Questionnaire
EUFJE Conference 2013, VIENNA
29/30 November 2013

Access to Justice in matters of environmental law

Report from

AUSTRIA

Verena Madner*

A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

There have not been any amendments to environmental law in Austria with regard to standing of individuals and/or NGOs as a consequence of the recent case law of the CJEU.

However, the EIA Act has been amended with regard to access to justice for eNGOs in EIA-screening procedures[1] due to an infringement proceeding. In case of a negative screening decision, "recognized eNGOs" are granted the right to inspect the files and challenge the screening decision with regard to compliance with environmental provisions before the Independent Environmental Senate (Umweltsenat), respectively (as of 1 January 2014) with the Federal Administrative Court of First Instance (Bundesverwaltungsgericht).

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

Although the tradition of the „Schutznormtheorie" is not without any tension with regard to the CJEU's wide concept of individual rights, the Janecek ruling has not lead to any changes in the jurisprudence of the national courts concerning individual standing. Quite recently a case concerning the failure to establish an air quality action plan has been brought to court[2] in which the applicant referred to the Janecek ruling and argued that taking into account both the exceedence of air quality limits in the respective state and her place of residence, she had a right to request an action program. The State Governor (Landeshauptmann) rejected the request as inadmissible. The claim filed with the Administrative Court (Verwaltungsgerichtshof) thereafter was dismissed without further discussing whether the right by EU air quality directive 2008/50/EG grants the right to individuals to request an air quality action plan and a monitoring network to be established, as the claimant, by referring to air quality and monitoring in all of Lower Austria, had failed to establish that the exceedence of air quality limits affected her directly.

---

* This report was extracted from a country study on Access to Justice, the author has prepared for the Commission in 2013.

1 § 3 (7a) EIA Act 2000, Federal Law Gazette I 2012/77 (UVP-G).

2 VwGH 26. 6. 2012, 2010/07/0161.

Up until now, recent judgments of the CJEU (i.a. the Slovak Brown Bear case, C- 240/09) have not led to changes in the jurisprudence of the national courts concerning eNGO standing. In a recent ruling the Administrative Court (Verwaltungsgerichtshof) has stated that Art 9.3 of the Aarhus Convention is not directly applicable and can therefore not be relied on directly by an NGO.[3]

The findings of the DLV ruling have been subject to a series of judgments by the national courts in order to determine the competent tribunal in the sense of Art 10a EIA-Directive to grant effective access to justice.
In a complaint concerning a consent for two high-speed railway projects (Angertalbrücke and Brenner Basistunnel) an eNGO and the Ombudsman for the Environment (Umweltanwalt) argued that the implementation of Art 10a EIA-Directive in Austria was insufficient because the EIA-development consent for a high-speed railway was not subject to full judicial review as such decisions can only be contested by filing a complaint to the Administrative Court (Verwaltungsgerichtshof) which is acting as a court of cassation, but has no competence to ascertain the relevant facts of the case by itself or gather any evidence.
The Constitutional Court (Verfassungsgerichtshof) held in a subsequent decision[4] *that the Administrative Court (Verwaltungsgerichtshof) meets the requirements of a tribunal in the sense of Art 6 ECHR; in the opinion of the Constitutional Court (Verfassungsgerichtshof) this is sufficient for the purpose in question as the law of the European Union*[5] *does not require courts having "full jurisdiction" in order to protect individuals' rights granted by the EIA-Directive.*

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

A main challenge for the Austrian legal system when it comes to access to justice in the field of environment is the right based model of standing and the concept of subjective rights according to the prevailing "Schutznormtheorie".
In order to effectively grant "access to justice" courts will be required to widen their interpretation with regard to standing rights (of individuals) to a certain extent. This widening effort may affect both the identification of those individuals that are entitled to standing on the basis of potential health concerns (as supported in the Janecek case, C-237/07) as well as the range of environmental concerns that individuals are entitled to invoke. According to the prevailing doctrine and case law, individuals are per se e.g. not entitled to invoke BAT-related water quality standard, energy efficiency standards or emission limit values for air quality. Even though the Aarhus Convention and related EU legislation allow for Member States to stick to a right-based approach, it is doubtful if – at least with regard to the rights of individuals to address the substantive and procedural legality of EIA and environmental licensing decision (Art 9.2) – this strict approach is adequate.

