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Vienna, 8. October 2010

**Case ACCC/C/2010/48, Austria**

**Additional arguments by the communicant regarding effective access to justice in Austria**

1. Based on recent evidence we make an additional submission with regard to case ACCC/C/2010/48, Austria. This submission aims to further clarify some of the allegations in our communication. TRANSLATIONS of legal provisions and court decisions were done by the communicant and are not official translations.

**Non compliance with Article 9 par 4 in conjunction with Article 9 par 1 and Article 4 par 2 of the Convention**

2. The issue refers to paragraph 72 and 73 of our revised communication dated 2. June 2010. Respective paragraphs read as follows:

> "**4.3 Timely procedures**
>
> 72. With regard to Article 9/1 the review procedure is not timely and efficient. If an authority does not respond to an environmental information request after two months the applicant has to legally request the authority to issue an administrative decision on the refusal. In most cases this takes some months as practice shows. This legal (refusal) decision is necessary to initiate an appeal procedure. In case the authority does not issue the refusal decision within six months, the applicant can go to court and make a "devolution request" in accordance with Article 73 AVG (general administrative procedure code). Then the court becomes competent to issue the refusal decision. In practice this means it can take up to one year until a person requesting environmental information gets a legal decision that the environmental information request is refused and this is in compliance with Austrian legislation. We see a clear breach of A**rticle 4 par 2 in connection with**

**Article 9 par 1 and par 4** of the Aarhus Convention in this legal position and practice.

73. This problem can easily be solved by reducing the six month period for a devolution request down to two months and by deleting the provision that only enables to request for a refusal decision two month after the original environmental information request has been submitted. “

**We further specify this allegation:**

3. Article 5 par 6 UIG (Environmental information act) reads as follows:[1]

“The request shall be answered without unnecessary delay, having regard to any timescale specified by the applicant, but the latest within one month after the receipt of the request. If this deadline can not be met because the volume and the complexity of the requested information is such that the one-month cannot be complied with, within two months. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it.”

4. Article 8 par 1 reads as follows:[2]

“If the environmental information requested (whether in full or in part) is not provided, an official notification of the refusal shall be issued if the applicant so requests. The competent body for issuing the notification shall be the information providing body, providing it performs public authority functions. Equivalent requests may be dealt with in one notification.”

5. Article 8 par 3 reads as follows[3]:

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[1] (6) Dem Begehren ist ohne unnötigen Aufschub unter Berücksichtigung etwaiger vom/von der Informationssuchenden angegebener Termine, spätestens aber innerhalb eines Monats zu entsprechen. Kann diese Frist auf Grund des Umfanges oder der Komplexität der begehrten Information nicht eingehalten werden, besteht die Möglichkeit, diese Frist auf bis zu zwei Monate zu erstrecken. In diesem Fall ist der/die Informationssuchende von der Verlängerung der Frist unter Angabe von Gründen so bald wie möglich, spätestens jedoch vor Ablauf der einmonatigen Frist zu verständigen.

[2] §8. (1) Werden die verlangten Umweltinformationen nicht oder nicht im begehrten Umfang mitgeteilt, so ist auf Antrag des/der Informationssuchenden hierüber ein Bescheid zu erlassen. Zuständig zur Erlassung des Bescheides ist die informationspflichtige Stelle soweit sie behördliche Aufgaben besorgt. Über gleichgerichtete Anträge kann unter einem entschieden werden.

[3] (4) Über Berufungen entscheidet der unabhängige Verwaltungssenat des Bundeslandes, in dem das bescheiderlassende Organ der Verwaltung seinen Sitz hat (Art. 129a Abs. 1 Z 3 B-VG)

"The independent administrative tribunal of the province where the authority issuing the official notification is located is competent for appeal procedures."

6. Art 73 AVG (Administrative Procedure Act) reads as follows:[4]

"(1) The authorities are obliged, if there is no opposing provision in administrative acts, to issue and official notification upon requests and appeals of the parties without unnecessary delay, but the latest within six months after notification of the decision.

2) If the official notification is not issued within the timeframe the competence to issue the official notification is transferred upon written request by the applicant to the the competent higher authority according to the subject matter; in cases where the independent administrative tribunal would be competent for appeals in this subject matter, the competence for the decision is transferred to the independent administrative tribunal ("Devolution-Request). The devolution request shall be submitted to the competent higher authority according to the subject matter (and to the independent administrative tribunal respectively). The devolution request shall be rejected if the delay was not caused predominantly by the failure of the authority.

3) The timeframe for the higher competent authority to issue the official notification starts with the day the Devolution-Request is received."

7. This legal position can be summarized as follows:

a) The authority has to answer environmental information requests with one month, in complex issues within two months (Article 5 par 6 UIG).

