

Mr. Jeremy Wates
Secretary to the AARHUS Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10
SWITZERLAND

Liezen, on 23st April 2009
Ref.: Verein/1 / CK 108-08

Ref.: ACCC/C/2008/26 - Austria

Complainant: The Organisation "NETT – Nein Ennstal Transit-Trasse; Verein für menschen- und umweltgerechte Verkehrspolitik" ("NETT – No to the Enns Valley Transit Route; Organisation for a socially and environmentally sound transport policy").

represented by the chairman of the organisation:

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COMMUNICATION
TO THE AARHUS CONVENTION'S
COMPLIANCE COMMITTEE

Dear Sirs !

The organisation NETT thanks you for the opportunity to hand in supporting arguments for their communication.

1.The major argumentation line of the party concerned is that *“the planning process is still only in the phase of defining the decision-making bases and not already in the stage of a decision-making process. Therefore there is no decision-making process on the authorisation of a planned activity as set out in Art. 6 of the Convention yet”(Communication Austria p.7)*. All option will be valued in the Strategic Traffic Assessment (STA).

In actual fact the decision to build the four-lane –motorway in the middle of the enns valley or at least to pursue only this variant has been already made, and there is no further public discussion process about the different options, e.g. the improvement of the existing two-lane- road, a tunnel or a ban for lorries over 7.5 tons¹:

Since the corresponding law was enacted 5 STAs have been taken place. In all these STAs the result was that the option (the building of a new road) that the government initially preferred was recommended. The public participation in the STA amounts to nothing more to send remarks to the ministry. There is no possibility to challenge the “recommendation” result of the STA, which violates Art 9/3 of the Aarhus Convention². The Compliance problem is to be seen in any case in the deficiencies in implementation and enforcement, not only in the lack of a regulatory framework.

All forums which were established by the Styrian to discuss the traffic solution government have been dissolved after the government motion 21.04.2008, which explicitly says that *“The presented planning process and the result of the route selection process (the middle variant) are taken note of with approval. The member of the Provincial Government responsible for transport, Mag. Kristina Edlinger - Ploder, is authorised to negotiate a funding option with ASFINAG and with BMVIT.”*

¹ The Committee is aware that at least one of the two decisions that it has chosen to focus on would need to be followed by further decisions on whether to grant environmental, construction and operating permits (and possibly other types of permits) before the activities in question could legitimately commence. However, public participation must take place at an early stage of the environmental decision-making process under the Convention. Therefore, it is important to consider whether public participation has been provided for at a sufficiently early stage of the environmental decision-making processes in these cases.

(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para.71)

² compare Cornelia Mittendorfer, Bundesarbeitskammer
Planungs- und Entscheidungspraxis im Verkehrsbereich
vor/nach der Umsetzung der SUP-RL in Österreich

The responsible member, Mag. Kristina Edlinger - Ploder, permanently proclaims in the public in television and newspapers since this motion that there is no further discussion whether the four-lane road in the middle of the valley will be build or there will be another traffic solution , e.g. in an interview with the ORF (Public Austrian television) 21.04.2008³:

"Andere Varianten rechtlich nicht möglich"

Mit dem Beschluss sei jedenfalls klar, dass nur mehr über eine Variante diskutiert wird, sagt Edlinger-Ploder: "Alle anderen Varianten, die wir ja auch geprüft haben, sind rechtlich nicht umsetzbar. Wir brauchen jetzt nicht mehr von vorne anfangen, denn das hat man in den letzten vier Jahren sehr ausführlich geprüft".

(Other variants are legally not possible. With this motion it is clear that there is only discussion about one single variant, says Edlinger-Ploder. All other variants we have considered are legally not viable. We don't have to start from the beginning, because in the last four years there have been extensive considerations)

Thus the government itself has declared with is motion on 21.04.2009 the end of the discussion and decision-making process and has dissolved the various forums. The public is talked into believing that the government decision is a decision past recall, can't be changed anyway, and further discussion is pointless⁴. Moreover it states that all other variants are legally not possible, which is obviously wrong, because there is no reason why the improvement of the existing road should be "legally impossible". This constitutes a deliberate disinformation to deter further discussion.

The government itself conceded in its communication *"From the chronology presented in Annex 1 it is clear that no public participation process in accordance with the Convention has taken place yet regarding the road construction project"* (p.11 last paragraph).