Standing rights for eNGOs pose a specific challenge to the Austrian right-based system: So far, extensive standing rights for eNGOs have been granted explicitly in legislation on EIA, IPPC/IED-procedures. Standing rights have also been established in environmental liability legislation. Yet,

---

3 See VwGH 27. 4. 2012, 2009/02/0239 also referring to the respective findings on lack of direct applicability of Art 9.3 in C-240/09, *Slovak brown bear*. In the case an eNGO had requested standing with regard to the issuance of an ordinance (Verordnung) establishing road traffic limitations for trucks with a capacity of more than 7,5t on a road in Styria. The Administrative Court (*Verwaltungsgerichtshof*) pointed out that the relevant provisions of the Road Traffic Act (*Straßenverkehrsordnung*) do not grant any subjective rights with regard to the issuance of an ordinance on traffic-restrictions and can therefore not be invoked by anybody (including an eNGO) to gain standing rights. The court in the case stated that EU law provisions that had been invoked by the NGO (i.e. Directive 2003/35; Regulation 1367/2006) did not confer such a right on the claimants either.

4 With reference to C-379/97, *Upjohn*: VfGH 28. 6. 2011, B254/11.

5 Art 47 of the European Charta of Fundamental Rights (ECFR).

outside the scope of these procedures the legislator has up to now refrained from granting eNGOs standing rights to challenge acts or omissions of a public authority or private person.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

With regard to court fees and cost for administrative procedure access to justice is not prohibitively expensive. In administrative appeal procedures and (as of 1 January 2014) in proceedings before the Administrative Courts of First Instance (Verwaltungsgerichte erster Instanz), members of the public who have standing in procedures have to bear their own costs with regard to legal representation (not mandatory before the Courts of First Instance) and presentation of technical expertise by private experts.
NGOs/citizens' groups repeatedly report that costs for lawyers and especially costs for providing private expert's opinion have a chilling effect on litigation. Apart from these costs it is mainly the time necessary to inspect the files - including official expert opinions - to actively take part in proceedings that keep the public concerned from initiating or pursuing a proceeding.

B. Examples:

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Question Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

An individual has to establish that the exceedence of air quality limits directly affects his/her personal wellbeing and that he/she would be directly affected by the air measures requested. So far, the only case brought to court in this respect was dismissed without further discussing whether the right by EU air quality directive 2008/50/EG grants the right to individuals to request an air quality action plan and a monitoring network to be established as the applicant failed to establish the above mentioned facts.
Yet, even if courts recognize an individual's right to request for an air quality action plan to be established, it may prove difficult to effectively enforce that right, because such an action plan would have to be adopted as an administrative ordinance (Verordnung) and the Austrian legal system does not provide for a procedure in case authorities fail to take a decision and adopt an ordinance (fehlender Säumnisschutz bei Verstoß gegen die behördliche Entscheidungspflicht). In order to meet the requirements of EU environmental law with regard to effective judicial protection of the rights of individuals that have been recognized in the Janecek case, Austrian doctrine came up with the following suggestion[6]: In accordance with the principle of equivalence (Äquivalenzprinzip), the

[6] *Potacs*, Subjektives Recht gegen Feinstaubbelastung? ZfV, 874 (878f).

remedies available in cases where a competent authority failed to issue an administrative decision (Bescheid) in time, may be applied correspondingly, in such way as six months after the plan should have been adopted an individual will have to request in writing that the competence to establish the plan falls with the higher authority (Devolutionsantrag).[7] If the higher authority (e.g. the Minister for the Environment in case the plan should have been drawn up by the State Governor) does not adopt the plan either, an individual would then, again six months later, be entitled to bring a complaint to the Administrative Court (Säumnisbeschwerde). In case the duty to establish the plan was with the highest authority in the first place (e.g. the Minister for the Environment) the Administrative Court (Verwaltungsgerichtshof) may be appealed directly. It has been conceded doubtful whether the time limits that are set for this procedure (six month at least) are in compliance with the right to effective judicial protection.
As regards eNGOs, the Austrian system for standing following a right-based concept, the request of an eNGOs to adopt an air quality plan with regard to health concerns will fail due to the lack of an (explicitly granted) subjective right.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

If the project requires an EIA (it most likely will) NGOs and citizen´s initiatives are entitled to challenge the decision. Individuals may challenge the decision with regard to protection of their health or private property or protection against intolerable nuisance. Individuals are not entitled to challenge the decision on the grounds that it might negatively affect nature.

