NGO participation in environmental matters
Judgment of the ECJ in Case C-664/15

The procedure

The subject-matter of the procecure is a permit to abstract water from a small creek (the Einsiedelbach) to run a snow-making facility on the Aichelberg in the cadastral district of **Karlstift** (**district of Gmünd**, Lower Austria, applicant: Aichelberglifte Karlstift GmbH). This permit is also based on an initial permit by the authority in charge of nature conservation issued in camera.

The project area is located in an **Important Bird Area** and **Special Protection Area under the Birds Directive** (SPA "Waldviertel", AT1201000) which was designated for the protection of bird species that are sensitive to noise and disturbance (several owl, woodpecker and grouse species, black stork, etc.). In 2000, after two years of study, the Aichelberg area was found to be a special refuge for forest bird communities, especially for specialized species inhabiting old growth and dead wood. It was confirmed that the hills surrounding Karlstift provided natural forest communities which are larger and more networked compared to other areas, with a good offer of caves, and the protected species occuring in high densities.

Furthermore, the project is located in a **wetland of international importance**, in a **wildlife migration corridor of international importance**, in the **Green Belt of Europe** and in the **habitat of Austria's only reproducing occurence of the lynx outside the Alps.** The project also affects an adjacent **SCI under Article 4(1) of the Habitats Directive** (AT1201A00) designated to protect, inter alia, several riverine species threatened with extinction.

In 2000, within this area, which is valuable and irreplaceable for many species, the authority granted a temporary permit for a snow-making facility, which was granted again in November 2013 for the expanded state previously made.

Fig. 1: The Einsiedelbach in 2012.

Impacts of technical snow-making

Avifaunistic surveys commissioned by Protect and BirdLife Austria in 2013 showed that all bird species sensitive to noise and disturbance far around the snow-making facility could no longer be detected or only at very low density. Soon after the commissioning of the facility the lynx – which ist subject to strict protection under the Habitats Directive – also disappeared in the area affected by the project.

Among other things by erosion of the over-used ski slope, the Einsiedelbach and the Lainsitz (SCI) were sedimented. In sedimented streams, life is largely extinguished by suffocation of the offspring, damage to spawning grounds, reduction of food supply, etc. The feeding habitats of protected birds and the vulnerable riverine species protected in the SCI, such as the freshwater pearl mussel, are seriously affected. The fresh water pearl mussel is threatened with extinction in Austria and has disappeared during the period of operation of the snow-making facility in the mother bed of the Lainsitz.

Fig. 2: The sedimented riverbed of the Lainsitz in the municipality of St. Martin in December 2015.

Finally, the abstraction of water itself leads to ecological damage. The Einsiedelbach has a mean discharge of only 9 l/s [1]. Especially in winter, when the water is needed for snow-making, there is even less water available due to the low temperatures, so that even without any water withdrawal the discharge falls as low as 3 l/s [2]. The lower the discharge, the smaller the remaining body of water and the faster the waters freeze.

To make matters worse, a few meters after water abstraction, the wastewater treatment facility, put into operation in 2005, discharges into the creek.

1 Discharge, which, averaged over ten years, is reached on average during 347 days of the year (Q_{347d}).

2 Lowest known outflow (NNQ_t)

Fig. 3: The Einsiedelbach in January 2014 about 400 m below the point of water abstraction for technical snow-making.

The serious impacts of technical snow-making and sedimentation of running waters on the endangered species, some of which are about to become extinct, have been documented repeatedly in numerous international studies for many years.

From the point of view of Protect, the negative environmental impact of the project – in the sense of the Birds, Habitats and Water Framework Directive and the related case law of the European Court of Justice – can be classified as extremely serious. Protect therefore submitted objections in the proceedings against another approval of technical snow-making.

The goal was and is to achieve the refusal of the request and thus to end as soon as possible the destruction and considerable damage to habitats and species – even within areas protected by the law.

Since in Austria the Århus Convention has not been converted into national law as to water and nature conservation issues there is no legal basis for a participation of NGOs in decision-making. Thus the district authority of Gmünd and the Lower Austria Regional Administrative Court declared the objections of Protect to be inadmissible.

Both instances ignored the both legally and technically substantiated submissions of Protect, which inevitably had to raise doubts about the correctness of the nature conservation expert's report as well.

Protect brought proceedings contesting that ruling before the Supreme Administrative Court, Austria which referred the matter to the European Court of Justice for a preliminary ruling.

The Århus Convention – objectives and application

The Århus Convention regulates access to information, public participation in decision-making and access to justice in environmental matters. The Convention was signed in 1998 ...

- *"Affirming the **need to protect, preserve and improve the state of the environment** and to ensure sustainable and environmentally sound development"*,
- *„Recognizing that adequate **protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to live itself"***
- and *"recognizing also that **every person has the right to live in an environment adequate to his or her health and well-being**, and the duty, **both individually and in association with others, to protect and improve the environment for the benefit of present and future generations**"*

... and ratified by Austria on 17 January 2005 [3].

