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in Decision-making and Access to Justice
in Environmental Matters

Compliance Committee

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Geneva, 26–29 June 2012

Item 7 of the provisional agenda

Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/48 concerning compliance by Austria

Adopted by the Compliance Committee on 16 December 2011

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I. Introduction

1. On 13 March 2010 the Coordination Office of Austrian Environmental Organizations (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 also alleges a failure of Austrian law to comply with the time limits in article 4, paragraph 2. In conjunction with this, the communication alleges non-compliance with article 9, paragraph 1, of the Convention. The communication further alleges non-compliance with article 9, paragraph 2, of the Convention, asserting that members of the public concerned do not have access to justice through the procedures on environmental impact assessment and on integrated pollution prevention and control to challenge breaches of public participation procedures under article 6. The communication focuses 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, after the discussion of the communication and further to the Committee's request and the parties' agreement, the parties provided a common answer to the questions of the Committee. The communicant 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 7 September 2011 and 16 September 2011, respectively.

10. At its thirty-fourth meeting (20–23 September 2011), the Committee noted that the comments received by both parties shed light on several aspects of the facts, which had been insufficiently represented by the communicant in its communication and subsequently in its written and oral submissions, and were incorrectly reflected in the Committee's draft findings. Due to the substantive changes introduced in the text of its findings, the Committee requested the secretariat to send the new draft to the Party concerned and to the communicant for comment. The Committee would take into account any comments in finalizing the findings at its thirty-fifth meeting. In deciding to take the unprecedented step of circulating a new set of draft findings, the Committee stressed that that was an extraordinary event in light of the particular circumstances.

11. The draft findings were then forwarded to the Party concerned and the communicant on 10 November 2011. Both were invited to provide comments by 10 December 2011. The Party concerned provided comments on 7 December 2011 and the communicant provided comments on 9 December 2011.

12. At its thirty-fifth meeting (13–16 December 2011), the Committee proceeded to finalize its findings in closed session, taking account of the comments received from the parties. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for its thirty-seventh meeting (26–29 June 2012). It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, legal framework and issues¹

A. Legal framework

Refusal of a request for information and judicial remedies

13. According to the Environmental Information Act (*Umweltinformationsgesetz* (UIG), art. 8, para. 1), if an authority does not provide the requested information or the information it provides is not satisfactory, the applicant must ask the authority to issue an official notification (an individual administrative decision) on the refusal in order to make an appeal, since a refusal letter alone that is not accompanied by this official notification is

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. Most of the documents and translations of legal acts referred to in this section are available on the Committee website from <http://www.unece.org.unecedev.colo.iway.ch/env/pp/compliance/Compliancecommittee/48TableAT.html>.

insufficient for an applicant to pursue an appeal.² The issuing of an official notification does not constitute a reconsideration of the request.

14. After receiving this “official notification”, the applicant may initiate appeal proceedings. If, however, the authority does not issue the official notification within six months, the applicant seeking to initiate appeal proceedings must first proceed with a “devolution request” to the administrative tribunal of the province (which becomes the “competent higher authority”), requesting the tribunal to issue such an official notification of refusal, according to the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz* (AVG), art. 73).

Legal interest in administrative proceedings and sectoral environmental laws

15. According to the general principle of administrative law in Austria (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. In addition, some laws, such as the Acts on Environmental Impact Assessment (EIA) and on Integrated Pollution Prevention and Control (IPPC), specify the “parties” — natural and legal persons, whose legal interests are recognized by law and are considered “parties”.

16. 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 art. 359b, para. 1), the Federal Waste Management Act (AWG) (art. 42, para. 1), the Mining Act (MinRoG) (art. 116, para. 3, and art. 119, para. 6), the Forestry Act (Forstgesetz) (art. 19, para. 4), the Water Act (WRG) (art. 102, para. 1), the nature protection laws of the provinces (various provisions according to which neighbours or non-governmental organizations (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.