If the project does not require an EIA, eNGOs and ad- hoc citizens' groups (Bürgerinitiativen) cannot participate in the permit procedure and cannot challenge the permit.
The same is true for individuals: Individuals are not granted standing in the procedure with regard to the mere interest of Natura-2000 protection and they cannot challenge the permit decision for an infrastructural construction project on the grounds that it might negatively affect a Natura-2000 site.

The Nature Protection laws of the states often grant Ombudsmen for the Environment (Umweltanwälte) the right to participate in administrative procedures and to administrative appeal against decisions. Access to the Administrative Court (Verwaltungsgerichtshof) is however restricted.

B.2.2. Does an administrative appeal or an application for judicial review automatically have a "suspensive effect" on the decision at stake?

[7] § 73 General Administrative Procedure Act (AVG).

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a "go-ahead-decision" in your national legal order?

Administrative appeal has automatic "suspensive effect".[8] *As of 1 January 2014 a complaint filed with Administrative Courts of First Instance (Verwaltungsgerichte erster Instanz) will also have automatic suspensive effect.*
However, several environmental laws include provisions offering the possibility to go ahead with the project before a final decision in administrative appeal procedures has been taken.[9]

Complaints against administrative rulings (Bescheide) filed with the Administrative Court (Verwaltungsgerichtshof) and the Constitutional Court (Verfassungsgerichtshof) are extraordinary remedies that do not have suspensive effect by law. However, the Courts can take a decision in favor of suspensive effect upon request of the claimant, unless this would be contrary to mandatory public interest. This decision can only be taken after consideration of all interests affected and after having considered whether the execution of the ruling would cause an unreasonable disadvantage for the applicant.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery). The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

Only those individuals (neighbors) whose subjective rights are affected can participate in the procedure and appeal against the decision and subsequently lodge a complaint to the Administrative Court (Verwaltungsgerichtshof). Subjective rights of citizens to be protected in the permit procedure include protection against health risks and intolerable nuisance as well as protection of property against detrimental influence, whereas compliance with environmental legislation is outside the scope of protection. Therefore neighbors having legal standing cannot claim the observance of BATs that apply to the installation unless they claim successfully that their health is affected by exceedance of limit values.[10]

However, if a permit decision causes nuisances for life or health of people, the competent authority has the possibility to correct/modify this decision ex officio in due consideration of the holder of the authorization's rights.[11]

---

8 § 64 General Administrative Procedure Act (AVG).
9 E.g. § 79 Industrial Code (GewO) with regard to industrial installations.
10 VwGH 14. 3. 2012, 2010/04/0143.
11 § 68 (3) General Administrative Procedure Act (AVG).

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

In the Austrian legal system standing with regard to judicial review is only granted if the applicant had standing rights in the administrative procedure. The applicant has to raise objections with regard to a subjective right within the timeline given in order to maintain these standing rights.[12] *This criterion applies to environmental and non-environmental cases. Standing-rights are a preliminary procedural requirement in order to initiate review.*

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

If there is a valid permit for the landfill, but the waste deposit is not operated within the limits of this permit, the authority has to order the operator to reinstate the proper state of affairs within a period of time to be set, otherwise the authority is competent to close down the site partly or completely.[13]
In case the polluter is not identifiable or capable to take action, the authority may issue an order to the owner of the land under certain conditions.[14]
Individuals are not granted standing rights with regard to the duty of the authority to take action.
eNGOs are not granted standing according to the Waste Management Act (AWG). However, „recognized eNGOs" can file a complaint with the competent authority referring to a substantial damage to waters and request remedial action, but only insofar as rights on water exploitation, excluding public use of waters, are concerned.[15]

[12] § 356b Abs 7 Z 1 79 Industrial Code (GewO).
[13] § 73 Waste Management Act (AWG). See also § 62 Waste Management Act (AWG).
[14] § 74 Waste Management Act (AWG).
[15] § 11 (2) Federal Environmental Liability Act (B-UHG); § 12 (2) Water Management Act (WRG).