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Ms. Ella Behlyarova
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Compliance Committee Case ACCC/C/2010/48, Austria
Update by the communicant

Vienna, 6. April 2011

Dear Ms. Behlyarova,
dear Aarhus Convention Compliance Committee,

With this letter we aim to update you with recent developments in Austria relevant for this case.

Timely procedures regarding environmental information (referring to paragraphs 72 and 73 of our revised communication and paragraphs 2 to 12 of our submission of 8. October 2010:

1. The cases requesting environmental information (paragraph 10 b) and c) of our 8. Oct 2010 submission) are still pending. This means one year after the environmental information request was submitted we neither have the requested information nor a legal possibility to appeal against this omission.

2. In the case regarding Mr. Schrefel (paragraph 10 b) the competent authority did not react on the application of Mr. Schrefel to issue an official notification for the refusal of environmental information. In December 2010 Mr. Schrefel referred to the Independent Administrative Senate with a devolution request (see paragraph 7 d) of our 8. Oct 2010 submission). But the Senate did not react either.

3. In the case regarding OEKOBUERO (paragraph 10 c) of our 8. Oct 2010 submission) the competent authority issued an official notification in December 2010. OEKOBUERO referred the environmental information request to ASFINAG, a 100 % state owned and controlled company. ASFINAG is responsible to construct and

maintain Austrian motorways. ASFINAG stated in a letter that they not fall under the environmental information act. The Minister of Transport (BMVIT) is the supervising and controlling authority. According to the Austrian environmental information act environmental information requests have to be submitted to the state owned companies, but requests for official notification on the (refusal of the) information request have to be submitted to the supervising and controlling authority.

4. OEKOBUERO therefore requested BMVIT to issue and official notification on the refusal of ASFING to hand over the environmental information requested. In December 2010 we received the official notification. BMVIT refused to issue a notification on the refusal, but confirmed that ASFINAG falls under the environmental information act as public controlled company and therefore has to provide the information. However, we have no legal means to force ASFINAG to disclose the information requested. In December 2010 we sent the decision of BMVIT to ASFINAG and requested them again to disclose the information. But ASFINAG does not react.

Effective remedies (paragraphs 58 to 66 of our revised communication as well as paragraphs 13 to 30 of our submission from 8. October 2010)

5. In the case regarding the A5 motorway (paragraph 61 of our revised communication and paragraphs 16 to 28 of our statement from 8. October 2010) we would like to inform you that our appeal from 3. January 2010 is still pending. This means the motorway has a valid construction permit since November 2009 when the EIA permit was issued. It is not clear when the Administrative Court will decide. Irreversible damage to the environment could have occurred after 1,5 years of construction. However, construction has not started yet due to financing problems after the financial crisis in this particular cases, but we referred to many other cases where the opposite was the case in this ACCC procedure.

6. In its submission of 30. November 2010 and in the public hearing in December 2010 the party concerned correctly referred to an Administrative Court decision of 30. September 2010 that established the competence of the Environmental Senate for appeal procedures with regard to EIA infrastructure projects. By this legal position the "injunction" issue is solved since the EIA permit becomes only final after the Environmental Senate decided. However, we want to reiterate what we argued during the public hearing: This landmarking decision was issued by a certain senate of the Administrative Court. This senate deals among others with rail-projects, but not with motorway projects. In the weeks after its decision of 30. September this senate has immediately closed all pending EIA- rail cases by referring to this decision and arguing the appeals have to be submitted to the Environmental Senate before addressing the Administrative Court.

7. The Administrative Court' senate responsible for motorway projects has not issued any decision since, even though this would be high in time, such as the A5 motorway case. If the court would be consequent it would have closed all pending cases as the other senate did. We see this reluctance as an indication of a dispute between the different senates of the Administrative Court and therefore expect a decision of an extended senate clarifying the issue. This means, from our perspective, the legal position regarding injunctions in motorway projects is still not clarified and stands on

a weak base respectively. The decision of 30. September 2010 could be overruled in new future by an extended senate.

Limited scope of standing (chapter 2 and 3 of our revised communication)

8. On 22. December 2010 the Adminstrative Court issued an interesting verdict that precisely demonstrates the understanding of standing positions in Austrian administrative law (Case 2010/06/0262-10, Automobile Testing Centre Voitsberg). This decision overruled a decision of the Environmental Senate (US 4B/2007/6-48). The Environmental Senate decision was used by the party concerned in its submission of 6. October 2010 (page 4, third paragraph and footnote 5) and in the public hearing in December 2010 to defend the Austrian legal position regarding standing.

9. In 2007 the permitting authority (province of Styria) permitted the project. In the second instance the Environmental Senate did not follow the first instance and refused to permit the Automobile Testing Centre in Voitsberg (ATC Voitsberg) since there were overriding environmental interests as to the forestry act. Claimants were eight neighbours. No NGO or citizen's group participated the procedure. The Adminstrative Court quashed the Environmental Senate's decision and argued the Environmental Senate must not legally assess public interests (in the forestry act) since neighbours have a limited scope of standing. Neighbours can only invoke their subjective rights, but not public environmental interests such as those in the forestry act. The court stressed that NGOs could have maintained public environmental interests, but no NGO was subject to the procedure.

Quotation from the decision: page 8 (copy with yellow marked passage is enclosed to this letter).

10. "*In contrast, the EIA act has the concept that public interests can only be raised by those parties that are expressly authorized to maintain them. This becomes clear from the fact that the EIA act distinguishes between two parts of parties. On the one hand there are parties that can maintain only subjective rights that concern them. On the other hand there are parties that can mainain public environmental interests. Therefore public interests can only be maintained by the latter, but not by the other parties (see Article 19 par 3 and 10 EIA-act). The second instance is therefore only authorized to assess the correctness of the first instance decision as far as the claimants may maintain rights. The right of the second instance to consider public interests therefore depends whether such a public interest was raised by a claimant that was legally entitled to claim such public interest, irrespective the first instance permitting authority is – as a matter of course- obliged to a comprehensive assessment of all public interests*."

11. "*As far as the claimants refer to their rights as "EIA-neighbours" they were not entitled to maintain public interests referring to forestry (see Article 19 par 1 suppar 1 EIA-act).* [Remark by the communicant: Since the forestry act has to be applied in conjunction with the EIA-act in EIA projects the neighbour provisions of the forestry act apply as well (Article 19 par 4 subpara 4 Forestry Act]). *In their appeal the claimants maintained that they are also "forestry-neighbours" as to Article 19 par 4*

subpara 4 Forestry Act. From that respect they only have a subjective right against the uprooting as far this concerns protection of forests in their private property from adverse effects through the uprooting, but not adverse effects referring to other public interests (see verdict of 3. October 2008, Zl. 2008/10/0196, with further references).“

12. This decision precisely demonstrates that neighbours standing rights are restricted in EIA and IPPC-procedures and that public interests can only be maintained and legally challenged if legislation expressly designates this right to the parties concerned. This legal position is not only relevant to EIA and IPPC procedures, but to all other procedures as well. It is a pre-condition for appeals in Austrian environmental law that legislation expressly designates the right to legally challenge public environmental interests to members of the public (concerned), otherwise they have limited standing rights (such as neighbours) or there are no standing rights for any member of the public at all (as in many other procedures we referred to in our communication).

Your sincerely

Thomas Alge

Annex: Administrative Court ATC Voitsberg decision