Ombudsman for the Environment

17. The Ombudsman for the Environment (*Volksanwaltschaft*) is an independent institution in every province in Austria. Its mandate is to be a contact point for citizens on environmental issues, to ensure environmental protection and nature conservation interests in administrative proceedings, to provide its views on draft laws and regulations relating to the environment and to provide expert information to citizens and the administration. The Ombudsmen for the Environment can also participate in procedures relating to nature conservation as envisaged by provincial laws; in all provinces, with the exception of Tyrol, they have standing before the administrative courts. At the federal level, the Ombudsmen for the Environment can participate in EIA procedures, in IPPC procedures (with respect to waste), in environmental liability laws and in nature conservation matters. In EIA

² UIG, art. 8, para. 1: “If the environmental information requested (whether in full or in part) is not provided, an official notification of the refusal shall be issued if the applicant so requests. The competent body for issuing the notification shall be the information providing body, providing it performs public authority functions. Equivalent requests may be dealt with in one notification” (translation provided by the communicant).

procedures, the Ombudsmen for the Environment have access to the highest courts; in federal IPPC procedures (under the Industrial Code, the Mining Law or the Waste Act, among others) and under the Federal Environmental Liability Act, they have access to the highest courts only for procedural rights concerning their interests.³

The Environmental Impact Assessment Act

18. The Environmental Impact Assessment Act (EIA Act, art. 19) provides for individuals and/or entities that are recognized as parties to the EIA process and thus have the right to appeal. Accordingly, this right is provided to:

(a) “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 the vicinity of the project and do not have any in rem rights; the law in the definition of neighbours includes foreign persons;

(b) Parties stipulated by the applicable administrative provisions unless they already have locus standi according to subparagraph (a) above;

(c) The Ombudsman for the Environment;

(d) The water management planning body;

(e) The host municipality and the directly adjoining Austrian municipalities;

(f) Local citizens’ groups;

(g) Environmental organizations.

19. 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” (EIA Act, art. 9, para. 5).

20. The criteria for and rights of environmental organizations are described in article 19 of the EIA Act, inter alia, in paragraphs 6, 7, 8 and 10. Accordingly,

(6) An environmental organization 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 of the *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,

³ <http://www.umweltanwaltschaft.gv.at/>. See also table submitted by the communicant on 15 February 2011 and agreed by the Party concerned (additional information on standing for the public in Austrian legislation, annex)

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 organization recognized 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.⁴

21. All parties to a regular EIA procedure have the right to appeal to the Environmental Senate. In addition, there is the possibility to appeal to the Administrative Court, while neighbours, the water management planning body and citizens' groups have the right to appeal to the Constitutional Court as well.

22. Apart from the regular EIA procedure, a simplified EIA procedure was introduced in 2000 and applies to projects with potentially less significant environmental impact. It mainly applies to industrial installations for which the IPPC law already applies. The rights of the parties in the simplified EIA procedure are the same as for the regular EIA procedure (EIA Act, art. 19), with the exception of citizens' groups who may participate in the simplified procedure as parties involved with the right to inspect the files, but have no right of appeal.⁵

23. Section 3 of the EIA Act provides for the carrying out of EIA for federal roads and high-speed railroads, while article 24f, paragraph 8, provides for the rights of the parties identified under article 19 of the Act. These rights are similar but not identical. While according to the Act (art. 24, para. 1), the competent authority in the first and last instance is the Federal Ministry of Transport, Innovation and Technology, all parties are entitled to complain directly to the Administrative Court and citizens' groups and neighbours can also address their concerns to the Constitutional Court. It should be noted that in simplified EIA procedures for transport infrastructure the rights of the citizens are limited to inspecting the files, but do not extend to the right of appeal.

The rule of concentration/consolidation

24. 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

⁴ English translation provided by the Party concerned.

⁵ Schedule B of the additional information submitted by the Party on 15 February 2011 and agreed by the communicant.

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

25. The communication raises a number of issues with regard to access to justice in Austrian legislation. Some allegations are very broad and general and, with respect to a number of issues, the Committee was invited to consult academic writings. As stated in paragraph 52 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 on these selected issues.

Time limits for public authorities to respond to requests for information (art. 4, para. 2)

26. The communicant alleges that the law of the Party concerned according to which the authorities are not obliged to provide an "official notification" when a request for information is refused and, as a consequence, the applicant has to specifically request the authority to issue such official notification on the refusal, is not in compliance with article 4, paragraph 2, of the Convention. It is only with an "official notification" that the applicant can seek remedies (see also para. 13 above).

