Draft findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2010/48 concerning compliance by Austria

I. Introduction

1. On 13 March 2010, the coordination office of Austrian environmental organisations Oekobuero (hereinafter the communicant) submitted a communication to the Committee alleging the failure of Austria to comply with its obligations under article 3, paragraph 1, article 4, paragraphs 2 and 7, and article 9, paragraphs 1, 2, 3 and 4 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). On 2 June 2010, the communicant submitted a revised version of the communication.
2. The communication alleges that the Austrian legal system lacks a clear, transparent and consistent framework implementing the access to justice provisions of the Convention; hence, according to the communication, the Party concerned fails to comply with article 3, paragraph 1, of the Convention. The communication alleges a failure of Austrian law to comply with the time limits in article 4, paragraph 2 - although the facts presented rather fall under article 4, paragraph 7. In conjunction with this, the communication alleges non-compliance with article 9, paragraph 1, of the Convention. The communication alleges non-compliance with article 9, paragraph 2, of the Convention, asserting that members of the public concerned do not have access to justice to challenge breaches of public participation procedures under article 6 through the procedures on environmental impact assessment (EIA) and Integrated Pollution Prevention and Control (IPPC). The communication focuses primarily on alleged non-compliance by the Party concerned with article 9, paragraph 3, of the Convention, asserting that members of the public do not have access to justice regarding acts and omissions from private persons and public authorities in environmental matters, due to the impairment of rights doctrine in Austrian administrative law. The communication also alleges non-compliance with article 9, paragraph 4, on the ground that in many cases access to justice is not adequate and effective, injunctions are not granted, procedures may be prohibitively expensive or not fair, and with regard to requests for information under article 4, access to justice is not timely.
3. At its twenty-seventh meeting (16-19 March 2010), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 8 April 2010. On the same date, the communicant was sent a letter with questions by the Committee seeking clarification on several points of the communication. The communicant submitted a revised version of the communication on 2 June 2010, which was forwarded to the Party concerned, on 23 June 2010, together with additional questions by the Committee to be addressed by the Party.
5. At its twenty-eighth meeting (15-18 June 2010), the Committee agreed to discuss the content of the communication at its twenty-ninth meeting (21–24 September 2010). Further to a request by the Party concerned for deferral of the discussion after the Committee’s twenty-ninth meeting and the agreement by the communicant, the Committee using its electronic decision-making procedure, agreed to discuss the content of the communication at its thirtieth meeting (14-17 December 2010).
6. The Party concerned responded to the allegations of the communication and the questions of the Committee on 6 October 2010. The communicant provided additional submissions on 8 October 2010. The Party concerned submitted additional arguments on 30 November 2010.
7. The Committee discussed the communication at its thirtieth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. On 15 February 2011, further to the Committee’s request and the parties’ agreement, the parties had coordinated and provided a common answer to the questions of the Committee after the discussion of the communication. The communicant also submitted additional information on 6 April 2011.
8. The Committee prepared draft findings at its thirty-third meeting (27-28 June 2011), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 19 August 2011. Both were invited to provide comments by 16 September 2011.
9. The Party concerned and the communicant provided comments on […] and […], respectively.
10. At its [thirty-fourth] meeting ([20-23 September 2011]), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, legal framework and issues[[1]](#footnote-1)

A. Legal framework

Refusal of a request for information and judicial remedies

1. According to the Environmental Information Act (*Umweltinformationsgesetz–UIG* art. 8, para. 1), if an authority does not respond to a request for environmental information within two months, the applicant needs to request the authority to issue an official notification/decision on the refusal.
2. After receiving the decision on refusal, the applicant may initiate appeal proceedings. If, however, the authority does not issue any refusal decision within six months, the applicant may proceed with a “devolution request” to the administrative tribunal of the province (which becomes the “competent higher authority”), according to the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz-AVG* art. 73).