In the STA itself some other options are assessed, but only superficially. Which options are assessed, lays within the scope of the ministry, and in our case, in the discussion on 02.04.2009 the representatives of the government explicitly ruled out the the 7.5 ban to be assessed as an alternative in the STA⁵⁶. Practically, in all cases the government-preferred variant has won the STA.

³ news article ORF online 21.04.2008

⁴ Furthermore, it appears that the responsible authorities treated the outcome of the hearings as if it were the outcome of public participation. This would have been more acceptable if the hearings had genuinely involved all key groupings within the public concerned. As it was, the views of those who were not invited to participate in the hearings, which apparently were expressed in other ways and were well known to the authorities, do not appear to have been taken into account.
(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25)

⁵ However, even if public participation is included at that stage, the scope of the decision on which the public would be consulted would be more limited than should be the case for article 6-type decisions, in the sense that some options (such as the option of not building any watch factory at a particular location) would no longer be open for discussion (cf. article 6, para. 4).
(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 29)

⁶ However, article 6, paragraph 4, requires early participation when all options are open and the participation can be effective. This requirement would clearly apply to the decision— making in question. Indeed, removing this phase might lead to removing the important opportunity for the public to participate in identifying

The assessment of the alternatives (Umweltbericht, environmental report) is charged by the initiator (the government or the road building company) and the report is paid by the initiator. This legal position is worsened by the fact that Ministry of transport (BMVIT, www.bmvit.gv.at) is

- politically responsible for federal motorway and railroad constructions (planning, construction, control) and
- by the same time the only (EIA) permitting authority for the same projects.
- With other words: BMVIT permits projects it plans before.

2. The decision-making process so far also violated the Aarhus Convention, as

- No environmental organisation had a seat in the regional planning advisory board, which decided to recommend the middle variant of the four lane road to the government. Practically in the past all of these recommendations have been approved by the government. The government refused to grant the organisation NETT a seat in this board⁷.
- There was no information and communication between the different boards.
- The protocols from the meetings were not accessible for the other boards or the public.
- There was no possibility to attend the other meetings even as a listener.
- Expertises were not provided to the different boards at the same time, for instance the round table was informed about expertises months after this information was provided to the planning board.
- No joint meetings of all the boards were provided for.
- There was no sufficient scoping.
- There was no possibility for the public to attend a meeting as a listener.
- There were no public hearings.
- There was no meeting of the state board, in which for instance the environmental commissioner (environmental advocate) which duty is to care for environmental issues had a seat.
- The public was not informed about the different options and their effects. Only after the styrian government in 2008 decided to pursue only the plan for four lane motorway they presented to the public noise and fumes maps for this variant and photomontages of the planned motorway in a two day exhibition in two communities.
- No expertises of the expected effects of the motorway for tourism and farming and the protected regions were made or presented to the public yet. No expertises are made until now how the motorway will change the traffic volume and the living and working conditions of the citizens of the enns valley as a basis for the discussion.
- The organisation nett also demanded that they were allowed to present to the board the result of a recent survey about the opinion of the people of the valley about the traffic situation. The survey showed that a vast majority did want the improvement of the existing road and the public traffic, but no four lane motorway, as this would harm the environment and their living conditions and also tourism and a motorway would cut through the protected

the criteria on which to base the detailed EIA.

(Hungary ACCC/C/ 2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 11)

⁷ The organisation nett tried to get a seat in the regional planning advisory board, but the government refused. We did appeal against this decision, and the highest constitutional courting Austria decided in december 2008 that there was no right for anyone, who was not mentioned in the law from 95 to get a set in this board. There was no reasoning why this is not possible, the court only said the constitution of the board did not interfere with the sphere of rights of the organisation. There was also no reasoning why it should be politically reasonable that for instance a member of the chamber of engineers or of the union of industrialists or from the local job centers or from the churches or the mayor of the city of graz, which is a hundred miles away, should be members, but no environmental organisation. We think that this law should be changed and ngos given a seat in this board.

regions, which are used by the population for leisure activities. The chairman of the board refused to hear the results of the survey.

- There are no legal possibilities to challenge the decision of the regional planning board or the government⁸⁹.

We think that for this reasons there was no sufficient public participation or scooping and information of the public in the planning process and think this constitutes a violation of Art. 6 and 7 of the convention.

3. After 2 or three meetings the round table was informed that furthermore only the option of a four lane motorway should be discussed, in the way whether this four lane motorway should be build in the north, middle or south of the enns valley. The organisation nett and other members of the round table demanded that all other options, eg improving the existing two lane road, building a tunnel should also be discussed and demanded access to the proceedings of the other boards. This was refused, and the government declared, only the location of the four lane motorway should further be discussed¹⁰. Thus the organisation nett and all other organisations left the round table, and there were no further meetings of the round table.