27. The communicant also points out that, according to the law of the Party concerned, if the authority does not issue the official notification within 6 months, then the applicant can obtain one only if it proceeds with a "devolution request" (see para. 13 above); this implies that it may actually take up to one year until the applicant, whose request for information has been refused, receives an official notification of the refusal, and this 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.

28. The Party concerned stresses that Austrian legislation (Environmental Information Act, art. 5, para. 7) requires authorities that do not provide the information requested to provide a written reasoned response to the applicant and to inform him/her about the possibility of remedies, although such a written response is not, in itself, sufficient for the applicant to seek remedies. The Party concerned also contends, however, that information requesters can avoid unnecessary lengthy procedures by making separate requests for "official notification" of refusal at the same time that they submit their requests for information. In support of this suggestion, the Party concerned states that the Environmental Information Act would not stand in the way of such an ad hoc procedure.

29. The Party concerned also argues that a competent authority could provide its refusal in less than six months, that there is no rule requiring the authority to take the full six months, and that this provision of the Administrative Procedure Act (AVG) can be interpreted and applied "in the light of the Convention's objectives" to require its refusal in less than six months. Therefore, in the view of the Party concerned, the six-month period "is assumed" to be in compliance with the provisions of the Aarhus Convention. In addition, in its oral submissions during the discussion of the case, the Party concerned stated that some cases, such as those described by the communicant, may have been due to confusion within the authorities on how to address requests for environmental information. The Party concerned also submits that the difficulty of balancing the right of the public to request information against the obligation of the competent authority to maintain

confidentiality in given cases may have led to delays in some cases, such as those described by the communicant.

**Timeliness of review procedures relating to requests for information
(art. 9, paras. 1 and 4)**

30. 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. 13 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.

31. While the Party concerned does not contest the communicant’s presentation of the law and practice in this respect in some cases, the Party concerned asserts that article 73 of the AVG is open to interpretation in the light of the Convention (see also para. 29 above).

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

32. The communicant alleges that the scope of standing for individuals 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 their “private well-being” or their property, 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”.

33. The communicant alleges, for instance, that the refusal of the Party concerned to consider claims relating to the environment in general, such as considerations relating to air quality, nature protection or climate change in EIA procedures, denies members of the public the opportunity to “challenge the substantive and procedural legality” of such a decision. In support of its allegation, the communicant refers to a recent decision by the Administrative Court (Case 2010/06/0262–10, Automobile Testing Centre Voitsberg).⁶ According to the communicant, these features of Austrian law are not in compliance with the requirements of article 9, paragraph 2, of the Convention.

34. With respect to climate change considerations, the Party concerned states that:

[Q]uestions 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.

35. 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”.

⁶ Communicant’s submission of 6 April 2011, annex.

36. The Party concerned argues that the EIA Act is in accordance with the general rule in administrative proceedings (and therefore in any 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” when the EIA procedure is carried out (a minimum of 200 signatures is necessary) (see also para. 19 above). The communicant replies that the latter is not possible in the case of a simplified EIA procedure or an IPPC procedure.

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

37. 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. 15 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 limitations on 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.

38. 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. 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., the Industrial Code — regular procedure and update/changes of permits; the Waste Management Act; the Mining Act; the Forestry Act; and the Water Act, etc.).⁷ However, the Party concerned 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”.

39. The Party concerned argues that the limitations on standing under Austrian legislation are not in non-compliance with article 9, paragraph 3, of the Convention, because the Convention does not pre-define certain criteria, and argues that the 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, this margin of discretion has been correctly used and applied by Austria.

40. 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 under the EIA legislation or can ask the Ombudsman (who has standing under some laws) or an NGO to represent their interests.

⁷ See table submitted by the communicant on 15 February 2011 and agreed by the Party concerned (additional information on standing for the public in Austrian legislation, annex)

Locus standi for non-governmental organizations to challenge acts and omissions by public authorities (art. 9, para. 3)

41. 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.

42. The communicant concedes 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 following European Union (EU) Directive 2004/35/EC. However, most of the sectoral laws — such as the Industrial Code, regular and simplified procedure; the Waste Management Act; the Mining Act; the Forestry Act; the Water Act; the Prevention Procedure; and nature protection laws of the provinces — do not provide for NGO standing. This is supported by the table provided by the communicant and agreed by the Party concerned.

