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Case ACCC/C/2010/48 Austria

Comments to the revised draft findings and recommendations of November 2011

General remarks

1. The communicant welcomes the revised draft findings and recommendations of the Compliance Committee.

2. We explicitly agree with any paragraph that is not commented below.

3. We are still disappointed that our allegations regarding effective remedies in infrastructure projects were not taken into account, but concede that this would have overstretched this procedure.

Comments to specific paragraphs of the draft findings and recommendations

I. Introduction

4. Paragraph 10: We are surprised that the Committee considers that certain facts were insufficiently represented by the communicant.

II. Summary of facts, legal framework and issues

A. Legal framework

5. Paragraph 13: For better understanding of the procedure Art 5 par 6 and Art 8 par 1 of the Environmental Information Act could be quoted. The relevant translations were provided in our submission of 8. October 2010.[1]

6. Paragraph 21: In the second sentence the term « administrative courts» should be replaced by « Administrative Court » since there is only one such court in Austria - that is by the same time the Highest Court in administrative matters. Austria has three Highest Courts with differentiated competences that sometimes overlap however.[2]

B. Substantive issues and arguments by the parties

7. Paragraph 28: The Party concerned claims there is a possibility that the official notification request can be made at the same time when the information request is submitted. As raised in the public hearing in December 2010 the administrative tribunals reject such requests (UVS Oberösterreich, VwSen-590003/3/Le/La) and this jurisprudence is not disputed in the legal commentaries to UIG (such as Ennöckl/Maitz, 2010)

8. Paragraph 30: It could be mentioned that this allegation was substantiated by various cases.

9. Paragraph 33: It should be stressed that climate change is only one example. The same counts for ambient air quality or nature protection. Climate change is a particular issue in Austria since climate change does not have any legal value in permitting procedures because of the arguments the party concerned refers to in paragraph 34 below.

10. The (Highest) Administrative Court decision on Voitsberg is crucial for the following interpretation of neighbours standing rights by the Committee in paragraph 68. The

[1] Article 5 par 6 UIG (Environmental Information Act) reads as follows: "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.

Article 8 par 1 UIG reads as follows: "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."

[2] For an overview of the Austrian administrative and judicial branches see pages 6 to 8 of the Milieu study (Annex 10 of our 8. October 2010 submission)

case refers to forestry law in the framework of an EIA procedure. The (Highest) Administrative Court rejected any attempt of the Environmental Senate to broaden the scope of claims neighbours can bring forward. In this verdict the Court referred to various other jurisprudence as to the "Schutznormtheorie". The concise argumentation of the Court was quoted in our submission of April 2011 and its Annex.[3]

11. Paragraph 35: Though this is only the opinion of the party concerned, it is legally not correct since the Highest Administrative Court takes the opposite view. It should therefore be stressed that the communicant sees this argumentation line as conflicting with the the Highest Courts rulings.

12. Paragraphs 46 to 50: It can be stressed that the communicant strongly disagrees that civil law provides for effective public interest remedies. This was addressed among others by the PM10 air quality case of Graz brought forward in the communication. It was also not disputed by the party concerned in the public hearing that NGOs can not be claimants in civil procedures relating public interests since they are not personally affected.

III. Consideration by the Committee

13. Paragraph 56 to 58: For further clarification on the information request procedure: The "official notification" problem occurs in any case, not only if requests are answered in writing. If there is an oral rejection of the request, the applicant has to request an official notification of the refusal. This means in any case an information request is refused (be it in writing or verbally or in any other format) the applicant has to request an official notification of this refusal and this can only be done after the information request was refused (totally or on part).

14. Paragraph 61: In the third line the words "written refusal" should be replaced by "official notification".

15. Paragraph 68: In the last sentence it becomes apparent that there is crucial misunderstanding of the Voitsberg decision. This is not a decision of a "local administrative court" but a landmarking ruling of the (Highest) Administrative Court. This means there is no other legal position than that. Following that the conclusion would be that Austria is in non-compliance with Article 9 par 2.

16. Paragraph 78: As mentioned above and as the (Highest) Administrative Court clarified again in the Voitsberg case it is not correct that "members of the public may not only bring forward allegations relating to their private well-being, but also issues of general environmental interest". Even though it is too late to further argue this now, it is

[3]. See for example paragraph 11 of this submission where we quoted from the Voitsberg judgement: "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 subpar 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).

definitively not possible to bring forward public interest arguments in civil law claims. This was, among others, demonstrated in the Graz PM10 air quality case brought forward in our communication, where the claimant had to demonstrate in as much exceeding air quality standards have implications to his personal well-being.

IV. Conclusions and recommendations

17. After paragraph 81 a new and additional paragraph 82 should follow referring to paragraph 68 considering the Voitsberg ruling is from the (Highest) Administrative Court and not from a local tribunal.

