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in Environmental Matters

Compliance Committee

Twenty-fifth meeting

Geneva, 22–25 September 2009

Report of the Compliance Committee on its Twenty-fifth meeting

Addendum

Findings with regard to communication ACCC/C/2008/26 concerning compliance by Austria

Adopted by the Compliance Committee on 25 September 2009

Summary

These findings were prepared by the Compliance Committee in accordance with its mandate as set out in paragraphs 13, 14 and 35 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2008/26 submitted by the non-governmental organizational *Nein Ennstal Transit-Trasse Verein für menschen- und umweltgerechte Verkehrspolitik (NETT)* regarding compliance by Austria with its obligations under the Convention in connection with decision-making processes related to alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320.

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I. Background

1. On 15 July 2008, the Nein Ennstal Transit-Trasse - Verein fuer Menschen- und Umweltgerechte Verkehrspolitik (NETT – No to the Enns Valley Transit Route: Organization for a socially and environmentally responsible transport policy), represented by Dr. Rolf-Michael Seiser and with powers of attorney granted to MMag. Johannes Pfeifer, hereinafter “the communicant”, submitted a communication to the Committee alleging failure by Austria to comply with its obligations under article 7, in conjunction with article 6, paragraphs 3, 4 and 8, article 8 and article 9, paragraphs 2, 3 and 4, of the Convention.

2. The communication concerns decision-making processes related to the consideration of alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320, as well as a link between the two decision-making processes:

(a) In its initial communication the communicant alleges that in the decision-making process regarding the consideration of alternative transport solutions for the Enns Valley, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention by not providing for adequate public participation in that decision-making process. In relationship thereto, the communicant also alleges that Austrian authorities failed to comply with article 2, paragraph 5, of the Convention by not allowing the communicant to participate in the decision-making process. In addition, the communicant alleges that the Austrian authorities failed to comply with article 8 of the Convention by not providing adequate public participation opportunities in connection with decision-making on executive regulations. The communicant further alleges that no opportunity to challenge relevant decisions was available and thus that Austrian authorities failed to comply with article 9 of the Convention.

(b) In its initial communication with respect to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320, the communicant alleges that the Austrian authorities failed to comply with article 7 in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention by not providing for adequate public participation. The communicant also alleges that the Austrian authorities failed to comply with article 8 of the Convention by not providing adequate public participation in connection with decision-making on executive regulations. The communicant furthermore alleges failure to comply with article 9 of the Convention because procedures were not available to challenge the omission to introduce the ban.

(c) The communicant also submits that there is a link between the two decision-making processes in that the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320 would diminish the need for large-scale transport alternatives in the Enns Valley.

3. The communication was supplemented with a number of supporting documents.

4. At its twenty-first meeting (17–19 September 2008), the Committee determined on a preliminary basis that communication ACCC/C/2008/26 was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7, the Committee forwarded the communication to the Party concerned on 26 September 2008. The Committee also raised a number of questions in relation to the communication with both the Party concerned and the communicant.

6. A response was received from the communicant on 15 January 2009, addressing the questions raised.

7. A response was received from the Party concerned on 25 February 2009, disputing the claims in the communication, addressing the questions raised and providing the Committee with relevant background information.

8. During its twenty-third meeting (31 March–3 April 2009), the Committee discussed the communication with the participation of representatives of both the Party concerned and the communicant, both of whom answered questions, clarified issues and presented information. On 31 March 2009, the communicant, in writing, also presented further allegations contending that both when considering alternative transport solutions for the Enns Valley and in not introducing a 7.5 tonnage restriction for lorries on route B 320, the Austrian authorities had failed to comply with article 6 of the Convention. In addition, the communicant submitted further information to substantiate its allegation that the Austrian authorities had failed to comply with articles 7, 8 and 9 of the Convention. The Party concerned informed the Committee that in its view the decision-making process regarding the alternative transport solutions was neither in the permitting stage nor in the planning stage, and thus not subject to the public participation requirements of article 6 or article 7, respectively, of the Convention. Furthermore, the Party concerned asserted that during the Strategic Traffic Assessment (STA), all options would be open. As for the proposed introduction of the 7.5-tonnage restriction for lorries, the Party concerned stated that under Austrian law, such a ban was considered as a traffic regulation concerned with the regulation and safety of traffic.