43. The communicant adds that a number of acts and omissions concerning permitting, planning and programming, and relating to the environment, are not subject to legal review at all. 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; strategic environmental assessment procedures on federal transport plans; environmental quality standards infringements; or EIA screening decisions. In this connection, the communicant also stresses that civil law remedies are not suitable for NGO or public interest litigation, referring in this regard to the PM₁₀ air quality case of Graz. In that case, a citizen of Graz lodged a civil lawsuit against the authorities for allowing levels of fine particles in the atmosphere that exceeded the values set by European and national law, but the case was dismissed, because the applicant was not able to prove that the omission of the authorities to comply with the standards had caused personal damage.

44. For all these reasons the communicant alleges that the Party concerned is not in compliance with article 9, paragraph 3, of the Convention.

45. 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 IPPC procedures — which cover a very broad spectrum of projects — to raise issues also under other laws, ensures compliance with the Convention. In addition, the Party concerned argues that NGOs have full legal standing in environmental complaints under the laws transposing the EU Environmental Liability Directive and draws the attention of the Committee to the fact that in the absence of locus standi, NGOs may request legal representation through the Ombudsman for the Environment.

46. According to the Party concerned there is the possibility for members of the public in general, such as neighbours and anybody covered by the impaired rights doctrine, to challenge any permitting procedure and seek injunctive relief. There is also the possibility for NGOs, the Ombudsman for the Environment and ad hoc citizen groups, which are all vested with special participatory rights under the EIA or the IPPC procedure, to do so. The Party concerned also contends that where administrative law does not provide sufficient protection, persons affected by a project have rights to preventive action under civil law. The Party concerned also refers to the institution of the Ombudsman for the Environment, which deals with citizens’ complaints in the case of misconduct by an authority according to the Federal Constitutional Law (Art 148a B-VG). For all these reasons, the Party concerned argues that the remedies provided under the Austrian system are in compliance with article 9, paragraph 3, of the Convention and are effective.

Right to have acts and omissions of private persons reviewed (art. 9, para. 3)

47. In its communication, the communicant alleges that “it is also not possible to initiate permitting procedures against third parties, e.g., against an operator of an industrial facility without permit. To be more specific, there is no right to initiate administrative or judicial review procedures on acts and omissions of private persons.” 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”.

48. The Party concerned claims that Austrian law entitles natural and legal persons to several remedies against private persons: there are administrative remedies (such as the possibility to have special orders issued against the operator of a plant under the Industrial Code, the Environmental Liability Act or the Water Rights Act) and also civil law remedies, such as preventive action and injunctive relief. Also, the Party concerned contends that “anybody who 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)

49. 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.

50. The Party Concerned has not responded to this allegation.

III. Consideration and evaluation by the Committee

51. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

52. 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. 25 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.

53. In view of the fact that many Parties, including the Party concerned in this case, and the communicants, in their submissions refer to the 2000 Aarhus Convention Implementation Guide,⁸ the Committee stresses that the text of the Implementation Guide, while a tool to assist Parties in their implementation of the Convention, does not constitute an authoritative text for the Committee to follow in its deliberations.

⁸ *The Aarhus Convention: An Implementation Guide*, United Nations publication, Sales No. E.00.II.E.3.

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

54. As noted above (see para. 26), the communicant alleges that Austrian legislation is not in compliance with article 4, paragraph 2, because when the authorities refuse to provide the requested information, they do so by way of simple letter that does not qualify as an “official notification” needed to seek remedies thereafter, and a separate written request for such official notification is therefore necessary. The communicant does not challenge that the simple letter of refusal is generally provided within the time limits prescribed by the Convention and in writing. Rather, it challenges the legal status of this written refusal.

55. Although the communicant asserts that this requirement for a separate request for refusal should be analysed under 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,” or the applicant so requests, paragraph 7 requires that a refusal “shall be in writing”. 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”.