Legal interest in administrative proceedings and sectoral environmental laws

1. According to the general principle of administrative law (deriving from the so called “impairment of rights doctrine” and “theory of standard protection” (*Schutznormtheorie*)), parties may claim the rights awarded to them by law, in other words their “legal interests”. Parties can file a complaint – and thus have locus standi - when according to article 8 of the Administrative Procedure Act they are involved in an activity of an authority by way of a legal title or legal interest. The laws, such as the EIA or IPPC Acts, specify the “parties”, natural and legal persons, whose legal interests are recognized by law and are considered “parties”.
2. This principle is reflected in the provisions defining locus standi in different environmental, federal or provincial, laws, such as the Industrial Code (GewO) (art. 74 para. 2 and 359b para. 1), Federal Waste Management Act (AWG) (art 42 para. 1), Mining Act (MinRoG) (art. 116 para. 3 and art. 119 para. 6), Forestry Act (*Forstgesetz*) (art. 19, para. 4); Water Act (WRG) (art. 102, para. 1), nature protection laws of the provinces (various provisions according to which neighbours or NGOs do not have standing); and references to provincial IPPC provisions (for example, art 5 para. 1 of the IPPC-Procedure in the Province of Salzburg, provides for standing of neighbours in case of nuisance from smell, noise, smoke, dust, vibrations, etc. and to NGOs with regard to environmental protection). Many of these laws grant locus standi to “neighbours”, on the basis of their impaired rights, but it is mainly the EIA and IPPC laws that grant standing to NGOs.

The EIA Act

1. The Environmental Impact Assessment Act (EIA Act art. 19) provides for the individuals and/or entities that are recognized as parties to the EIA process and have thus the right to appeal. Accordingly, this right is provided to: (1) “neighbours”, namely persons who may be threatened or disturbed through the construction, the operation or the existence of a project, or whose in rem rights, inside the country and abroad, could be put at risk, including the owners of facilities where other people temporarily reside, but not the persons that temporarily stay in vicinity of the project and do not have any in rem rights; the law in the definition of neighbours includes foreign persons; (2) parties stipulated by the applicable administrative provisions unless they already lave locus standi according to 1; (3) the ombudsman; (4) the water management planning body; (5) the host and the directly adjoining Austrian municipalities; (6) citizens’ groups; and (7) environmental organizations.
2. If a comment submitted during the submission period “is supported by 200 persons or more who have the right to vote in municipal elections in the host municipality or in a directly adjoining municipality at the time of expressing their support, this group of persons (citizens’ group) shall have locus standi in the development consent procedure for the project and in the procedure according to article 20 or shall be considered to be a party involved” (art. 9, para. 5 of the EIA Act).
3. The criteria and rights of environmental organizations are described in article 19, *inter alia* in paragraphs 6, 7, 8 and 10 of the EIA Act. Accordingly,

(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 Articles 35 and 36 Bundesabgabenordnung—BAO (Federal Fiscal Code), BGBl. No. 194/1961, and

3. that has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7.

(7) (**Constitutional provision**) In agreement with the Federal Minister for Economic Affairs and Labour, the Federal Minister of Agriculture and Forestry, Environment and Water Management shall decide upon request by administrative order whether an environmental organization meets the criteria of paragraph 6 and in which *Laender* the environmental organization is entitled to exercise the rights related to *locus standi*. Complaints against the decision may also be filed with the Constitutional Court.

(8) The request pursuant to paragraph 7 shall be supported by suitable documents that prove that the criteria of paragraph 6 are met and that indicate the *Land/Laender* covered by the activities of the environmental organization. The rights related to *locus standi* can be exercised in procedures on projects to be implemented in this *Land/*in these *Laender* or in directly neighbouring *Laender*. The Federal Minister of Agriculture and Forestry, Environment and Water Management shall make public a list of the environmental organizations recognized by administrative order pursuant to paragraph 7 on the Internet site of Federal Minister of Agriculture and Forestry, Environment and Water Management. This list shall specify the *Laender*  in which the environmental organizations are entitled to exercise rights related to *locus standi.*