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[4] Art 73 AVG:

§ 73. (1) Die Behörden sind verpflichtet, wenn in den Verwaltungsvorschriften nicht anderes bestimmt ist, über Anträge von Parteien (§ 8) und Berufungen ohne unnötigen Aufschub, spätestens aber sechs Monate nach deren Einlangen den Bescheid zu erlassen.

(2) Wird der Bescheid nicht innerhalb der Entscheidungsfrist erlassen, so geht auf schriftlichen Antrag der Partei die Zuständigkeit zur Entscheidung auf die sachlich in Betracht kommende Oberbehörde, wenn aber gegen den Bescheid Berufung an den unabhängigen Verwaltungssenat erhoben werden könnte, auf diesen über (Devolutionsantrag). Der Devolutionsantrag ist bei der Oberbehörde (beim unabhängigen Verwaltungssenat) einzubringen. Er ist abzuweisen, wenn die Verzögerung nicht auf ein überwiegendes Verschulden der Behörde zurückzuführen ist.

(3) Für die Oberbehörde (den unabhängigen Verwaltungssenat) beginnt die Entscheidungsfrist mit dem Tag des Einlangens des Devolutionsantrages zu laufen.

b) In case the request is refused or not provided, the applicant has the right to **request an "official notification"** on this matter (Article 8 par 1 UIG).

c) Only after the reception of the official notification the applicant has the right to claim access to justice because an official notification in a legal issue ("BESCHEID") is the **legal formal requirement** for initiating legal appeal procedures in Austria.

d) In case the authority does not issue the official notification the applicant has to wait six **months** (Art 73 par 1 AVG) from the official notification request (meaning one or two months after the environmental information request was submitted) until he/she can make a "**devolution request**" to the independent administrative tribunal of the province (= higher competent authority) of the provinces (Art 73 par 2 AVG).

e) If the devolution request is successful the independent administrative tribunal of the province (= competent higher authority as to Art 73 par 2) is the competent authority to issue the official notification on the refusal of the environmental information request. This is, the earliest, **seven or eight months** after the environmental information request was submitted.

f). The independent administrative tribunal of the province (= competent higher authority) has **additional six months** (Art 73 par 3 AVG to issue the official notification on the refusal of the environmental information request ) after it became competent authority.

g) This means that it can take up 13 or 14 months until the applicant receives an official and legally valid refusal notification of the environmental information request that enables the applicant to **submit an appeal** against the refusal of the environmental information request. In the worst case the access to justice procedure can only be initiated after this period of time and this is fully in line with the Austrian legal position.

8. From our perspective it is obvious that such a legal position is in non compliance with Article 4 par 2 of the Convention that sets a one (or two) month deadline for answering environmental information requests since in Austria this period is up to 14 months.

9. Furthermore this legal position is not in line with Article 9 par 1 of the Convention that provides among others for "expeditious procedures". It is not an expeditious procedure if the applicant has to wait 14 months until it can make an appeal. By the same time it is not a timely and effective procedure in the meaning of Article 9 par 4 of the Convention.

10. The practical implication of this legal position can be illustrated by three case examples, two of them are still pending cases:

**a). GLOBAL 2000 (FoE Austria) vs Ministry of Environment**

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|---|---|
| 21.06.2007 | Env. Information request regarding study on transport and traffic pollution |
| 04.07.2007 | MoE answer that study not completed yet, can not be disclose |
| 19.05.2008 | Env. Information request regarding the same study |
| 18.06.2008 | MoE answer that study is outdated and only "internal communication", can not be disclosed – **Annex 1** |
| 30.06.2008 | Request by the applicant to issue an official notification on the refusal - **Annex 2** |
| 03.03.2009 | Devolution request to higher authority in accordance with Article 73 AVG |
| 16.03.2009 | MoE discloses information; GLOBAL 2000 fact sheet (German) on the case - **Annex 3** |

**b) Individual person vs Ministry of Transport**

| | |
|---|---|
| 13.04.2010 | Mr. Schrefel env. information request regarding traffic figures on new motorways to Minister of Transport |
| 19.04.2010 | Minister of Transport forwards the request to ASFINAG[5] |
| 21.05.2010 | ASFINAG refusal message |
| 02.06.2010 | Mr. Schrefel requests official notification for refusal – **Annex 7** |
| | on 2.12.2010 Mr. Schrefel could make a devolution request |

**c) OEKOBUERO vs Ministry of Transport**

| | |
|---|---|
| 20.04.2010 | OEKOBUERO env. information request regarding traffic figures on new motorways to ASFINAG – **Annex 4** |
| 21.05.2010 | ASFINAG refusal message – **Annex 5** |
| 02.06.2010 | OEKOBUERO requests official notification on refusal – **Annex 6** |
| | on 2.12.2010 OEKOBUERO could make a devolution request |

11. The three cases are self explaining and illustrate that the system is not functioning. The major legal problem is the fact that the applicant can and has to respectively request an official notification only after the request was refused. The refusal of a request has no legal character and is only a message or statement by the authority. If there would be a legal obligation for the authority that any env. information request refusal has to be issued in the legal form of an "official notification" the applicant could directly make an appeal against such refusals.