56. According to article 4, paragraph 7, of the Convention, a refusal in writing shall be made as soon as possible and at the latest within one month. It should also state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. It follows that one of the purposes of the refusal in writing is to provide the basis for a member of the public to have access to justice under article 9, paragraph 1, and to ensure that the applicants can do so on an “effective” and “timely” basis, as required by article 9, paragraph 4. The possibilities for a review procedure seem to be significantly delayed by the system envisaged under Austrian law, i.e., that a separate request is necessary to obtain an “official notification” that would enable the applicant to seek the remedies under article 9. Moreover, if this request is not satisfied due to failure of authorities to provide an official notification, a further request (devolution request) has to be submitted. The Committee finds that the Party concerned, by maintaining this system, where a specific form (“official notification”) must be requested in order to be used before the courts, and where authorities may fail to comply with such a request, is not in compliance with article 4, paragraph 7, of the Convention.

Timeliness of review procedures relating to information requests (art. 9, para. 4)

57. 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. 29 above).

58. 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 a “timely” procedure and an “effective remedy” (art. 9, para. 4).

59. 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 fails to provide official notification 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, can it 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 a timely review procedure with respect to requests for information, as required by article 9, paragraph 4 of the Convention.

Locus standi for individuals to challenge decisions, acts and omissions (art. 9, paras. 2 and 3)

60. The communicant alleges that Austrian law provides for limited locus standi for individuals to challenge decisions subject to article 6 of the Convention, whereas the Party concerned disagrees with the communicant's position (see paras. 32–36).

61. 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 ECE/MP.PP/C.1/2006/4/Add.2, 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 to its general obligations under articles 1, 3 and 9 of the Convention.

62. 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 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 (see para. 18 above) is consistent with the objective of giving wide access to justice.

63. In the view of the Committee the standing criteria for individuals set by Austrian legislation do not seem to run counter to the objectives of the Convention regarding wide access to justice. However, the definition of “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). The information provided does not sufficiently substantiate the allegations, e.g., by reference to relevant case-law, to the extent that the Committee finds the Party not to comply with article 9, paragraphs 2 and 3, in these respects. Despite this, the Committee finds that the information before it raises some concern as to how this provision of the EIA Act 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 reviewable claims sought by the individuals (art. 9, para. 2)

64. The communicant alleges that the Party concerned refuses to consider claims relating to the environment in general, such as claims related to 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”.

65. As noted previously by the Committee in its findings on communication ACCC/C/2008/33 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.3, 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.

66. 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, and that in such situations, individuals may also raise issues of general environmental concern. However, the Committee understands that it is up to the courts to consider whether they will in fact take up such more general environmental issues. As an example, the communicant refers to the decision of the Administrative Court (Case 2010/06/0262–10, Automobile Testing Centre Voitsberg), which ruled that neighbours are not entitled to invoke environmental provisions that go beyond the impairment of rights doctrine.⁹ However, the information provided does not sufficiently substantiate, e.g., by reference to recent case-law, that this indeed reflects the general court practice. Therefore, the Committee does not conclude whether the Party concerned is in a state of non-compliance with article 9, paragraph 2, of the Convention. The Committee nevertheless raises a concern with respect to the line of reasoning by the Administrative Court, and notes that if this was the line generally adopted by Austrian courts, this would amount to non-compliance with article 9, paragraph 2.

Locus standi for non-governmental organizations to challenge acts and omissions by public authorities (art. 9 para. 3)

67. 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 outlining the possibilities for the public concerned to seek standing as provided for by article 9, paragraph 3, of the Convention. The Party disagrees that individuals and NGOs are denied standing and refers to the wording of the provision, “where they meet the criteria, if any, laid down in national law”, and to the possibility to seek judicial review under article 9, paragraph 3, through an ad hoc citizen group, an NGO or the Ombudsman for the Environment (see paras. 37–48 above).

68. Article 9, paragraph 3, applies to a broad range of acts or omissions, while at the same time it allows for more flexibility — as compared to article 9, paragraphs 1 and 2 — by the Parties in implementing it. 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.

69. The Committee has considered the criteria for standing under article 9, paragraph 3, in several cases. For instance, in communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para. 35) it noted that:

⁹ English translation taken from the communicant’s comments of 16 November 2011, para. 11.

[T]he 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 the other 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” (ibid., para. 36). In addition, in communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, para. 29), 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”.

70. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e., the extent to which national law effectively blocks access to justice 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” (see ibid., para. 30).