9. The Committee confirmed that the communication was admissible. It requested clarification of various aspects of the arguments put forward by the Party concerned and the communicant with regard to, inter alia, the starting point of the planning phase. It requested from the Party concerned a written list of all options that were going to be considered during the STA phase of the planning process, together with further information and legal references to substantiate the claim by the Party concerned that all options remained open. The Committee also agreed to take into consideration new information offered by the communicant, within the framework of the communication.

10. On 23 April 2009, the communicant submitted further information to the Committee upholding its allegations that the Austrian authorities had failed to comply with articles 6, 7, 8 and 9 of the Convention, both when considering alternative transport solutions for the Enns Valley and in the decision-making process related to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320. More specifically, the communicant submitted that the motion dated 31 March 2008 and adopted by the Styrian Provincial Government on 21 April 2008 constituted a final choice for a specific route, namely the 4-lane middle route.

11. On 27 May 2009 (with corrections submitted on 12 June 2009), the Party concerned submitted further information to the Committee disputing the claims presented by the communicant, both those presented in writing and orally at the twenty-third meeting of the Committee. The Party concerned informed the Committee that in its view the planning process was initiated by the decision of the Styrian Provincial Government of 21 April 2008 and submitted a list of options to be considered in that process (zero option, construction of new major roads, construction of new local roads, expansion of existing roads, public transportation option, combined option). The Party concerned also noted that the communicant had raised a new point in its submission of 31 March 2009 and orally at the twenty-third meeting of the Committee. This point concerned the manner in which strategic environmental assessments are conducted in the field of transport in Austria. The Party concerned suggested that this point should not be part of the present proceedings because it was not raised in the original communication submitted by the communicant. The Party concerned nevertheless provided information on how strategic environmental assessments in the field of transport are conducted in Austria.

12. In accordance with paragraph 34 of the annex to decision I/7, the Committee prepared draft findings at its twenty-fourth meeting (30 June–3 July 2009). These were forwarded to the Party concerned and the communicant on 20 August 2009 with an invitation to provide comments, if any, by 15 September 2009.

13. The Party concerned provided comments on 18 September 2009, accepting the draft findings, and the communicant provided comments on 14 September 2009 reiterating its position.

14. On 15 September 2009, comments were received from Oekobuero, criticizing the findings.

15. At its twenty-fifth meeting (22–25 September 2009), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues¹

A. National legal framework

16. The communication concerns decision-making processes related to the consideration of alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the introduction of a 7.5 tonnage restriction for lorries on route B 320, as well as the link between the two decision-making processes.

1. Alternative transport solutions in the Enns Valley

17. The Federal Act on the Strategic Assessment of Transport (SP-V Act), published in the Federal Law Gazette (FLG) I No. 96/2005, requires that network alterations of the major road network, such as some of the transport solutions being considered in the Enns Valley, be submitted to a strategic assessment in which potential substantial adverse environmental impacts are to be considered. After the conduct of the strategic assessment, the remaining option(s) would be subject to an environmental impact assessment based on the Federal Act on Environmental Impact Assessment 2000 (EIA Act 2000), FLG I No. 697/1993, last amended in 2008 (see FLG I No. 2/2008). Both Acts serve to implement the Convention and relevant European Community Directives.

18. The SP-V Act requires the initiator, which in case of the high-level road network (such as motorways) is ASFINAG (Austrian Organization for Financing Motorways), when suggesting alterations to the network, to present a proposal including an environmental report, prepared in cooperation with the Ministry of Transport (article 4 of the SP-V Act). The aim of the proposal is the inclusion of the proposed road on the Annex to the 1971 Federal Roads Act by way of a decision taken in Parliament (article 3(1)(3) of the SP-V Act). The Act requires the operator when assessing alterations to the high-level network, inter alia, to ensure sustainable passenger and freight transport, taking into account social and safety conditions, to ensure a high level of environmental protection, to ensure optimal utilization of available capacity and to provide interoperability and intermodality within and between different modes of transport. In addition, possible substantial adverse impacts of,

