

**1. When did NETT apply for participation in the regional planning committee regarding the 4-lane route option? What form of participation was requested by NETT? When was the request for participation rejected?**

The application for participation was carried out by 14<sup>th</sup> February 2008 in written form.

NETT requested for a participation in the regional planning committee with equal rights.

The rejection was communicated by a letter of the department 16 of the Federal State Government of Styria (Fachabteilung 16 der Steiermärkischen Landesregierung) dated 17<sup>th</sup> March 2008.

**2. In addition to participation in the regional planning committee, were there other ways in which NETT might have participated in the decision-making process regarding the four-lane route option? If so, did it make use of these options?**

There were no other ways to participate effectively in the decision-making process.

There was merely a round table for the NGOs organized as an informal meeting and forum of discussion without any relevance for the decision-making process. NETT was taking part in the discussion until that point where an open not predetermined decision process came out to be highly unlikely since the 4-lane route option was already a premise, and until there were instructions not to discuss any other options, e.g. improvement of the existing two-lane route.

Moreover, the decision-making process was untransparent, deficient and not comprehensible. The meetings of the state forum as decision-making forum within the hierarchy of the already mentioned discussion forums installed in 2004 have stopped in the same year (2004). The predetermination of the four-lane solution happened exclusively on a political level.

**3. Did NETT appeal the decision regarding its non-admission to the regional planning committee regarding the four-lane route option? Alternatively, is NETT of the view that the available procedure was too lengthy or otherwise deficient?**

NETT did appeal this decision. The legal representative of NETT appealed within the respite of 14 days and submitted a complaint at the Constitutional Court (Verfassungsgerichtshof) against the rejection Nr. B 1671/08, V44/08. The complaint at the Constitutional Court was rejected at 15<sup>th</sup> December 2008. According to the statement of the Constitutional Court the admission/non-admission to the regional planning committee has not to be decided by the Federal State Government of Styria by a notification; furthermore, the prescription concerning the members of the committee is only an organization norm, which is not influencing the legal sphere of NETT. NETT is not affected by these sitting prescriptions, neither directly nor actually – following the statement of the Constitutional Court. Hence, the national legal claim is exploited. According to the Supreme Court, there is no option to claim admission to the planning committee or to appeal their decisions.

**4. What is the legal relevance of the fact that the refusal to allow NETT to participate in the regional planning committee was communicated by a letter instead of by official notification?**

As stated above, the decision concerning admission/non-admission has not to be made by an official defeasible notification, in the view of the Constitutional Court. The regulation of which persons/institutions have to be admitted to the committee is not defeasible on a national level. From the point of view of NETT the formation of the regional planning advisory board Liezen does not conform to the principles of the Aarhus-Convention and violates the directly applicable directives 2003/4/EG as well as 2003/35/EG and the directives of the additional protocols for the Alpine Convention. According to article 7 of the Aarhus-

Convention, a public participation in a fair and transparent way shall take place during the preparation of environmental programs and planning. According to article 1 each Party shall ensure the right to public participation in the decision process. In accordance with article 6, paragraph 4, early public participation shall be provided, when all options are open and effective public participation can take place. Again according to article 7 the possibility for the public to submit any comments or opinions *that it considers relevant to the proposed activity* shall be provided. Each Party shall ensure, according to article 8, that the results of the public participation is adequately taken into account. According to article 2, paragraph 5 *non-governmental organizations promoting environmental protection and meeting any requirements under national law* have ex lege an interest. This is the outcome of the directive 2003/35/EG, in implementation of the Convention, in particular article 2. The selection of the alternative options, which was apparently made by the planning advisory board, is therefore important and predetermining, so that NGOs shall be included especially in this selection process. There is no need to argue further that the proposals of the planning advisory board for the 4-lane express highway und the selection of the alternative options is an environmentally relevant issue according to the Aarhus-Convention.

The prosecuted authorities admitted that the organisation has special knowledge on regional planning but without any claim according to substantive or formal law. These circumstances contradict the Aarhus-Convention and its implementation through the mentioned EG-directives.

**5. How, in your view, does the decision on the 7.5-ton ban for lorries fall under article 6, paragraph 1 or articles 7 or 8 of the Convention?**

The decision on the 7.5-ton ban for lorries has to be made in accordance to the following legal foundation:

§ 43 StVO Verkehrsverbote, Verkehrserleichterungen und Hinweise.

(§ 43 of the road traffic regulations: traffic bans, facilitations and advices)

.....

*(2) Zur Fernhaltung von Gefahren oder Belästigungen, insbesondere durch Lärm, Geruch oder Schadstoffe, hat die Behörde, wenn und insoweit es zum Schutz der Bevölkerung oder der Umwelt oder aus anderen wichtigen Gründen erforderlich ist, durch Verordnung*

*a) für bestimmte Gebiete, Straßen oder Straßenstrecken für alle oder für bestimmte Fahrzeugarten oder für Fahrzeuge mit bestimmten Ladungen dauernde oder zeitweise Verkehrsbeschränkungen oder Verkehrsverbote zu erlassen,*

.....

