20.11.2007

Inventory of EU Member States' measures on access to justice in environmental matters Comments by Austria

With regard to the summary report as well as the country report for Austria, the Federal Ministry for Agriculture, Forestry, Environment and Water management (BMLFUW) would like to avail of the opportunity of commenting some initial details on the legal requirements mentioned.

We are grateful for the extended commenting period in our case due to other international Aarhus activities but would have appreciated a minimum of contacts to Focal points. While we focus here on some of the textual shortcomings in this study, the Austrian authorities may not be satisfied on the overall approach taken.

The general question must be permitted why clear-cut background information from Aarhus subsidiary bodies was no fed into the study´s terms of reference from the beginning. For illustration, we would like to refer here to the 2005 Almaty Decision II/2 of Aarhus Parties on promoting effective access to justice[1], the 2006 findings of the Compliance Committee set up as a specialized subsidiary body to the Convention and a larger look at the ongoing activities of the corresponding Task Force.

That having said Austria stays further committed to fair and even approaches at ECE level if appropriate to strengthen enforcement and implementation in line with the EPRG 2006 document.

Country report for Austria:

2. Access to justice in environmental matters
2.1.2. legal standing

In the first paragraph on page 10 the report refers to the existing legislation in Austria giving a legal standing to NGOs in administrative proceedings regarding environmental issues transposing Directive 2003/35/EC. The reference to the Waste Act should be corrected as this law applies in general to IPPC facilities. Therefore, the 3rd sentence should be read as follows:

> "According to Sect. 42 of the Waste Management Act 2002 (Abfallwirtschaftsgesetz 2002) for procedures concerning IPPC installations …"

With regard to the reference of IPPC installations (instead of waste facilities) we would ask you to correct this throughout the entire report.

Furthermore, Sect. 356b of the Trade Act asserts the same rights to NGOs as Sect. 42 of the Waste Management Act. However, we feel that this is not clearly enough expressed when referring to the Trade Act in the parentheses of the last sentence.

Moreover, there are further provisions existing in the Austrian legislation which provide the same rights to NGOs in procedures relating to IPPC-installations. These should be mentioned in the country and summary report as well:

[1] compare para 14 in particular

- Sec. 7 para. 3 Emission Protection Act for Steam Boilers (Emissionsschutzgesetz für Kesselanlagen), Federal Law Gazette I No. 150/2004, as amended by FLG I No. 84/2006
- Sec. 121 para. 11 of the Mineral Resources Act (Mineralrohstoffgesetz) Federal Law Gazette I No. 38/1999, as amended by FLG I No. 113/2006

3. Assessment of the legal measures for implementing article 9 (3) requirements on access to justice

Concerning the 4th paragraph on page 13 the second sentence should be read as follows:

“Regarding environmental impact assessment and permitting procedures concerning IPPC installations, ..."

Summary report:

2.2. Legal standing

On the 3rd paragraph on page 7 the third sentence is wrong and should be read as follows:

"The interpretation is very strict in practice and, in Austria, for example with the exception of EIA proceedings and IPPC facilities ..."

On the 2nd paragraph on page 9, in the second sentence the expression between parentheses concerning Austria should be changed into:

"Standing based on procedural rights is granted in Austria (only for EIA and IPPC)...."

3. Assessment of the legislative measures implementing article 9 (3) requirements on access to justice

With regard to the overall assessment done by the authors and the comparative table of EU-25 we are surprised by the final assessment for Austria as 3 out of 4 results assessing the criteria are positive as well as there are other positive facts mentioned in the remaining text. The assessment by tables annexed to the summary report for instance shows more clearly some of the merits of the Austrian system concerning costs and effective remedies. No *actio popularis* was foreseen as the Austrian administrative law in its tradition follows the concept of asserting procedural rights to persons having a legitimate interest.

As for the predominant criterion of legal standing identified by the authors as the most important criterion, other means of access to justice such as the ombudsmen etc. were not taken into account as stated on page 17. However, the Austrian institution of environmental attorney (*Landesumweltanwalt*) is qualified as being a good if not excellent instrument for raising environmental issues in courts (para. 4 on page 19). This fact obviously did not count at all for the overall assessment.

The argument that the study focuses on judicial and administrative remedies/procedures only, does not explain in a comprehensive let alone legally satisfactory way the reason why such an instrument does not contribute under the criterion of legal standing or may compensate one of the remaining criteria. As a matter of fact, the Austrian environmental attorney has legal standing and asserted procedural rights established by law.

On the requirements for Aarhus Parties and Member States transposing access to justice, the Aarhus Compliance Committee itself already stated last year its legal view in its findings

and recommendations with regard to compliance by Belgium (ECE/MP.PP/C.1/2006/4/add.2). According to that Committee's expression on Article 9 (3), the Convention does not define "the criteria, if any, laid down in national law" nor does it set out the criteria to be avoided: "Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice".

As Aarhus Parties are not obliged to establish an *actio popularis* and could employ some sort of criteria (being affected or having an interest), the system of a popular action should be assessed as one way transposing this article rather than being the only solution (see para. 35 and 36).

In our conviction a comparison of national systems as undertaken in this study should have allowed at least the same flexibility on the instruments installed by each of the 27 MS as in the view of the Aarhus Compliance Committee itself.