(10) An environmental organisation recognised pursuant to paragraph 7 shall have locus standi and be 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 Article 9 (1). It shall also be entitled to complain to the Administrative Court.[[2]](#footnote-2)

The rule of concentration/consolidation

1. The rule of concentration under Austrian law allows for the integration of multiple sectoral laws procedures into a single procedure, such as the IPPC and the EIA procedures. As a result, persons who under sectoral laws might not have been considered “parties” to the procedure and might have been denied standing, may be automatically granted standing for all sectoral laws issues on the basis of the rule of concentration/consolidation in the context of the EIA, the IPPC, the Industrial or the Federal Waste Management procedures.

B. Substantive issues and arguments of the parties

1. The communication raises a number of issues with regard to access to justice in Austrian legislation. Some allegations are very broad and general, and the Committee was with respect to a number of issues invited to consult academic writings. As stated in paragraph 49 below, the Committee decided to focus its considerations on selected issues, such as standing and the availability of administrative and/or judicial remedies against acts or omissions of public authorities and private persons. The paragraphs below summarize the main allegations and arguments of the Parties in these selected issues.

Time limits for public authorities to respond to requests for information and procedures for refusal (art. 4, paras. 2 and 7)

1. The communicant alleges that the law of the Party concerned according to which the authorities are not obliged to provide for a refusal in writing, when a request for information is refused, and the applicant has to request the authority to issue an official decision on the refusal, is not in compliance with article 4, paragraph 2, of the Convention (see also para. above).
2. The communicant also alleges that following the law of the Party concerned for a “devolution request” (see para. above), when the competent authority refuses to address a request for information, it may take up to one year until the applicant, whose request for information has been refused, has a formal decision on the refusal. This, according to the communicant, is not in compliance with article 4, paragraph 2, in connection with article 9, paragraphs 1 and 4. The communication referred to some examples to illustrate its allegations with regard to access to information.
3. The Party concerned does not dispute the communicant’s explanation of Austrian legislation (Environmental Information Act and the Administrative Procedure Act). The Party concerned contends, however, that information requesters can avoid unnecessary lengthy procedures by making separate requests for refusal at the same time that they submit their requests for information. In support of this suggestion, the Party concerned cites an academic commentary from 1998 and states that the Environmental Information Act would not stand in the way of such a procedure.
4. The communicant disagrees with this position of the Party concerned.
5. The Party concerned also points out that a competent authority could provide its refusal in less than six months and there is no rule requiring the authority to take the full six months. Still, in the view of the Party concerned, the six-month period “is assumed” to be in compliance with the provisions of the Aarhus Convention.

Access to justice for failure to respond to requests for information (art. 9, paras. 1 and 4)

1. The communicant alleges that it may take over one year (13 or 14 months) until the applicant, whose request for information has been refused, has a formal decision on the refusal and can then submit an appeal against the refusal at the court (one or two months after the request for information; six months after the separate request for refusal; and another six months after the “devolution request” at the administrative tribunal of the province) (see also para. above). According to the communicant, this is not in compliance with the timely procedures as required by article 9, paragraphs 1 and 4, of the Convention.
2. The Party concerned does not contest the communicant’s presentation of the law and practice in this respect.

Locus standi for individuals to challenge decisions subject to article 6 and scope of the reviewable claims (art. 9, para. 2)