12. The second legal problem is that any authority has a six months period to react on the request for official notification (Art 73 AVG). Art 73 AVG sets a period of six months only "*if there is no opposing provision in administrative acts*". If the env. information act would contain a provision that the official notification has to be issued within, e.g. one month, a devolution request could be submitted after that one month. However, in any case the legal position should enable the applicant to go to court immediately after the request was formally (by official notification) or factually (if the authority does not act) refused. Art 73 AVG should not be applicable in such cases.

**Non compliance with Article 9 par 4 with regard to injunctions when the highest courts are the only independent tribunal**

13. This issue refers to para 58 to 66 of our revised communication from 2. June 2010.

[5] ASFINAG is the federal motorway construction and maintenance company. It is responsible to construct and maintain any Austrian motorway. ASFINAG is owned and controlled 100 % by the Republic of Austria. ASFINAG is under direct supervision and control of the Minister of Transport.

14. In Austria the EIA procedure is by the same time the project permitting procedure. The EIA decision is by the same time the development consent for the project. If this decision becomes final, constructions can start. With regard to federal motorway and rail projects, executed under the third section of the EIA-act, the Federal Minister of Transport (BMVIT) is the permitting authority. Since there is no competent higher authority the EIA permit of BMVIT becomes final right after it is issued. This is in contrast to all other projects that fall under the EIA-act that only become final after the independent Environmental Senate has decided on appeal procedures.

15. Parties can appeal to the Highest Administrative Court (Verwaltungsgerichtshof, VwGH) against EIA-permits issued by BMVIT. The complainant can request the Court to order suspensive effect (injunction), but injunctions are more or less never granted in environment related procedures. Respective cases and jurisprudence was illustrated in paragraphs 58 to 66 of our revised communication.

16. In mid June 2010 we received a decision of VwGH (Zl. AW 2010/06/0001-11 issued on 8. June 2010 – **Annex 8,** translation (by communicant) of the key sections: **Annex 9**) that refused our request for an injunction with regard to a federal motorway project (**A5 motorway Vienna-Brno**). We referred this appeal in paragraph 61 of our revised communication. In our appeal we directly referred to Art 9 par 4 of the Aarhus Convention and the case law of the Compliance Committee of the Aarhus Convention, in particular regarding the application of the EU-EIA directive and the need to interpret it in line with the Convention. We come back to this decision below.

17. The provision regarding injunctions is regulated in Art 30 *Administrative Court Act 1985 (VwGG).* It reads as follows (translation by communicant):

"§ 30. (1) The complaints have no suspensive effect by virtue of the law. The same is true for a motion for reinstatement into the status quo ante because of expiry of the period of time allowed for the complaint.

(2) Upon request of petitioner, however, the Administrative Court is to issue a court order in favour of the suspensive effect, **unless it would be contrary to mandatory public interest** and after consideration of all interests affected, whether the implementation or the use of the license by a third party, as granted by a ruling, would constitute an **unreasonable disadvantage** for petitioner. After any considerable change in the circumstances relevant for the decision in favour of the suspensive effect of the complaint, the matter has to be decided anew in case of being requested by a party. The reasons for the decision in favour of the suspensive effect need only be stated if interests of third parties are affected.

(3) Court orders according to para 2 shall be served to all parties. In case the suspensive effect is granted, the authority shall suspend execution of the ruling contested and take the necessary steps to this effect; the holder of the contested license is not allowed to practice the license."

18. We stated in paragraph 63 of our revised communication that Art 30 VwGG is not in self in non compliance with the Convention, but its interpretation by the Court. In any environment related case we are aware of, the court found arguments to not grant an injunction. This true in particular for appeal procedures regarding EIA and IPPC permits, and these are the only appeal procedures where NGOs and/or a wider group of the public have access to justice as it was claimed in other sections of the our revised communication.

19. The Court constantly sees coercive public interests that make injunctions impossible. In the recent decision with regard to A5 motorway the court referred to an argument that will basically prevent any injunction regarding motorway projects in future (this part is highlighted in our translation Annex 9):

"Because the project in question will be lowering the accident rate on the existing road B 7 regarding perilous accidents or heavy accidents respectively by 36%, in any case overriding public interests stand against the granting of suspensive effect (see amongst others ruling Zl. AW 2005/05/0120 of 27 December 2005)."