*Bei der Erlassung solcher Verordnungen ist einerseits auf den angestrebten Zweck und andererseits auf die Bedeutung der Verkehrsbeziehungen und der Verkehrserfordernisse Bedacht zu nehmen.*

[To keep away danger or molestation, in particular because of noisiness, smell or harmful substances, the authorities shall, if and so far it is required for the protection of the people or the environment or for other important purposes, impose via regulations

a) permanent or intermittent traffic restrictions or bans for certain areas, roads or sections of roads regarding all kinds or particular kinds of crafts or regarding crafts with special loads,

.....

During the imposition of such regulations the intended purpose and the impact of the traffic relations and need have to be taken into account.]

Therefore, the authorities have to adopt the 7.5-ton ban for lorries, if the restriction is needed to protect environment and people. Hence, it is a matter of decisions, plans, programs or politics relating to the environment according to article 6 and 7 of the Convention. Additionally it concerns an executive prescription and other generally applicable legally binding rules, which can have a significant effect on the environment (art. 8). There is no doubt about the fact, that the decision on imposing or rather not imposing this ban is directly

affecting the healthiness and environment of the persons concerned. So, the application of NETT to be party to the proceedings of the decision-making process shall be accepted. And if such a regulation is not passed, the decision should be made according to article 9, paragraph 4 in written form, to provide the opportunity to appeal the "omission". An adequate and effective legal protection according to art. 9, p. 4 of the Convention is ensured only by an appropriate appealable decision.

The refusal of the right to be party to the proceedings constitutes a serious violation of the Aarhus-Convention, since as a consequence there is no possibility for NETT to communicate its opinion. Therefore, the authorities can not take into account these opinions adequately, which is not conducive to the responsibility and transparency within the decision-making process.

The preamble of the directly applicable directive 2003/35/EG says that an effective public participation in decision-making processes provides the opportunity to communicate opinions and doubts for the public and the possibility to take these opinions and doubts into consideration for the decision-making unit. Furthermore, it is explicitly stated that the participation including NGOs promoting environmental protection should be promoted. In article 7 of this regulation it is explicitly stated that members of the public shall have access to justice to appeal the lawfulness of decisions or omissions according to substantive or formal law.

Particularly the participation of the Organisation can ensure a balanced consideration of the people's and tourism's interests to keep away danger and molestation and the interests concerning the use of the LB 320 within the relevant area.

**6. How does the allegation related to violations of article 9, paragraph 3, of the Convention (as set out on pages 19 and 20 of the English text of the communication) relate to the facts of the present case? Does it relate to the fact that a ban was not issued and if so. Is there a well-established practice that the authorities were under an obligation to issue such a ban?**

Citing article 9, paragraph 3:

*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

Following the case law during proceedings for a regulation according to § 43 of the StVO (Road Traffic Regulations) nobody may be party to the proceedings in such a procedure. According to the previous jurisdiction nobody may claim remission of a regulation. Furthermore, the subjective public right of an individual may not be violated because of the non-regulation of a ban of driving ( Highest Administration court = VwGH 29.11.1950, 792/49, 20.10.1969, 1579/68, 18.09.1981 81/020016, et al.). The omission of imposing such a regulation including environmentally relevant effects can not be appealed at courts or administrative authorities as intended in article 9, paragraph 3. As a consequence of the impossibility to be party to the proceedings, neither concerned individuals nor institutions as NETT are allowed to access records of the proceedings, such as expert opinions concerning environmentally relevant effects of such restrictions. Thus, the decision proceedings are completely untransparent in practice. Rights concerning hearing or being party are not intended. Hence, the imposition of such restrictions is frequently not comprehensible and not revealed and therefore not verifiable.

Since the Janecek-decision of the EUGH (C-237/07), a renouncing of the case law is claimed also within the law school of Austria (e.g. Wilhelm in ecolex 2008, 1073), namely – according

to the application of the environmentally relevant directives of the EG and the directives in implementation of the Aarhus Convention – the allowance of a subjective right to claim such a environmentally relevant regulation, as it is already implemented in Germany, including the possibility to appeal the omission of the imposition of such kind of regulation.

**7. Taking into account applicability of the European Union law, has NETT or any other relevant party undertaken any steps to complain to the European Commission, e.g. with a view to commencing infringement procedures against Austria? If so, with what result?**

In the name of and authorized by NETT its legal representative MMag. Johannes Pfeifer did complain to the European Commission in Brussels on 16<sup>th</sup> June 2008. The Republic of Austria was requested by the Commission to state its position concerning GZ 154/08/ENVI; this has not happened so far.