1. The communicant alleges that the scope of standing for natural persons to challenge a permit (in the context of the EIA and IPPC procedures) under article 6 is limited to grounds related to “legal interest” and that “neighbours” may challenge the permitting procedure only to the extent that the activities affect e.g. their “private well-being”, but “not the environment as such” and not the “correct application of environmental law.” According to the communicant, such a limitation to claims involving their private well-being exceeds the discretion of the Party concerned under article 9 because it conflicts with the “objective of giving the public concerned wide access to justice.”
2. The communicant alleges, for instance, that the refusal of the Party concerned to consider claims relating to the environment, in general, such as climate change considerations in EIA procedures, denies members of the public the opportunity to “challenge the substantive and procedural legality” of such a decision. According to the communicant, these features of Austrian law are not in compliance with the requirements of article 9, paragraph 2, of the Convention.
3. In this regard, the Party concerned states 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.”
4. The Party concerned argues that, despite the lack of standing exclusively on the basis of climate change arguments, if a natural person has standing as a “neighbour” under the EIA Act, because, for instance, his property, health or private well-being may be affected, the person would be able to raise issues concerning climate change during the judicial process under the “rule of concentration”.
5. The Party concerned argues that the EIA Act is in accordance with the general rule in administrative proceedings (and therefore in subsequent court proceedings), that natural persons need to claim a “legal title or interest” to be able to become parties. However, a person may alternatively become a “party” through a representative, such as by addressing its concerns to the ombudsman, asking an NGO to file a lawsuit, or joining a “citizens’ group” (a minimum of 200 signatures is necessary) (see also para. above).

Locus standi for individuals (natural persons) to challenge acts by public authorities (art. 9, para. 3)

1. The communicant alleges that Austrian law provides standing for challenging acts and omissions of public authorities in environmental matters only for those natural persons who have a “legal title or interest” according to the “impairment of rights doctrine” (see para. above). The communication alleges that the requirement for “legal title or interest” prevents standing from being granted to persons to advocate a general public interest. According to the communicant, the limiting standing provided by Austrian legislation exceeds Austria’s discretion under article 9, paragraph 3, of the Convention, because it conflicts with the “objective of giving the public concerned wide access to justice,” And thus the Party concerned is not in compliance with this provision of the Convention. The communicant does not refer in its allegations to the possibility for the public to challenge acts or omission of private parties, such as polluters.
2. The Party concerned agrees that standing is restricted to “legal interest”. It does not disagree that the restriction to “legal title or interest” in Austria prevents a person that wants to advocate a general public interest from having standing, although it points out that certain legislation “effectively entitles the party to claim a certain level of environmental quality pertaining to the area of living, of the work place or the business place.” For instance, the Party concerned agrees with the communicant that only “neighbours” have standing under a number of procedures stipulated in sectoral environmental laws (e.g. Industrial Code, regular procedure and Update/changes of permits, Waste Management Act, Mining Act, possible under the Forestry and the Water Acts, etc.).[[3]](#footnote-3)
3. The Party concerned, however, argues that the limitations of standing under Austrian legislation are not in non-compliance with article 9, paragraph 3, of the Convention, because that paragraph permits a Party to limit standing by any “criteria according to national legislation” that it wishes, as long as the criteria are “reasonable and comply with the principles of the Convention.” According to the Party concerned, Austria’s criteria are automatically “reasonable and in accordance with the Aarhus Convention” because the Convention “does not pre-define certain criteria.”
4. In addition, the Party concerned asserts that there are “alternative ways” for individuals to “gain legal standing.” For instance, persons living nearby can form “an ad hoc citizen group” of 200 persons or can ask the ombudsman or an NGO to represent their interests.

Locus standi for NGOs to challenge acts by public authorities (art. 9, para. 3)

1. The communicant alleges that Austrian law does not in general grant standing to NGOs to challenge acts or omissions in environmental matters. The Party concerned agrees that NGOs are not in general granted standing under the Administrative Procedure Act.
2. The communicant also states that standing is granted to NGOs to some extent under some procedures, such as the EIA and the IPPC procedures or the Federal Environmental Liability Act (B-UHG) following the Directive 2004/35/EC. However, most of the sectoral laws (such as Industrial Code (GewO) - regular and simplified procedure, Waste Management Act (AWG), Mining Act (MinRoG), Forestry Act (Forstgesetz), Water Act (WRG), Prevention Procedure (WRG) and nature protection laws of the provinces) do not provide for NGO standing. This is supported by the table provided by the communicant and accorded by the Party concerned.
3. The communicant adds that there are several decision-making processes for which NGOs cannot seek review, such as: permitting procedures for railways, roads, shipping, nature conservation and often water and local building permits; or planning and programming procedures, including spatial planning and programs, waste management plans, air quality plans, strategic noise maps or action plans.
4. For all these reasons the communicant alleges that the Party concerned is not in compliance with article 9, paragraph 3, of the Convention.
5. The Party concerned does not deny that NGOs lack standing in the various sectoral laws, but it asserts that the “rule of concentration” enabling NGOs who have standing in EIA or the IPPC procedures to raise issues also under other laws, ensures compliance with the Convention.

