In case of **imminent danger** and according to Art 15a para 3 and Art 16 para 4 of the cited law, the competent authority is entitled to order **immediate measures** in relation to the protection of the habitat of plants and the protection of animals.

d. Vienna Nature Protection Act

The communicant invokes Art 9 and 10 of the Vienna Nature Protection Act. These provisions deal with the protection of wild fauna and flora and its habitats and the prohibition of impairing measures.

According to Art 37 of the cited law, the person undertaking interventions in the environment in violation of the provisions of the Vienna Nature Protection Act is obliged to the restoration of the natural state.

In line with Art 38, the nature conservation authority is entitled to impose immediate **orders of loss prevention and damage control** in case of **irreparable damage** to the environment.

e. Remedies under the Environmental Liability Acts

As a preliminary remark, it must be observed that part VI, point 21 of Annex to Decision I/7 on review of compliance dated 2nd April 2004 (ECE/MP.PP/2/Add.8) determines as follows:

*"The Committee should **at all relevant stages** take into account **any available domestic remedy** unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."¹*

In the light of that provision we would like to point out, that the communicant could have first made use of the adequate remedies that are available particularly under the Austrian Environmental Liability Laws before filing the present complaint to the Compliance Committee:

According to Art 2 para 1 subpara a of the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on **environmental liability**, "environmental damage" means "*damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species.*"

A definition of "*protected species and natural habitats*" is to be found in Art 2 para 3 of Directive 2004/35/CE:

"(a) the species mentioned in Article 4 (2) of Directive 79/409/EEC or listed in Annex I thereto² or listed in Annexes II and IV to Directive 92/43/EEC;

(b) the habitats of species mentioned in Article 4 (2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annex II to Directive 92/43/EEC, and the natural habitats listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC; and

(c) where a Member State so determines, any habitat or species, not listed in those

¹ We are aware of the interpretation of this provision reflected in the Guidance Document on the Aarhus Convention Compliance Mechanism, page 34 et seq. as follows: "The exhaustion of domestic remedies does not constitute a strict requirement (...) Also, if a domestic remedy has not been used, the Committee is not precluded from considering the communication."

² Please note that the Egyptian vulture (*Neophron percnopterus*) that is dealt with in decision 18 Bs 244/IIf of the Vienna Provincial Court of Appeal (cf. page 2 of the present communication to the ACCC), is listed in Annex I to Directive 79/409/EEC.

Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives".

To summarize, Directive 2004/35/CE on environmental liability covers **wild birds** in line with Directive 79/409/EEC as well as **natural habitats and wild fauna and flora** in line with Directive 92/43/EEC.

These provisions of the Environmental Liability Directive are implemented in Austria in the Environmental Liability laws at regional level ("Länder"). As the communicant refers to the Nature Protection Acts of Vienna and Burgenland, the Environmental Liability laws of these two provinces are subsequently presented in detail:

Art 4 para 1 of the **Vienna Environmental Liability Act** defines an "environmental damage" as a "damage to protected species and natural habitats (...)", meaning any damage that results in significant adverse effects concerning the attainment or upkeep of a favourable conservation status of these species or natural habitats. "Protected species" and "natural habitats" in Art 4 para 3 subpara a of the cited law are determined as **species and its habitats** that are **protected by the Vienna Nature Protection Act**. According to Art 11 para 1 of the Vienna Environmental Liability Act, environmental organisations (NGOs) that are admitted by the Austrian EIA Act 2000³, are entitled to file an environmental complaint ("Umweltbeschwerde") if their rights may be violated by a specific environmental damage. In the context of protected species or natural habitats, the probable cause of the presence of an environmental damage is qualified as a right in the meaning of Art 11 para 1 in line with Art 11 para 2 subpara 1. According to Art 12 para 1 of the cited law, **environmental organisations** that have filed an **environmental complaint** have **legal standing** in the proceedings concerning precautionary measures and compensation of already occurred environmental damages (Art 6 paras 1 to 3, Art 7 para 2 of the cited law). These organisations are entitled to appeal to the Independent Administrative Senate ("Unabhängiger Verwaltungssenat").