4. As far as the 7.5. ton ban is concerned this ban would have a significant effect on the environment, within the meaning of Art 6 / 1 lit b of the convention, as the negative environmental effects would be drastically improved without the lorry traffic. The ban is also an policy subject to Art 7 of the convention and a regulation or instrument subject to Art 8 and furthermore subjected to Art 9¹¹.

⁸ However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the Convention. In this case, the Committee has not been made aware of any compelling reason justifying the choice of this form of decision-making.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 38)

⁹ The Committee finds some merit in the argument of the communicant that deficiencies in applying public participation procedures effectively deprived it of its rights under article 9, paragraph 2, of the Convention, i.e. the possibility to challenge the decisions taken at the early stage of decision-making.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 63)

¹⁰ A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events on the ground” have effectively eliminated alternative options. If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 74)

¹¹ The Convention does not establish a precise boundary between article 6–type decisions and article 7–type decisions. (Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 28)

More to the point, without the traffic of these heavy lorries there would be much less necessity for a four lane motorway, and much less pressure from the transport business and industrialists for this motorway, which are the main lobbyists for the motorway besides the construction industry. Furthermore with an existing 7.5 ton ban the evaluation of the different options in the STA would have a different outcome, as the zero-variant (no building of a new road) would have a better rating because of the lesser fumes and noise and the lesser existing traffic, so there is direct link to the traffic decision item.

We are of the opinion that the public should therefore have the right of participation and access to information and justice also in the decision process over this ban. If the public would succeed in imposing this ban, very likely the motorway will not be build, as the parameters for the decision on the motorway and the discussion base would drastically change¹², especially the traffic parameters. Although this ban is no activity mentioned in annex 1 of the convention per se, this decision would change the parameters for such an activity and their meaningfulness mentioned in the annex significantly.

The ban would imposed by means of a decree by the district commissioner. According to Austrian law, no one has a right to comment in the process of the preparation of this decree, or to make representations, or to challenge for instance the decision which expertises are made and by whom. Also no one has the right to examine the files, for instance the expertises. If there is no decision, as in this case for over five years, no one has the right to demand that a decision should be made in reasonable time. If the commissioner decides that no ban should be imposed, no one has a right to appeal against this decision, and there is no review procedure as it is laid down in Art 9 of the convention. The organisation NETT demanded that the expert opinions that were obtained by the commissioner should be conveyed to the organisation, for instance an expertise over the medical and environmental effects of the ban, for instance the reduction of fine particles, and the commissioner refused. In the meeting on 02.04.2009 the government representatives stated that the expertises are not finished yet. As a matter of fact the noise expertise and the small particles expertise are finished at least since July 2008, as the district commissioner e-mailed on 25.07.2008 to NETT that these two expertises were already gathered and are present at his office, but he declined to convey them to NETT¹³.

Finally Nett submitted a complaint because of these violations of the EC-Directives to the European Commission on 01.07.2008, and the Commission requested a statement from Austria until September 2008. No answer has been given from Austria yet. Nett appealed against the decision not to get a seat in the planning board without success (compare footnote 7). Nett also filed a complaint against the denial of their participation rights in the 7.5 ton ban proceedings with the Highest Administrative Court on 04.08.2008 with no decision rendered yet.

We think that this constitutes a gross violation of art 6 to 9 of the convention, as there is no public participation, information of the public, access to information and access to a review procedure and no decision in an appropriate period. We also think that the public should not only have the right to challenge the legality of a decision subject to the convention, but also should have the possibility to demand executive regulations which improve their living and environmental conditions within reasonable time, and should be entitled to challenge omissions in this respect.

¹² Where individual provisions are not in themselves in conflict with the requirements of the Convention, one cannot exclude a possibility that their cumulative effect might lead to non-compliance.
(Hungary ACCC/C/ 2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 14)

¹³ E-Mail 25.07.2008

Yours Sincerely

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Appendixes:

Study Cornelia Mittendorfer, Bundesarbeitskammer
Planungs- und Entscheidungspraxis im Verkehrsbereich
vor/nach der Umsetzung der SUP-RL in Österreich

news article ORF online 21.04.2008

e-mail 25.07.2008

Copy of this e-mail was sent to the party concerned to office@lebensministerium.at