Reviewability of acts and omissions of public authorities (art. 9, para. 3)

1. The communicant alleges that according to Austrian legislation, a number of acts and omissions concerning permitting, planning and programming, and relating to the environment, are not subject to legal review at all. This according to the communicant, is not in compliance with article 9, paragraph 3, of the Convention.
2. In support of its allegation, the communicant mentions, for example, that nobody, neither neighbours nor NGOs, may challenge permitting procedures concerning railways, roads, shipping, nature conservation, most aspects of water permitting and building permits; local and spatial planning procedures, waste management plans, air quality plans, strategic noise maps or actions plans; SEA procedures on federal transport plans; environmental quality standards infringements; or EIA screening decisions.
3. The Party concerned does not dispute that there is no judicial review for the omissions referred to in para. . Instead, the Party concerned responds that there is the possibility to challenge an omission by filing a civil claim for damages under some acts (e.g. Austrian Water Act, Austrian Forestry Act, Austrian Genetic Engineering Act, and Austrian Nuclear Liability Act) and under the Liability of Public Bodies Act or by lodging complaints with a special commission established for this purpose (Volksanwaltschaft) under the Federal Constitutional Law. The Party concerned also observes that the provincial Ombudsmen for the Environment can participate in certain administrative procedures, get the rights of a party, and have the right of appeal to the courts.

Scope of claims against private persons (art. 9, para. 3)

1. In addition, the communicant alleges that persons, including neighbours, have no right “to protect themselves” in the event that an operator produces “emissions [that] are higher than permitted”.
2. The Party concerned does not deny that there are no administrative or judicial procedures for persons, including neighbours, to challenge acts of an operator, for example, such as emissions that are higher than allowed in a permit and that therefore contravene national law. However, the Party concerned contends that it is possible for “anybodywho is or fears to be endangered by pollution is entitled to file a civil lawsuit against the polluter and to seek an injunction” if the pollution is “detrimental to health,” based on article 16 of the Civil Code” and cites relevant jurisprudence.

Lack of a clear, transparent and consistent framework (art. 3, para. 1)

1. The communicant alleges that the Party concerned has not taken the necessary legislative, regulatory and other measures to implement the provisions of article 9 of the Convention, and that it lacks a clear, transparent and consistent framework required by article 3, paragraph 1. As a result, Austria is not in compliance with this provision of the Convention.
2. The Party Concerned has not responded to this allegation.

III. Consideration and evaluation by the Committee

1. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.
2. The communication contains a number of allegations of non-compliance by the Party concerned with several aspects of the access to justice provisions of the Convention. In the view of the Committee, some allegations are very broad and general (see also para. above). Therefore, the Committee has decided to focus on selected issues, such as standing and the availability of administrative and/or judicial remedies against acts or omissions of public authorities and private persons. In addition, the Committee will not deal with the allegations of non-compliance with article 3, paragraph 1, as these were not adequately substantiated.