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

as well as reasonable alternatives to, the proposed alterations of the network have to be considered in the proposal (article 5(1) of the SP-V Act). The Act, furthermore, requires the operator to consult the Federal Minister of Agriculture, Forestry, Environment and Water Management as well as the environmental authorities of the provinces involved. The proposal and the environmental report are to be published on the Internet on a page hosted by the Federal Ministry of Transport, and notifications are to be placed in at least two daily newspapers (article 8(1) of the SP-V Act). After the publication of the report, the public is entitled to make statements during a period of six weeks (article 8(1) of the SP-V Act). In conducting the strategic assessment, the Minister of Transport is to collect statements by the public and other public authorities and to take such statements into account (article 5(2) and article 8 of the SP-V Act). The draft parliamentary decision as well as a document indicating how statements from the public and environmental considerations have been taken into account is also to be published on the website of the Ministry of Transport (article 9 of the SP-V Act). Subsequently, a decision is taken in Parliament, which is subject to the general legislative procedure.

19. The EIA Act 2000 regulates the conduct of environmental impact assessment, including participation of the public therein. Depending on whether the option chosen qualifies as a provincial road (e.g. adjustments to route B 320, which is a provincial road) or federal road (e.g. a new 4-lane route included on the Annex to the 1971 Federal Roads Act), either the Styrian Provincial Government or the Federal Government would be responsible for the environmental impact process. Concomitantly, either section 2 or 3 of the EIA Act 2000 would apply. Either way, provisions on public participation and access to justice govern the decision-making processes. In the case that the option chosen qualifies as a provincial road, article 19 of the EIA Act 2000 regulates public participation; in the case that it qualifies as a federal road, article 19 applies *mutatis mutandis* (see e.g. article 24 (5) and article 24h(8) of the EIA Act 2000). Article 19(6) provides the conditions which NGOs must meet to qualify as an environmental organization and which the Minister of Agriculture, Forestry, Environment and Water Management must apply, based on article 19(7), in deciding whether a non-governmental organization (NGO) is entitled to *locus standi* in the procedures envisaged in the EIA Act 2000.

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

20. The Austrian Highway Code qualifies the imposition of a 7.5 tonnage restriction for lorries on route B 320 as a measure to regulate traffic or the safety of traffic. According to established Constitutional Court practice, hearings are held prior to such a regulation being issued. If no such hearings are held the regulation is deemed unlawful. No regulations have been issued which determine how such hearings are to be held.

B. Decision-making processes

21. The communicant was recognized as an environmental organization for, among other provinces, the province of Styria, by a decision of the Federal Minister of Agriculture, Forestry, Environment and Water Management taken on 10 July 2007, on the basis of article 19(7) of the EIA Act 2000. The communicant thereby has *locus standi* regarding environmental impact assessment procedures and is entitled to act, including by submitting complaints, in order to secure the observance of environmental law.

1. Alternative transport solutions in the Enns Valley

22. Alternative transport solutions in the Enns Valley have been the object of study since 1971. The most recent study concerns the so-called “Basler Study” presented in July 2003. This study served as a basis for a “route finding process” (*Trassenfindungsprozess*)

which the Provincial Government initiated by a decision of 22 January 2004 and in which alternative transport solutions in the Enns Valley were considered. During these considerations, various options for addressing the traffic situation in the Enns Valley were presented and considered by, among other forums, the Regional Planning Council, an advisory body for regional planning, constituted in 2004. Pursuant to a decision of 25 April 2005, the Regional Planning Council approved the functional evaluation of the road network as set out in the draft Regional Traffic Concept. This evaluation was subsequently approved by the Provincial Government. One of the options that played a role in this process is the realization of a 4-lane route through the Enns Valley, an option favoured by the Regional Planning Council. Since 2004, various meetings involving communities (Community Forums) and NGOs (Round Tables) have been organized to discuss alternative transport solutions in the Enns Valley. The communicant participated in these Round Tables until February 2006 when, after the presentation of unmet demands (regarding the content of the discussions, which according to the communicant were limited to the 4-lane route option), the communicant and other NGOs left the process.

