

Transboundary Access to Justice – Some Austrian experience



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Overview

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OEKOBÜERO – Coordination Office of Austrian Environmental organizations

- 15 Austrian member organizations including
- FoE Austria, Greenpeace CEE, WWF Austria
- Focus on environmental law and public participation
- Member of J&E, EEB and European ECO-Forum

Justice and Environment (J&E)

- European Network-NGO with 12 member organizations from 12 EU and SEE countries
- Implementation of Environmental Law
- Legal support and litigation for the public concerned
- Legal studies and policy recommendations

Austrian legal framework

- Espoo projects are regulated in EIA-act or IPPC-acts
- **Consolidated permitting** procedures (EIA = project permit)
- No AtJ regarding plans and programmes
- Participation in permitting procedures is condition for AtJ (standing)

Standing for the Austrian public

- Art 19 EIA-act (UVP-G 2000)
- Neighbours (health, property)
- Environmental Ombudsman
- Citizens groups (Bürgerinitiative, 200 signatures, 6 weeks)
- NGOs (EIA-act pre-registration, 30 NGOs)
- Municipalities

Standing for parties outside AT

- Basically literal transposition (Espoo) of directive 2003/35/EC on national level
- Some shortcomings in most Bundesländer (certain IPPC-installations)
- Pre-condition for **NGO-standing** is notification of other state (Art 10 EIA-act)
- When notified standing for NGOs from foreign state (Art 19 par 11 EIA-act)
- **Foreign neighbours** included (without notification?)
- **Municipalities** (after recent court decision)
- Project applicant has to provide for translation of relevant documentation

Standing provision for foreign NGOs

Art 19 par 11 EIA-act: An environmental organisation from a foreign state may exercise (...)

- if this state has **been notified** (...),
- if the **effects impact that part of the environment** in the foreign state whose protection is pursued by the environmental organisation and
- if the environmental organisation **could participate** in an environmental impact assessment procedure and a development consent procedure if the project was implemented in this **foreign state**.

Potential obstacles for transboundary procedures

- Language (translation not always provided; quality, quantity)
- Foreign legal system
- Foreign procedural requirements
- Standing if no notification?
- MS rejects consultation, but public wants to participate?

Espoo vs Aarhus (notification)

- Espoo Convention and EU-directive 2003/35/EC request agreement of other state for consultations (Art 7 par 2 EIA-directive)
- But Aarhus Convention not: it refers to **the public concerned**/and principle of non discrimination
- Condition that MS have to agree on consultations (Art 7 par 2 EIA-directive) could be in conflict with the Aarhus Convention
- Austrian legal position beyond Art 7 par 2, but not for NGOs

Who is the “public concerned”? - (1)

Article 2 par 5 Aarhus Convention

5. “The public concerned” means the public **affected or likely to be affected by**, or having an interest in, (...)” including NGOs in any case

Article 3 par 9 Aarhus Convention

9: (...) have access to justice in environmental matters **without discrimination** as to citizenship, nationality or **domicile** and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities

Who is the “public concerned”? - (2)

Aarhus Convention Compliance Committee (ACCC):

The communicant is a non-governmental organization working in the field of environmental protection and falls under the definitions of the public and the public concerned as set out in article 2, paragraphs 4 and 5, of the Convention. **Foreign or international non governmental environmental organizations** that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.

(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1;
ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 26)

Implications of ACCC case law as to EU law

“The Committee notes the point made by the Party concerned (para. 23) that under European Community law, an **international agreement concluded by the Community** is binding on the Community institutions and the Member States, and **takes precedence over legal acts adopted** by the Community. According to the Party concerned, this means that Community law texts should be interpreted in accordance with such an agreement.”
(Case 2006/17 European Community para 58)

Austrian case examples

- A5/R52 motorway Vienna (AT) – Brno (CZ)
- Nuclear Power Plant Mochovce (SK, AT)
- Waste incinerator “Heiligenkreuz” (AT, HU)
- Electric power line Carinthia (AT, IT)

A5 motorway – Vienna-Brno

- Ca. 60 km in AT (40 in CZ)
- **3 parallel EIA procedures in AT** for different sections (south, middle, north; salami slicing?)
- **Espoo** procedure only for northern part (10 km track)
- **Czech NGOs** and **municipalities** wanted to participate also in other EIA
- Project documentation says middle section has no impact to CZ due to a **hill between AT and CZ**
- Case pending at Austrian Highest Administrative Court since January 2010

R52 motorway Brno-Vienna (ca. 60 km)

- Land use planning without SEA and Espoo procedure
- Joint complaint of Czech and Austrian public concerned
- Land use plan was abolished

NPP Mochovce (SK) - (1)

- Extension from two to four reactors
- 2008: **various permitting** procedures without PP, **constructions** started
- SK argues permits of **1986** still valid, EU Commission agrees (!!)
- Slovak and Austrian NGOs filed **lawsuits**, decisions pending
- 2009: NGOs filed **communication to ACCC**
- Draft ACCC decision on 10. Oct 2010: **non compliance**

NPP Mochovce (SK) - (2)

- EIA started 2009/2010 **after international pressure**
- Slovak EIA is **no permitting** procedure
- EIA should be relevant only for „**operational permit**“, after constructions finalized
- **Poor translation** and quality of EIA documentation
- Ten thousands Austrian individuals comment EIA
- Outcome unclear
- Anyway breach of Aarhus Convention (and EIA-directive)

Waste incinerator “Heiligenkreuz” (AT, HU)

- Austrian project few meters close to Hungary
- Heavy resistance in Hungary, but also in AT
- **Comprehensive participation** of Hungarian public
- **Hungarian municipalities** had no standing in first instance
- ACCC case submitted by municipality
- **Second Austrian instance** (court) interpreted foreign municipalities can be seen as „**neighbours**“ (e.g. as to their schools, hospitals etc)
- ACCC case inadmissible after verdict

Electric power line Weidenburg - Somplago (AT, IT)

- ECJ-C 205/08 of 25. June 2009 preliminary ruling
- For EIA threshold (Annex II directive) Austrian (7km) and Italian (45km) part have to be cumulated
- New EIA procedure followed
- No Espoo consultation
- Italian citizen's group standing right rejected
- Case pending

Austrian Espoo facilitation

Website of Austrian Environmental Agency on all Espoo procedures

<http://www.umweltbundesamt.at/umweltsituation/uvpsup/espooverfahren/>

Espoo Commission AT-CZ; AT-SK: regular bilateral meetings

Concluding remarks

- Limited experience until now
- Jurisprudence and practice evolves
- First obstacle is proper consultation procedure
- Translation of documentation is crucial
- Foreign language and legal system are challenge
- Strong foreign (local) partner needed anyway
- Austrian Espoo facilitation is best practice
- Constant information exchange needed

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