Time allowed for responding to a request for information and providing notice of refusal (art. 4, paras. 2 and 7)

1. As noted above (see para. 20), the communicant alleges that Austrian legislation requires a separate written request in order to obtain a refusal of provision of information.
2. Although the communicant asserts that this requirement for a separate request for refusal is a violation of article 4, paragraph 2, in the view of the Committee this requirement of the Austrian legislation should be considered in the light of article 4, paragraph 7. If the original request for information is “in writing,” paragraph 7 requires that a refusal “shall be in writing”—without having to make a separate request for a written refusal. And this response in writing should be provided by the authorities “within one month after the request has been submitted,” a period that given certain circumstances may be extended “up to two months after the request”.
3. According to the legislation of the Party concerned (Environmental Information Act, art. 8, para. 1), the authorities have the right to refuse to respond in writing to any request for information. Then, the applicant has to request the authority to issue an official notification/decision on the refusal, and in case the authority refuses again to issue such decision, the applicant has to follow the so-called “devolution request” procedure, under article 73 of the Administrative Procedure Act. This procedure could entail that a written refusal on the request for information is obtained one year or later after that request was initially submitted. This is much longer than what is prescribed under the Convention.
4. For these reasons the Committee finds that the Party concerned by allowing public authorities not to respond at all to requests for information submitted in writing (or to respond well beyond the time frames set by the Convention), is not in compliance with article 4, paragraphs 2 and 7, of the Convention.

Access to justice for failure to respond to a request for information (art. 9, paras. 1 and 4)

1. The communicant alleges that the requirement for a second request for refusal, which can be made only after six months (devolution request) is not in compliance with article 9, paragraphs 1 and 4, while the Party concerned states that such a requirement for a second request “is assumed” to be “in compliance with the provisions the Convention” (see para. above).
2. According to the Convention, Parties are required to ensure that any person has access to a review procedure when it believes that its request for information has not been properly dealt with in accordance with article 4. This is to be done “within the framework of national legislation”. However, national legislation has to fulfil some minimum requirements set by the Convention, such as to ensure that a person has access to an expeditious procedure.
3. In addition, article 9, paragraph 4, of the Convention requires that the procedure established by the Parties pursuant to article 9, paragraph 1, of the Convention be “timely”.
4. The national legislation of the Party concerned, requires that if the authority does not provide any answer to the request for information within two months and it further refuses to provide a written refusal within the next six months, the information requester has to proceed with the devolution request and only after it has received a response to its devolution request, it can seek a review procedure. This means that, if the requester believes that its request was not properly addressed by the authorities, it may have to wait for longer than one year after its initial request for information until it can access a review procedure. Therefore, the Committee finds that the Party concerned fails to ensure access to an expeditious and timely review procedure for access to requests for information, as required by article 9, paragraphs 1 and 4 of the Convention.

Locus standi for individuals to challenge decisions subject to article 6 (art. 9 para. 2)

1. The communicant alleges that Austrian law provides for limited locus standi to individuals to challenge decisions subject to article 6 of the Convention, whereas the Party concerned disagrees with the communicant’s position (see paras. -).
2. In defining standing under article 9, paragraph 2, the Convention allows a Party to determine within the framework of its national legislation, whether members of the public have “sufficient interest” or whether they can maintain an “impairment of a right”, where the administrative procedural law requires this as a precondition. While for NGOs, the Convention provides some further guidance on how the “sufficient interest” should be interpreted, for persons, such as “individuals”, the Convention requires that “sufficient interest” and “impairment of a right” be determined “in accordance with the requirements of national law”. Parties, thus, retain some discretion in defining the scope of the public entitled to standing in these cases, but the Convention further sets the limitation that this determination must be consistent “with the objective of giving the public concerned wide access to justice within the scope of the Convention” (see also the findings of the Committee on communication ACCC/C/2005/11 (UN Doc. ECE/MP.PP/C.1/2006/4/Add.2) concerning Belgium, in para. 33).This means that the Parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter its general obligations under article 1, 3 and 9 of the Convention.
3. The Austrian legal system follows the impairment of a right criterion to determine standing rights for individuals. The question thus arises whether the impairment of rights under the Austrian legislation meets the standards of the Convention. In other words, whether the definition of “neighbours” under article 19, paragraph 1, of the EIA Act (as “persons who may be threatened or disturbed through the construction, the operation or the existence of a project, or whose in rem rights, inside the country and abroad, could be put at risk, including the owners of facilities where other people temporarily reside, but not the persons that temporarily stay in vicinity of the project and do not have any in rem rights”, see para. above) is consistent with the objective of giving wide access to justice.
4. In the view of the Committee the standing criteria for individuals set by Austrian legislation do not seem to run counter the objectives of the Convention regarding wide access to justice. However, the definition of the “neighbours” may be limiting the rights of “persons that temporarily stay in the vicinity of the project and do not have any in rem rights” (EIA Act, art. 19(1)1), such as tenants or individuals that work in the vicinity, unless they could claim that they “may be threatened or disturbed through the construction, the operation or the existence of a project” (EIA Act, art. 19(1)1). While, the law of the Party concerned in determining standing rights for individuals is not per se in non-compliance with the Convention, the Committee finds that given the information before it, the law raises some concern on how this provision may be interpreted and applied. Therefore, the Committee encourages courts of the Party concerned to interpret and apply the provisions relating to locus standi for individuals in the light of the Convention’s objectives.