With respect to the **Burgenland Environmental Liability Act**, Art 4 para 1 subpara a defines an "environmental damage" as any damage of **protected species and natural habitats**, meaning any damage, that results in significant adverse effects concerning the attainment or upkeep of a favourable conservation status of these

³ See the list of admitted NGOs as of 30.3.2012 as pdf download on the website of our Ministry: http://www.lebensministerium.at/umwelt/betriebl_umweltschutz_uvp/uvp/anerkennung_uo.html

species or natural habitats. In line with Art 4 para 3 subpara a and b, protected species and natural habitats are considered as species that are listed in Art 4 para 2 or Annex I of Directive 79/409/EEC (wild birds) and in Annex II and IV of Directive 92/43/EEC (natural habitats and wild fauna and flora) including its natural habitats. According to Art 11 para 1 of the Burgenland Environmental Liability Act, **environmental organisations** that are admitted by the Austrian EIA Act 2000, are entitled to file an **environmental complaint** ("Umweltbeschwerde") if their rights may be violated by a specific environmental damage in relation to protected species and natural habitats. According to Art 12 para 1 of the cited law, **environmental organisations** that have filed an environmental complaint have **legal standing** in the proceedings concerning precautionary measures and compensation of already occurred environmental damages (Art 6, Art 7 para 2 of the cited law). These organisations are entitled to appeal to the Independent Administrative Senate ("Unabhängiger Verwaltungssenat").

With regard to the Environmental Liability laws of the other provinces (Upper Austria, Lower Austria, Styria, Salzburg, Carinthia, Vorarlberg and Tyrol), we point to the fact that the above mentioned procedural rights of environmental organisations are also implemented in their respective Environmental Liability Act.

Additionally and in accordance with item 3 c above (immediate measures in line with Art 15a para 3 and Art 16 para 4 of the Burgenland Nature Protection Act) and item 3 d above (obligation to the restoration of the natural state in line with Art 37; immediate orders of loss prevention and damage control in line with Art 38 of the Vienna Nature Protection Act) of the present response we point to the fact, that the Austrian **Environmental Information Act** provides for a possibility for NGOs to obtain further information about environmental impacts:

According to Art 4 in conjunction with Art 5 of the Austrian Environmental Information Act a request for access to environmental information can be filed by any natural or legal person without legal entitlement or interest. In line with Art 2 para 1 and 3 of the cited law, "*environmental information*" is

- the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and **natural sites** including wetlands, coastal and marine areas, **biological diversity and its components**, including genetically modified organisms, and the interaction among these elements (para 1)

- measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in para 1 (...) as well as **measures or activities designed to protect those elements** (para 3).

Consequently, the communicant also would have had the possibility to file a request for environmental information according to the Austrian Environmental Information Act.

4. Summary

Summing up, the complaints raised in the communication with regard to the NGOs' legal status in criminal and administrative penal proceedings are in our opinion not justified.

To our reading the Convention does not oblige member states to grant specific participatory - or even prosecutive - rights to NGOs in criminal or administrative penal proceedings.

Their right "to challenge acts and omissions" under Art 9 paras 3 and 4 of the Convention may be granted in administrative and/or civil proceedings.

In prosecuting the individual responsible for the alleged violation the main purpose of criminal and penal procedures is to implement the entitlement of the state under public penal law. These procedures do not primarily envisage to rectifying or offsetting the act or omission which contravened environmental law.

In fact, in the cases mentioned by the communicant, Austrian law provides adequate remedies to NGOs that the communicant failed to use, i.e the Environmental Complaint under the Environmental Liability Acts.

Apart from that, some of the laws mentioned in the complaint do not seem to be covered by the scope of environmental matters under the Convention, namely the Animal Protection Act and the Wildlife Trade Act.

Annex

Overview of the Austrian legal situation concerning penal proceedings

1. Administrative penal proceedings

1.1 Legal standing

According to Art 24 of the Administrative Penal Act (VStG), the provisions of the Administrative Procedure Act (AVG) - including its Art 8 - also apply to the administrative penal proceedings, unless otherwise indicated. Art 8 of the Administrative Procedure Act generally states that persons who are involved in the matter on the grounds of a legal title or a legal interest are parties who can also file a complaint. Beyond that, Art 32 para 1 of the Administrative Penal Act explicitly determines the accused as party to the proceedings. Moreover, legal standing is guaranteed to the private party (Art 56 para 2 of the Administrative Penal Act) and the private prosecutor (Art 57 para 1 of the cited law). NGOs are not entitled legal standing in administrative penal proceedings.

1.2 Private party ("Privatbeteiligter")

The possibility to participate in administrative penal proceedings as private party depends on the regulation in the respective sectoral laws.

Art 57 para 2 of the Administrative Penal Act entitles the claimant to take part in civil legal proceedings insofar as his claims have not been recognised in the course of the administrative penal proceeding.

1.3 Principle of investigation "ex officio" ("Offizialmaxime")

According to Art 25 of the Administrative Penal Act, administrative offences are basically to be prosecuted ex officio. The competent authority is obliged to initiate and conduct a proceeding in case of a suspicion. Central element of the principle in question is the authority's duty to determine the circumstances of the case. It is to be noted that the Administrative Penal Act does not provide legal entitlement to criminal prosecution for third parties.