23. In 2007, a public survey was conducted in the Enns Valley which according to the communicant illustrated the rejection of the 4-lane option. The communicant subsequently tried to engage in a discussion with the Regional Planning Council, which, according to the communicant, refused to engage in a discussion regarding the results of the public survey and the interim results of an intermodal traffic planning project. On 14 February 2008, the communicant applied for membership to the Regional Planning Council. Its application was rejected, based on the argument that the composition of the Council was determined by the Styrian Regional Planning Act, which does not provide for the participation of entities such as the communicant in the Council. This rejection was communicated to the communicant by letter from the Provincial Government of Styria, dated 17 March 2008. The communicant appealed the rejection of its application for membership to the Regional Planning Council before the Constitutional Court. The Court rejected the appeal on the grounds that it was not for the Styrian Government to decide on the composition of the Council on an ad hoc basis and that the communicant was not legally affected by the proceedings of the Council.

24. On 21 April 2008, the Styrian Provincial Government adopted a motion in which the proposed planning process and the results of the route selection process were noted with approval, and in which the negotiations for a funding option and the conclusion of a contract as well as the conduct of other necessary procedures were authorized. At the basis of the motion is a document dated 27 March 2008 which summarizes the planning process and the route selection process. Under the heading "Remaining routes – Method of Choosing" (Verbleibende Trassen – Auswahlverfahren), the document mentions "Als Ergebnis der Untersuchungen wird empfohlen, die Mittelvariante weiter zu verfolgen" ("As a result of the investigations it is recommended to further pursue the middle option").

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

25. In 2004, eight municipalities and other interested parties, including the communicant, submitted applications for the imposition of a 7.5 tonnage restriction on route B 320. No decisions regarding the imposition of such a restriction have been taken. The District Commissioner has obtained or is in the process of obtaining relevant expert opinions, regarding, for example, medical and environmental effects. Part of the expert opinions were presented and discussed in public by the District Administration of Liezen on 11 April 2007. NETT requested access to the available expert opinions, but such access was denied.

26. On 14 February 2008, the communicant submitted an application to participate in the decision-making process regarding the proposal to introduce a 7.5 tonnage restriction on

route B 320. Its application was rejected for lack of a legal, as opposed to actual, interest. In addition, it was pointed out that its status as an environmental organization under article 19(7) of the EIA Act 2000 only applied to environmental impact procedures conducted pursuant to that Act and not to decisions taken within the framework of road traffic regulations. The communicant appealed this decision before the Highest Administrative Court on 4 August 2008. The case is still pending.

27. Also, on 1 July 2008, the communicant submitted a complaint to the European Commission regarding the non-imposition of a 7.5 tonnage restriction on route B 320. The complaint is still pending.

C. Substantive issues

1. Alternative transport solutions in the Enns Valley

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

28. The communicant alleges that in the decision-making process regarding the decision of the Regional Planning Council of 25 April 2005, there was “no sufficient participation and information of the public in the planning process” and that this constitutes a violation of article 6 of the Convention (written statement submitted 31 March 2009 and orally at the twenty-third meeting of the Committee).

29. Furthermore, the communicant alleges that the motion adopted by the Styrian Provincial Government dated 21 April 2008 amounted to a decision to permit what is known as the “4-lane middle variant” and that in the decision-making process, the Austrian authorities failed to comply with article 6 of the Convention (written statement submitted 31 March 2009 and orally at the twenty-third meeting of the Committee).

30. The Party concerned maintains that the process for considering alternative transport solutions for the Enns Valley had not reached the permitting stage, neither when the Regional Planning Council adopted its advisory decision on 25 April 2005 nor when the Styrian Federal Government took its decision on 21 April 2008, and that therefore article 6 of the Convention is not applicable.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

31. The communicant alleges that the decision of the Regional Planning Council of 25 April 2005 precludes consideration of options other than a 4-lane route. It consequently alleges as follows:

(a) Since the public was not informed about the planned decision of the Regional Planning Council, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention.