Scope of the reviewable claims sought by the individuals (art. 9, para. 2)

1. The communicant alleges that the Party concerned refuses to consider claims relating to the environment in general, such as climate change, and that the EIA procedures deny members of the public the opportunity to “challenge the substantive and procedural legality” of a decision. The Party concerned contends that once an individual is granted locus standi, it has the possibility to raise issues of general interest under the “rule of concentration”.
2. As noted previously by the Committee in its findings on communication ACCC/C/2008/33 (para. 123) “article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases.”
3. The Committee understands that the Party concerned allows individuals to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2, of the Convention, when their rights relating to property or well-being, have been violated. The Committee appreciates that in such a situation, they may also raise issues of general environmental concern. Given the information provided, however, the Committee cannot evaluate, whether or not that is sufficient to fulfil the criteria of the Convention with respect to issues of general environmental concern. Therefore, the Committee does not come to a conclusion on whether the Party concerned is in a state of non-compliance with article 9, paragraph 2, of the Convention.

Locus standi for NGOs to challenge acts and omissions by public authorities and scope of reviewable claims (art. 9 para. 3)

1. The communicant alleges that Austrian legislation in general denies standing to individuals and NGOs to challenge acts or omissions of public authorities or private persons, when such acts contravene Austrian environmental law. A list of laws was provided to the Committee indicating issues of standing for the public concerned under article 9, paragraph 3, of the Convention. The Party disagrees and refers to the terms of the provision, “criteria, if any, laid down in national law”, and to the possibility to seek judicial review under article 9, paragraph 3, through ad hoc citizen group, an NGO or the ombudsman (see paras. - above).
2. Article 9, paragraph 3, applies to a broad range of acts or omissions, while at the same time it allows for more flexibility by the Parties in implementing it. Thus, the Convention allows Parties to set criteria for standing and access to environmental enforcement proceedings, but any such criteria should be consistent with the objectives of the Convention to ensure wide access to justice.
3. The Committee has considered the criteria for standing under article 9, paragraph 3, in several cases. For instance, in its findings on communication ACCC/C/2005/11 concerning Belgium (see paras. 35 and 36 of the findings, UN Doc. ECE/MP.PP/C.1/2006/4/Add.2) it noted that “the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“actio popularis”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment”. It further held that “the phrase ‘the criteria, if any, laid down in national law’ indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.” In addition, in its findings on communication ACCC/C/2006/18 concerning Denmark (see para. 29 of these findings, UN Doc. ECE/MP.PP/2008/5/Add.4), the Committee held that the criteria laid down in national law cannot be so strict “that they effectively bar all or almost all environmental organizations or other members of the public from challenging act or omissions that contravene national law relating to the environment.”
4. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture (see also findings on communication ACCC/C/2006/18 concerning Denmark, at para. 30), i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental NGOs, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”.
5. A number of Austrian environmental laws presented to the Committee,[[4]](#footnote-4) do not provide standing for NGOs at all, while they may provide standing to neighbours. In addition, apart from the sectoral environmental laws which do not provide locus standi to NGOs, there seem to be no other remedies available for NGOs to actually challenge acts and omissions by public authorities that contravene provisions of its national law relating to the environment, unless the procedure envisaged by the sectoral law is consolidated with the EIA or IPPC procedure. In the view of the Committee, and based on its findings in previous cases (see above), these criteria laid down by the Party concerned in its national law, are so strict that they effectively bar NGOs from challenging acts or omissions that contravene national laws relating to the environment. The fact that there is a possibility that the procedure laid down under the sectoral environmental law may be consolidated in the framework of the EIA or IPPC procedure for the purposes of a large project is not sufficient to fulfil the requirements of article 9, paragraph 3, on effective access to justice.
6. Therefore, the Committee finds that the Party concerned in setting criteria for standing of environmental NGOs to challenge acts or omissions of a public authority or private person, is not in compliance with article 9, paragraph 3, of the Convention, because it substantially limits access to justice.