1.4 Principle of inquisition

In administrative penal proceedings the administrative authority exercises both the role of the prosecutor and of the judge. Due to this dual function the authority is committed to consider aggravating as well as mitigating circumstances from the sphere of the accused. The competent penal authority is responsible for the initiation or the termination of the proceedings, the conduct of investigations and the imposition of sanctions.

2. Judicial criminal proceedings

2.1 Parties to the proceedings

The procedural rules of Austrian criminal law are provided by the Code of Criminal Procedure ("Strafprozessordnung 1975"). According to Art 220 of the cited law, following persons are parties to the criminal proceedings: public prosecutor, accused, liable stakeholder, private prosecutor, subsidiary prosecutor and private party. Parties to the appeal procedure are the accused and - in case of a nullity appeal - also the public prosecutor, the legal representative, the private party and the private prosecutor. NGOs and environmental organizations are not entitled legal standing in Austrian judicial criminal proceedings.

2.2 Mandatory prosecution principle ("Legalitätsprinzip")

In the context of judicial criminal proceedings, the mandatory prosecution principle aims at guaranteeing the equality of everyone before the law so as to avoid prosecution becoming subject to political or other legally irrelevant criteria. The criminal investigation department, the public prosecution department and the courts have the duty to search for the truth by means of and in strict accordance with all legal remedies available; discretionary power does not exist. NGOs have the possibility to indicate possible infringements of provisions of environmental law to the criminal investigation respectively the public prosecution department. Once a report is made, it can not be withdrawn due to the protection of the suspect against further prosecution measures. Based on the given circumstances and the legal situation, the public prosecutor has to consider if further prosecution is needed. A charge is just to be filed if the conviction of the suspect is more likely than an acquittal, otherwise the proceeding is to be closed due to the protection of the suspect against arbitrary prosecution measures.

Additionally, we refer to the Austrian principle of publicity ("Öffentlichkeitsgrundsatz") within the meaning of Art 90 para 1 of the Federal Constitutional Act (Bundes- Verfassungsgesetz) whereupon hearings in private and criminal law have to be conducted orally and publicly. However, this principle does not apply to the investigation proceedings.

2.3 Definition of "victim"

The Austrian Code of Criminal Procedure ("Strafprozessordnung") draws a distinction between victims, that are or have been exposed to a particular emotional burden (Art 65 subpara 1 lit a and b of Code of Criminal Procedure) and victims, that have suffered damage and therefore seek for redress (Art 65 subpara 1 lit c of Code of Criminal Procedure).

Victims within the meaning of Art 65 subpara 1 of Code of Criminal Procedure are

- persons, who have been exposed to violence or threat to life or physical condition by a criminal offence intentionally committed respectively whose sexual integrity has been impaired (lit a);
- spouse, domestic partner, relatives, brother or sister of an individual, who has been killed by a criminal offence (lit b);
- persons, who have suffered damage due to a criminal offence or whose legally protected interests have been impaired (lit c).

Every victim is entitled to participate in the penal proceedings by way of being heard during main trial, being informed about his or her procedural rights and having the right to inspect the files if relevant interests are affected. Victims and other persons, who are legally interested in criminal prosecution, have the opportunity to review the lawfulness of a suspension of the proceedings (Art 190 to 192 of Code of Criminal Procedure) and require the continuation of the proceedings (Art 195 of Code of Criminal Procedure).

2.4 Private party ("Privatbeteiligter")

With the declaration of participation in the criminal proceedings a victim becomes a private party in order to receive compensation for damage. If their legal interests are not apparent, victims have to constitute their entitlement of participation in the procedure and their demand for compensation by demonstrating a correlation between criminal offence and damage.

Moreover, the private party has the right to apply for the taking of evidence by the criminal investigation or public prosecution department. The private party can also file a complaint against the acquittal of investigation proceedings and continue the proceedings as a subsidiary prosecutor ("Subsidiarankläger").

Every victim – as well as legal entities - who has directly or indirectly suffered from a damage inflicted by a particular criminal offence may join the proceedings as private party.

The private party is entitled to lodge an appeal against the punitive sentence in case of being referred to the civil courts despite the defendant's conviction (Art 366 para 3 of Code of Criminal Procedure).

2.5 Legal Protection Representative ("Rechtsschutzbeauftragter")

The Austrian institution of the Legal Protection Representative ("Rechtsschutzbeauftragter") aims at judicially examining the lawfulness of an abatement of action by the public prosecution department and the compliance with the mandatory prosecution principle ("Legalitätsprinzip"). Inter alia within the frame of criminal offences against environmental law, the Representative is entitled to file a petition of continuance of the proceedings in line with Art 195 of Code of Criminal Procedure. According to this provision, a continuance of the proceedings has to be judicially ordered, if applicable law has been violated or incorrectly applied, if strong doubts exist about the circumstances that led to the suspension of the proceedings or if new facts or evidence came up.