Each Contracting Party – including Austria – **must ensure that *"persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way of their involvement"***.

The objective of Article 9(3) of the Århus Convention is to safeguard effective environmental protection through access to justice. The procedural rules shall ensure the protection of rights the individual derives from EU law (here from EU environmental law including the provisions of the Water Framework Directive) in each case. Environmental protection organisations, which defend the interests of the public in environmental matters, must be able to enforce compliance with EU environmental law before a court.

Exercising the rights conferred by EU law must not be rendered in practice impossible or excessively difficult. Member States shall grant wide access to justice. According to Article 9(4) of the Convention, these procedures shall be fair, equitable, timely and not prohibitively expensive. The public concerned must not be disadvantaged vis-à-vis the other parties to the proceedings.

The judgment of the European Court of Justice in case C-664/15 is of great importance for the enforcement of environmental and nature protection law throughout Austria and Europe and is in line with the judgments in the cases C-240/09 [4], C-115/09 [5], C-137/14 [6] and C-243/15 [7], all of which grant environmental protection organisations the right to sue in compliance with the Århus Convention, in various environmental and nature protection matters.

The NGOs have a watchdog function defending a highly valued public interest in protecting the environment and nature in all its varieties. But it is not the job of environmental organizations to do the work of the authorities.

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3 Federal Law Gazette III No. 88/2005, published in United Nations Treaty Series, Vol. 2297, p. 272.

4 European Court of Justice (2011a): Judgment of 08 March 2011 in Case C-240/09 Lesoochranárske zoskupenie VLK v Ministervvo životného prostredia Slovenskej republiky, URL: http://curia.europa.eu/juris/document/document.jsf?docid=80235&doclang=EN.

5 European Court of Justice (2011b): Judgment of 12 May 2011 in Case C-115/09 Federation of the Environment and Nature Conservation Germany, Landesverband Nordrhein Westfalen e. V. v District Government Arnsberg, URL: http://curia.europa.eu/juris/document/document.jsf?text=&docid=82053&pageIndex=0&doclang=EN.

6 European Court of Justice (2015): Judgment of 15 October 2015 in Case C-137/14 European Commission v Federal Republic of Germany, URL: http://curia.europa.eu/juris/document/document.jsf?docid=169823&doclang=EN.

7 European Court of Justice (2016): Judgment of 08.11.2016 in Case C-243/15 Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín, URL: http://curia.europa.eu/juris/document/document.jsf?text=&docid=185199&pageIndex=0&doclang=EN.

To date, authorities have often approved projects submitted by applicants in spite of their well-known and significant adverse environmental impacts or relying on untrue or misleading expert‘s reports, further worsening the already inadequate or poor conservation status of habitats and species.

The judgment must not distract from the fact that it is – now and in the future – the responsibility of the State and its authorities to investigate wholly, carefully and objectively in licensing procedures, to carry out sound procedures and to ensure full application of the Convention on Biological Diversity and mandatory EU law such as the Birds Directive, the Habitats Directive or the Water Framework Directive – and to achieve the objectives of the Conventions and Directives.

The development of biodiversity

The diversity of life, also called biodiversity or biological diversity, is the prerequisite for existence on earth – including man's.

The first version of the **Birds Directive** of 1979[8] already stated that: *"A large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, very rapidly in some cases. This decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby"*.

In addition, when the **Habitats Directive** was drawn up in 1992[9], the legislature stated: *"In the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them"*.

Numerous other international regulations lay down similar statements, such as the **Convention on Biological Diversity**, ratified by Austria on 18 August 1994, the decision of the National Council expressly including the fulfillment of this State Treaty[10].

The Convention on Biological Diversity unequivocally holds that *"it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source"*. It was drawn up, inter alia, ...

- *"Conscious also of the **importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere**"*,
- *"Affirming that the **conservation of biological diversity is a common concern of humankind**"*
- and *"Reaffirming also that **States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner**"*

8 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, published in OJ No L 103 of 25 April 1979 [since 15 February 2010, the codified Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, published in OJ L 20 of 26 January 2010, as last amended by Council Directive 2013/17/EU of 13 May 2013, published in OJ No. L 158 of 10 June 2013].

9 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, published in OJ No L 206 of 22 July 1992 [as last amended by Council Directive 2013/17/EU of 13 May 2013, published in OJ No L 158 of 10 June 2013].

10 Federal Law Gazette No. 213/1995.

... and **covers biological diversity, genetic diversity within individual species and the diversity of ecosystems**.

Although the dangers of ecosystem deterioration and deterioration of species and their habitats are long-standing, there has been no change in granting practice.