18. Paragraph 83 a. ii.: Here we would add ".. for example by introducing a shorter timeframe for deveolution requests or by introducing a "tacit refusal" rule in case the authority does not react to requests.

19. A sub-paragraph iv. should follow referring to paragraph 65 that encourages courts of the Party concerned to interpret and apply provisions relating to locus standi for individuals in the light of the Convention's objectives.

20. After sub-paragraph 83 b. a sub-paragraph c. should follow inviting Austria to develop a timeplan and strategy in order to bring Austria into compliance with the Convention.

Comments to the remarks of the Party concerned of 7. December 2011 to the draft findings

21. In order to facilitate the finalization of this case and to avoid any further confusion we comment briefly on the Austrian statement of 7. December 2011.

22. We agree the Ombudsman is under professional liability, as any other public body is. There is however no legal obligation to bring a case indicated by individuals or NGOs to court. The same counts to "Volksanwaltschaft". In this context we refer to the conclusions of the 2007 Milieu study of the European Commission, referring to Ombudsman before: "*Article 9(3) of the Aarhus Convention cannot be said to have been implemented when members of the public have no participatory rights in administrative procedures. The public's ability to inform authorities of violations that could result in supervisory control proceedings, immediate administrative action or criminal proceedings is obviously insufficient*."

23. We also recall our quotation of the Austrian MoE study (2009) on Article 9 par 3 of the Convention (following the Milieu study): "*Because environmental ombudsmen are not representing interests of members of civil society organisations and their lacking of independence from the state, they cannot or only under strict conditions be seen as members of the public in terms of the Aarhus convention."*[4]

24. We agree the Ombudsman has access to court, but only in selected procedures as the joint tables of the communicant and the party concerned of February 2010 show.

25. We more or less agree to what is said as to paragraph 58. It has to be considered that Art 5 par 7 UIG refers to the "substantive answering" of the request, whereas the issue invoked was that authorities have to answer in a non legal format, but to get a legally

[4] http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2010-48/Correspondence/Submissions%20commun%2011.10.2010/Annex_12MOEStudySummaryTranslationEN.pdf

valid answer (official notification) Art 8 par 1 UIG (request for official notification) has to applied. Only if the official notification is not issued within 6 months, the devolution request can be made. To make it clear, when the Party concerned (last paragraph of page 2) refers to the "justified response to the applicant" in accordance with Art 5 par 7 UIG it refers to the answer in the "non-legal format", whereas our allegations referred to Art 8 par 1 UIG (legal format official notification) and the fact there is no legal remedy against answers in the sense of Art 5 par 7 UIG because it does not have the legal format of an official notification.

26. We agree to the proposed wording by the party concerned as to paragraph 61 with the following amendment: the term "written refusal" has to be replaced with "official notification". This is consistent with the issue at stake (the problem is not the written format but it's legal quality) as referred to in paragraph 14 above.

27. We strongly disagree with the attempt of the Party concerned to questioning the Voitsberg verdict of the Highest Austrian Administrative Court (comment to paragraph 68, page 3). This case is not pending, but closed. The permitting authority and the Environmental Senate are bound to the ruling of the Highest Administrative Court.[5] It is not possible for the authorities to interpret standing provisions in a different manner than the Court did in this ruling. Any other interpretation would be illegal and annulled by the Court. This principle is laid down in the Austrian constitution (as it is expected to be in any other European legal state). In case the Party concerned contests this principle (that authorities and courts are bound to the highest courts interpretations) it should show explicitly state and argue how this should work.

28. Comments to paragraph 73: This is the opinion of the Party concerned.

29. Comments to paragraph 74: What is said on environmental liability is fine for us. We have not contested any issue regarding NGO standing in environmental liability matters. But we disagree with the proposed wording on page 5 since it mixes several issues. Paragraph 74 runs under the headline "locus standi for NGOs". We consider the original text of the revised findings correct. Regarding civil lawsuits: We are not aware of any evidence brought forward by the Party concerned demonstrating successful public interest litigation by NGOs or private persons under civil law.

30. Comments to paragraph 75: We agree that Article 9 par 3 is correctly implemented as to NGOs with regard to cases referring to Article 6 of the Convention (meaning when Article 9 par 2 applies, with the exclusion of EIA-screening) and Environmental Liability.

31. Comments to paragraph 76: As to the waste management act we agree. As for the Ombudsman "discretion" we refer to what was said above.

32. Comments to paragraph 77 and 82: Same as paragraph 30 (comments to para 75).

33. Comments to paragraph 83: We see no need for changes in the findings.

[5] The Highest Court is a court of cassation. It can therefore only cancel decisions. Article 63 par 1 of the Higest Administrative Courts procedure act (VwGG) states that public authorities are obliged to use all available legal means in order to immediately create a legal situation that complies with the legal view of the Court.