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## Economic Commission for Europe

### Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

#### **Fifth session**

Maastricht, the Netherlands, 30 June–1 July 2014

Item 5 (b) of the provisional agenda

#### **Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism**

## **Compliance by Austria with its obligations under the Convention**

### **Report by the Compliance Committee**

#### *Summary*

The present document was prepared by the Compliance Committee pursuant to the request set out in paragraph 10 of decision IV/9 of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (see ECE/MP.PP/2011/2/Add.1) and in accordance with the Committee's mandate set out in paragraphs 13 (b), 14 and 35 of the annex to decision I/7 on review of compliance (ECE/MP.PP/2/Add.8).

The document reviews the progress made by Austria in the intersessional period in implementing the recommendations set out in the Committee's findings on communication ACCC/C/2010/48, adopted on 16 December 2011 (ECE/MP.PP/C.1/2012/4), in particular with regard to the implementation of the Convention's provisions on access to information and access to justice.

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1. Communication ACCC/C/2010/48<sup>1</sup> was submitted by the Coordination Office of Austrian Environmental Organizations (OEKOBUERO) alleging the failure of Austria to comply with its obligations under article 3, paragraph 1, article 4, paragraphs 2 and 7, and article 9, paragraphs 1, 2, 3 and 4, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleged that the Austrian legal system lacked a clear, transparent and consistent framework implementing the access to justice provisions of the Convention; hence, according to the communication, the Party concerned failed to comply with article 3, paragraph 1, of the Convention. The communication also alleged a failure of Austrian law to comply with the time limits in article 4, paragraph 2. In conjunction with this, the communication alleged non-compliance with article 9, paragraph 1, of the Convention. The communication further alleged non-compliance with article 9, paragraph 2, of the Convention, asserting that members of the public concerned did not have access to justice through the procedures on environmental impact assessment (EIA) and on integrated pollution prevention and control (IPPC) to challenge breaches of public participation procedures under article 6. The communication focused on alleged non-compliance by the Party concerned with article 9, paragraph 3, of the Convention, asserting that members of the public did not have access to justice regarding acts and omissions from private persons and public authorities in environmental matters, due to the impairment of rights doctrine in Austrian administrative law. The communication also alleged non-compliance with article 9, paragraph 4, on the ground that in many cases access to justice was not adequate and effective, injunctions were not granted, procedures might be prohibitively expensive or not fair and, with regard to requests for information under article 4, access to justice was not timely.

3. Having considered the communication in accordance with the procedure set out in section VI of the annex to decision I/7, the Committee at its thirty-fifth meeting (Geneva, 13–16 December 2011), found that:

(a) The requirement for a separate “official notification” as a precondition for an appeal of a denial of an information request was not in compliance with article 4, paragraph 7, of the Convention;

(b) The Party concerned, by not ensuring access to a timely review procedure for access to requests for information, was not in compliance with article 9, paragraph 4, of the Convention;

(c) The Party concerned, in not ensuring standing of environmental non-governmental organizations (NGOs) to challenge acts or omissions of a public authority or private person in many of its sectoral laws, was not in compliance with article 9, paragraph 3, of the Convention.

4. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the same, recommended that the Party concerned:

(a) Take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) The procedure for having a refusal of a request for information reviewed is simplified for the requester. This could preferably be done by requiring any written

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<sup>1</sup> The communication and other documents relating to it are available on the Committee’s website from <http://www.unece.org/env/pp/pubcom.html>.

refusal of a request for information to have the legal status of an “official notification” and that any such refusal is to be made as soon as possible, and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request;

(ii) The available review procedures for persons who consider that their request for information under article 4 has been ignored, wrongfully refused or inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, are timely and expeditious;

(iii) Criteria for NGO standing to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention be revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EIA, IPPC, waste management or environmental liability laws;

(b) Develop a capacity-building programme and provide training on the implementation of the Aarhus Convention for federal and provincial authorities responsible for Aarhus-related issues, and for judges, prosecutors and lawyers.

5. The Committee confirmed the adoption of the edited version of its findings and recommendations in English, as well as their translation into French and Russian, at its thirty-seventh meeting (Geneva, 26–29 June 2012) as document ECE/MP.PP/C.1/2012/4.

6. Also at its thirty-seventh meeting, the Committee invited the Party concerned to provide information, by no later than 16 September 2013, on its progress in implementing the Committee’s recommendations.

7. The Party concerned provided its progress report on 10 September 2013 and the communicant provided comments on 23 September 2013.