20. In case coercive public interest is given, there is no further obligation to weigh other interests against each other. However, it is matter of statistical facts, that the accidental rate is far lower on motorways compared to other roads. Any transport statistic proofs this. Therefore this argument is valid for any motorway project. This means any motorway project is in coercive public interest and no injunctions can be granted. From our perspective this is a clear breach of Article 9 par 4 of the Convention. In our revised communication we referred to other decisions regarding other arguments that lead to coercive public interest.

21. In the A5 motorway case the Court furthermore argued that it would have turned down our request for suspensive effect even if there would be no coercive public interest, because the other public interests in favour of the project prevail against other public interests such as environmental protection. The court argued that the following public interests are overriding environmental protection:
    - "better protection of life and health of the road users in this area,
    - the considerable improvement of traffic safety of a road,
    - the important function of the part of the road in question regarding the trans-European road network,
    - the extensive reduction of immissions on main trough-roads,
    - the economic effects of a large federal roads project"[6]

22. Exactly the same arguments are relevant for any motorway project and most infrastructure projects as this was highlighted in our revised communication.

23. Next to this the Court repeated its jurisprudence regarding the constructions would not lead to irreversible environmental damage:

"It has to be mentioned that concerning the necessary sealing and solidifying of the soil in the course of the construction of a federal road, the Administrative Court already argued (see ruling Zl. AW 2008/06/0029 of 1 July 2008) that these measures could, and that was also argued by the parties in this proceeding, **be reversed with a certain (considerable) effort at least to a large extent.** The party now rightly argues, that the authorities possess adequate

[6] Respective text is highlight in our translation Annex 9

legal means to take action against the measures taken without permit and to demand their removal in case of the annulment of the permit or a possible denial of the permit. The authorities are also obliged to make use of these means. Additionally, in case the complainant wins, the project proponent will have to bear the consequences of measures taken, in this case without a permit (see for construction project amongst others ruling AW 2007/05/0007 of 22 February 2007)."[7]

24. Finally the court reiterated its constant jurisprudence in similar cases that there is either no disproportional harm for the complainant or respective harm is not sufficiently substantiated:

"It does not conflict the mentioned suspensive effect according to the Aarhus Convention if the national law demands that the alleged disadvantage has to be specified accordingly by the complainant (see amongst others ruling Nr: 10.381/A of 25 February 1987 and ruling Zl. AW 2006/04/0001 of 2 February 2006). This duty to specify also exists for institutions which are entitled to protect environmental interests (see ruling Zl. AW 2009/07/0009 of 6 April 2009). The complainants have not complied with this duty to specify."

25. We agree with the Court that the Aarhus Convention does not prevent to request the complainant demonstrating disproportional harm. However, the public never succeeded in demonstrating disproportional harm regarding large scale projects until now.

26. We therefore claim that this verdict clearly demonstrates that Court practice is non compliance with Article 9 par 4 of the Convention because injunctions are never granted with regard to large infrastructure projects and it is factually impossible to find arguments that lead to an injunction.

27. We are aware of very exceptional decisions where injunctions are granted in environment related procedures (but not regarding EIA, IPPC and other infrastructure projects). Furthermore, respective cases where not brought by members of the public concerned (since they lack standing). We have no evidence, but we guess that in more than 99 % of cases injunctions are not granted in cases relating to the environment. In case statistical evidence is needed we could start research on this.

28. Finally we want to stress that Court needed five months to decide on the interim relief request. The complaint was submitted on 4. January 2010. We received the decision on 15. June 2010. We expect a decision regarding the merits of the case in the next months.

29. In the S1-West case we referred to in paragraph 60 of our revised communication the procedural timeline was similar: The complaint was submitted in February 2008, the decision regarding injunction was received in July 2008). Similar timelines can be found in other cases.

[7] Respective text is highlight in our translation Annex 9

30. We claim that a period of five months to decide on a request to order interim measures is by itself not compatible with Article 9 par 4 of the Convention since irreversible damage can occur in this time through respective projects and access to justice is thus neither effective nor timely.

31. To conclude we enclose some publications we referred to in our communication:
- Annex 9: European Commision/Mileu study on access to justice in Austria (2007)
- Annex 10: elni review article on Austria EIA procedure, standing case law and S1 motorway case
- Annex 11: Austrian MoE study on Article 9 par 3 (2009)[8]

Vienna, 8. October 2010

Markus Piringer

[8] Rechtliche Optionen zur Verbesserung des Zugang zu Gerichten im österreichischen Umweltrecht gemäß Art 9 Abs 3 der Aarhus Konvention, *Schulev-Steindl, Goby (2009); Download* *http://www.wiso.boku.ac.at/fileadmin/_/H73/H736/Schulev-Steindl/Endb-AarhusKV_Adobe.pdf*