The result is continuous and severe damage to biodiversity: Inger et al. (2015) note that in Europe between 1980 and 2009, i.e. while the EU Member States were to apply the Birds Directive, the number of birds fell further by 421 million individuals, in excess of the population decline recorded in 1979. The Common farmland bird indicator for Europe notes a decline in number of 55 % over the period 1980-2015 (European Bird Census Council 2017).

"Highlights" in Austria are, for example, declines in number of 81 % for the serin, 82 % for the partridge or 90 % for the corn bunting during an observed period of only 18 years (1998 to 2016) (Teufelbauer & Seaman 2017).

The Living Planet Report (Oerlemans et al. 2016) holds that between 1970 and 2010 more than half of the populations of vertebrates worldwide (mammals, birds, fish, amphibians, and reptiles) disappeared.

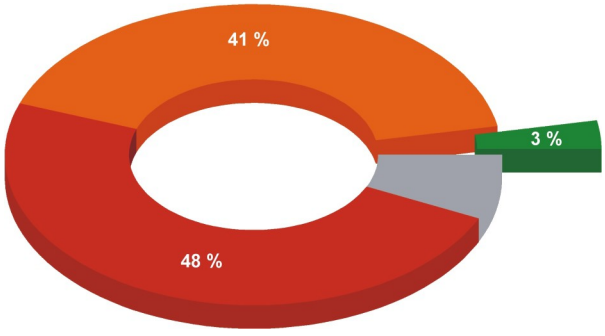
Van Swaay et al. (2013) found that the populations of grassland butterflies in the EU have decreased by around 50 % between 1990 and 2011, primarily due to the dramatic loss of grassland biodiversity.

Long-term surveys in Germany on the species and number of individuals of insects show a frightening negative trend: *"Even **in nature reserves**, this trend does not stop. In several studies, a **decrease in insect** biomass of **80 % was found** (Sorg 2013, Schwenninger & Scheuchl 2016). In the context of a hoverflies study, for example, **declines in species numbers between 30 % and 70 % were recorded between** 1989 and 2014, **and losses of individuals range from 70 % to 96 %** (Ssymank, unpublished)."* (Federal Agency for Nature Conservation 2017)

The European Environment Agency (2015) states unequivocally on *"Terrestrial and freshwater biodiversity"*:

- *"5–10 year trends: High proportion of protected species and habitats in unfavourable conditions."*
- *"20+ year outlook: Underlying drivers of biodiversity loss are not changing favourably. Full implementation of policy is needed to deliver improvements."*.

Across the EU, a favorable conservation status can be identified only for 23 % (less than a quarter) of the more than 1,200 species under the Habitats Directive (European Commission 2015). The situation in Austria is even worse: in the Alpine biogeographical region only 18 % of the species under the Habitats Directive are in a favorable state of conservation, and in the Continental region only 13 % (Federal Environmental Agency 2013).



The conservation status of habitat types in Austria is particularly dramatic: For the Continental biogeographical region of Austria, a favorable conservation status is taken for only 3 % (!) of the habitat types (see Fig. 4, Federal Environmental Agency 2013).

Fig. 4: Conservation status of habitat types under the Directive in the continental biogeographical region of Austria for the evaluation period 2007-2012: green = favorable, orange = inadequate, red = bad, gray = unknown [data from Federal Environmental Agency 2013].

ROCKSTRÖM et al. (2009) have found that the loss of biodiversity already caused poses the greatest threat to life on Earth – far worse than the dangers of climate change.

To make things worse the fading of species following the habitat destruction takes place with a significant delay: The habitat damage done today will bring additional biodiversity losses in years or decades – or vice versa: the loss of biodiversity, which we note today, has its cause in habitat destruction years ago (see, for example, TILMAN et al. 1994, DULLINGER et al. 2013, HYLANDER & EHRLÉN 2013, ESSL et al. 2015a and 2015b).

The massive interventions in natural or semi-natural habitats in recent years, attacking even the few remaining areas of retreat, will still become visible, and thus biological diversity will be reduced further, the individual numbers will continue to decline and population networks will be even more suppressed.

BARNOSKY et al. (2011) conclude from their research that mass extinction has already begun. It can only be stopped if the habitat destruction is reversed immediately (without delay) and further threats to the species are avoided – which is in line with the **obligation to restore laid down in the Natura 2000 directives**.

In November 2017, 15,373 scientists from 184 countries – including Franz Essl, Stefan Dullinger, Manfred A. Fischer and Thomas Wrbka and Konrad Fiedler from Austria – published an urgent appeal "World Scientists' Warning to Humanity" (RIPPLE et al. 2017, in BioScience), noting that it requires wide public pressure on politics to obtain the necessary changes.

It is the duty of the politicians and the European Commission to immediately ensure compliance with the Conventions and Directives in the light of the standardized targets, which in any case precludes any further deterioration of the environment and requires recovery measures.

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