71. While they may provide standing for neighbours, a number of Austrian environmental laws presented to the Committee¹⁰ do not provide standing for NGOs at all. Moreover, in addition to these sectoral environmental laws which do not provide locus standi to NGOs, there seem to be rather limited avenues available to NGOs to actually challenge acts and omissions by public authorities that contravene provisions of its national law relating to the environment. These avenues include: (a) when the procedure envisaged by the sectoral law at issue is consolidated with the EIA or IPPC procedure; (b) under the environmental liability laws; and, in any event, (c) through the Ombudsman for the Environment, who according to the sectoral or provincial legislation, may or may not have the right to access the courts. The administrative procedures failing, there is a possibility for those affected to seek civil remedies.

72. The Committee, in evaluating the compliance of Austrian law with the Convention, considers the general picture described by the parties. It understands that, in effect, under Austrian law, there is insufficient possibility for a members of the public to challenge an act or omission of a public authority, if the procedure is not consolidated under the EIA or IPPC procedures, or if they cannot prove that they may be adversely affected by environmental damage so as to benefit from the laws transposing the EU Environmental Liability Directive. In addition, members of the public who cannot prove that they are affected by a project have insufficient means of recourse to civil remedies.

73. In the view of the Committee, outside the scope of the EIA and IPPC procedures and environmental liability, the conditions laid down by the Party concerned in its national law

¹⁰ See common table submitted by the Party concerned and the communicant on 15 February 2011 (additional information on standing for the public in Austrian legislation, annex).

are so strict that they effectively bar NGOs from challenging acts or omissions that contravene national laws relating to the environment (cf. findings in previous cases referred to in paras. 69 and 70 above). The fact that there is a possibility that the procedure laid down under the sectoral environmental laws may be consolidated in the framework of the EIA or IPPC procedure for the purposes of a large project or that environmental liability and civil law remedies may apply, under conditions, does not compensate for the failure to fulfil the requirements of article 9, paragraph 3, concerning other acts and omissions.

74. The Party concerned emphasizes the importance of the institution of the Ombudsman for the Environment and the possibility for a member of the public, including an NGO, to ask the Ombudsman to take on its claims. The Committee notes, however, that according to the table prepared by the communicant and agreed by the Party concerned, the authority of the Ombudsman for the Environment may be limited, as it does not have standing in procedures of many sectoral laws relating to the environment other than the EIA and IPPC procedures, environmental liability, nature conservation procedures and waste management. Moreover, the Ombudsman has discretion whether or not to bring a case to court despite the request of a member of the public, including an NGO.

75. In the light of the considerations set out above, the Committee finds that the Party concerned, in failing to ensure standing of environmental NGOs to challenge acts or omissions of a public authority or private person which contravene provisions of national law relating to the environment, is not in compliance with article 9, paragraph 3, of the Convention.

Right to have acts and omissions of private persons reviewed (art. 9, para. 3)

76. As was stated in the table prepared by the communicant and agreed by the Party concerned,¹¹ in principle members of the public can only bring claims against private persons under Austrian legislation with respect to “nuisance from smell, noise, smoke, dust, vibrations or in other ways”. As regards the scope of reviewable claims under article 9, paragraph 2, the Party concerned asserted 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. 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 on this ground.

IV. Conclusions and recommendations

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

¹¹ Ibid.

A. Main findings with regard to non-compliance

78. The Committee finds that the requirement for a separate “official notification” as a precondition for an appeal of a denial of an information request is not in compliance with article 4, paragraph 7, of the Convention (see para. 56).

79. The Committee finds that the Party concerned, by not ensuring access to a timely review procedure for access to requests for information, is not in compliance with article 9, paragraph 4, of the Convention (see para. 59).

80. The Committee finds that the Party concerned, in not ensuring standing of environmental NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws, is not in compliance with article 9, paragraph 3, of the Convention (see para. 75).

B. Recommendations

81. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties to the Convention, 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 that the Party concerned:

(a) Take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) The procedure for having a refusal of a request for information reviewed is simplified for the requester. This could preferably be done by requiring any written refusal of a request for information to have the legal status of an “official notification” and that any such refusal is to 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;

(ii) 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;

(iii) Criteria for NGO standing to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention be revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EIA, IPPC, waste management or environmental liability laws.

(b) 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.