Scope of claims against private persons under article 9, paragraph 3

1. As was stated by the Party concerned and the communicant,[[5]](#footnote-5) the scope of claims against private persons under Austrian legislation is limited to “nuisance from smell, noise, smoke, dust, vibrations or in other ways” and does not extend to violations of emission standards, permit conditions, or other requirements of environmental law. With respect to the scope of reviewable claims under article 9, paragraph 2, the Party concerned mentioned that once locus standi has been established, members of the public may not only bring forward allegations relating to their property or well-being, but also raise issues of general environmental interest. From the information provided by the parties, it is not clear to the Committee, whether this would also be the case for claims under article 9, paragraph 3; namely, whether a member of the public that has obtained standing in a civil law/nuisance case for damages, may be in a position to argue in its submissions that the act or omission at issue also violates standards set by Austrian environmental law, because, for instance, it causes emissions above these standards. The Committee is, therefore, not able to evaluate whether or not the Party concerned fails to comply with article 9, paragraph 3, of the Convention. It notes, however, that if the practice of the Austrian courts is such that in a nuisance case members of the public cannot bring claims relating to contraventions of provisions of Austrian law relating to the environment, this may constitute non-compliance with, article 9, paragraph 3, of the Convention.

IV. Conclusions and recommendations

1. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

1. The Committee finds that the Party concerned, by allowing public authorities not to respond at all to requests for information submitted in writing (or to respond well beyond the time frames set by the Convention), is not in compliance with article 4, paragraphs 2 and 7, of the Convention (see para. 53).
2. The Committee finds that the Party concerned, by not ensuring access to an expeditious and timely review procedure for access to requests for information, is not in compliance with article 9, paragraphs 1 and 4, of the Convention (see para. 57).
3. The Committee finds that the Party concerned, due to the criteria set for standing of environmental NGOs to challenge acts or omissions of a public authority or private person, is not in compliance with article 9, paragraph 3, of the Convention (see para. 70).

B. Recommendations

1. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends the Party concerned
   1. To take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:
      1. Refusals of requests for information be in writing if the request was in writing (or the applicant requests that a refusal be in writing) and that such refusals be made as soon as possible, and at the latest within one month after the request has been submitted unless the volume and the complexity of the information justify an extension of this period up to two months after the request;
      2. The available review procedures for persons who consider that their request for information under article 4 has been ignored, wrongfully refused or inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, are timely and expeditious;
      3. The legislative standing criteria for NGOs to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment be revised so as not to exclude environmental NGOs from standing under article 9, paragraph 3, of the Convention.
   2. To develop a capacity-building programme and provide training on the implementation of the Aarhus Convention for federal and provincial authorities responsible for Aarhus-related issues, and for judges, prosecutors and lawyers.

1. This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee. [↑](#footnote-ref-1)
2. Translation in English provided by the Party concerned. [↑](#footnote-ref-2)
3. See common table submitted by the Party concerned and the communicated on 15 February 2011. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)