8. The Party concerned reported on a number of developments concerning public participation and legal standing that had taken place in its legislation and case-law since the findings on communication ACCC/C/2010/48 were adopted. Several laws expanding public participation had been amended and were now in force. The legislative measures had primarily concerned two issues:

(a) Adapting the constitutional framework to enable legislators to implement rights to challenge environmental decisions beyond the “impaired rights” doctrine, thus allowing for broader participation of NGOs and other members of the public;

(b) Using the opportunity of the transposition of the new European Union Industrial Emissions Directive<sup>2</sup> to extend the scope of public participation, including standing rights for NGOs, to a much wider range of projects than had been the case under the former IPPC-regime. In addition, thresholds for EIA installations had been lowered with regard to a number of projects and exceptions had been eliminated, both of which had increased the number of EIA procedures providing for effective public participation and legal standing for NGOs.

9. The Party concerned reported that the above legislative measures alone had — according to first estimates — at least doubled the number of projects and procedures for which NGOs and other members of the public were granted legal standing. In addition,

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<sup>2</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

since the decision of the Constitutional Court in Case B606/11 in March 2012,<sup>3</sup> members of the public, e.g., neighbours, could now claim legal standing even though the relevant sectoral laws did not expressly provide for participation. With respect to a public authorities' consideration of whether or not a project impacted, e.g., on the current emission level, neighbours were now entitled to participate (get legal standing) in the relevant procedure. In line with the Aarhus Convention, the implications of the Court's reasoning also extended to environmental NGOs. A major reform of the Party concerned's administrative court system was currently under way, to take effect as of January 2014. Extending the scope of NGO participation had been actively discussed in the course of drafting amendments to a number of sectoral laws in preparation for the new system, including the Industrial Code, the Waste Management Act and the Act on Combustion Plants. The new administrative courts would be competent for challenges against administrative decisions, *inter alia*, concerning the environment.

10. The Party concerned further reported that it was preparing for general elections at the end of September, which had made it difficult to start new legal initiatives outside the scope of the aforementioned ongoing administrative court system reform. As an EU member State, it was also awaiting a proposal on access to justice from the European Commission which was expected to be presented in 2013.

11. In addition, the Party concerned noted that it had made numerous efforts to inform all affected stakeholders about the Committee's findings and recommendations on communication ACCC/C/2010/48, including the competent federal and provincial authorities, and to involve them. It had also made clear that implementation of the findings and recommendations should commence prior to their endorsement by the Meeting of the Parties.

12. In its comments on the Party concerned's progress, the communicant welcomed the willingness and efforts of the Austrian focal point to initiate processes regarding the Committee's findings on ACCC/C/2010/48, and expressed its appreciation for the respectful and open communication between the focal point and the communicant. While it agreed that the Ministry of Environment had undertaken various awareness-raising measures to inform the federal and provincial administration departments of their obligations under the Convention, no relevant legislative acts had been adopted since the findings on communication ACCC/C/2010/48 had been adopted by the Committee in December 2011, nor were any currently in the pipeline. This was disappointing, as most Austrian environmental legislation had been procedurally amended in the past few months in the course of adapting it to both the new administrative court system and the European Union's Industrial Emissions Directive. It requested the Committee to make clear and precise recommendations to the Meeting of the Parties, including a timeline with clear deadlines, for Austria to follow-up and to express its concern to the Meeting of the Parties at Austria's failure to date to implement the Committee's recommendations on communication ACCC/C/2010/48.

13. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee reviewed the progress report submitted by the Party concerned and the communicant's comments. The Committee noted the efforts made so far by the Party concerned, but expressed its concern that, despite nearly two years having passed since the findings were adopted at its thirty-fifth meeting (Geneva, 13–16 December 2011), no relevant legislative measures had been taken yet to address the Committee's recommendations.

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<sup>3</sup> Case B606/11, decision of the Constitutional Court dated 1 March 2012.

14. Also at its forty-second meeting, the Committee prepared the draft of the present report and recommendations. The draft was then sent to the Party concerned and the communicant on 18 November 2013 for their comments by 9 December 2013. The communicant provided its comments on 5 December 2013, indicating that it agreed with the wording of the draft report. The Party concerned provided its comments on 9 December 2013, identifying points of clarification in the draft report. The Committee, considering the comments submitted, adopted the report and recommendations at its forty-third meeting (Geneva, 17–20 December 2013) and agreed to submit it to the Meeting of the Parties at its fifth session.

15. The Committee recommends to the Meeting of the Parties, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance and measures taken by the Party concerned in the intersessional period, to:

- (a) Endorse the findings and recommendations of the Committee as adopted at its thirty-fifth meeting;
  - (b) Note the efforts made by the Party concerned so far;
  - (c) Express its concern that, despite nearly two years having passed since the findings on communication ACCC/C/2010/48 were adopted at its thirty-fifth meeting, no relevant legislative measures have yet been adopted by the Party concerned to address the Committee's recommendations;
  - (d) Invite the Party concerned to submit to the Committee periodically (on 31 December 2014, 31 October 2015 and 31 October 2016) detailed information on further progress in implementing the recommendation set out above;
  - (e) Undertake to review the situation at its sixth session.
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