(b) Since the public, in general, and the communicant, in particular, were not entitled to participate in the Regional Planning Council, the decisions were taken without early public participation when all options are open; and because participation in the Round Tables did not amount to effective public participation, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention.

(c) Because the input of NGOs in general and of the communicant in particular in the Round Table process was not properly taken account of and because the results of a household survey could not be presented to the Regional Planning Council, the Austrian

authorities failed to comply with article 7, in conjunction with article 6, paragraph 8, of the Convention.

32. In addition, the communicant alleges that the decision of the Styrian Provincial Government dated 21 April 2008 amounts to a decision to pursue the “4-lane middle variant”, and that in the decision-making process, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention. In particular, the communicant alleges that the Round Tables for NGOs in which it participated until February 2006 did not provide for effective participation when all options were open and amounted to a failure to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention; and that the outcome of those Round Tables as well as other submissions by the public were not given due account in the planning process, which according to the communicant amounts to a failure to comply with article 6, paragraph 8, of the Convention.

33. The Party concerned maintains that the participatory processes undertaken prior to 21 April 2008 involved a pre-planning phase in which possible options for a road in the Enns Valley were assessed having regard to the legal limitations on the available options, in view of, among others, the European Community Habitats and Birds Directives². Consequently, the Party concerned maintains that article 7 of the Convention does not apply to the actions challenged by the communicant. It maintains that the planning process and thus the application of article 7 will only start with the launching of the Strategic Traffic Assessment in furtherance of the motion adopted by the Styrian Provincial Government on 21 April 2008. The Party concerned submits that in this process, public participation is envisaged in conformity with the Convention. Furthermore, the Party concerned maintains that in that process, all options remain open. The Party concerned also points to the five Round Tables which were organized in the pre-planning stage in order to involve NGOs and points out that since February 2006 the communicant declined to participate in these Round Tables. Finally, the Party concerned disputes the allegation by the communicant that at that stage all options were no longer open.

Public participation in the preparation of executive regulations and/or generally applicable legally binding normative instrument – article 8

34. The communicant alleges that some of the aforementioned decisions, without referring to specific decisions, constitute executive decisions within the purview of article 8 of the Convention, that these decisions have not been made publicly available and that the public has not been given the opportunity to comment thereon. It thus alleges a failure to comply with article 8 on the part of the Party concerned.

35. The Party concerned submits that no executive decisions have been taken.

Access to justice – article 9

36. The communicant alleges failure of the Party concerned to comply with article 9, paragraph 2, of the Convention on the grounds that insufficient means were available to challenge the composition of the Regional Planning Council or to challenge the rejection of its application for membership to the Council. The communicant in this respect also alleges failure by the Party concerned to provide effective remedies and thus failure to comply with article 9, paragraph 4, of the Convention.

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

37. More generally, the communicant alleges that the Party concerned has failed to comply with article 9, paragraph 3, of the Convention.

38. The Party concerned submits that since article 6 of the Convention does not apply to the decision-making process at stake, thus article 9, paragraph 2, and consequently paragraph 4 of the Convention, are not applicable.

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

39. The communicant alleges that lack of public participation with respect to the proposal to introduce the 7.5 tonnage restriction for lorries on route B 320 constitutes a failure of the Party concerned to comply with article 6 of the Convention (written statement submitted on 31 March 2009 and orally at the twenty-third meeting of the Committee).

40. The Party concerned submits that article 6 of the Convention does not apply to the decision-making process in question, given that the decision at issue is not a permitting decision and does not come within any of the categories listed in annex I of the Convention.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

41. The communicant alleges that lack of public participation with respect to the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320 constitutes a failure of the Party concerned to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

42. The Party concerned submits that the decision-making process in question concerns a measure that seeks to regulate traffic and the safety of traffic and does not constitute the development of a plan, programme or policy relating to the environment in the sense of article 7 of the Convention. It furthermore points out that the decision-making process is still ongoing and that any decision taken according to the Constitutional Court practice will have to be subjected to a hearing prior to becoming effective.

Public participation in the preparation of executive regulations and/or generally applicable legally binding normative instrument – article 8

43. The communicant alleges that the fact that the public does not have the opportunity to comment on that no decision has been taken regarding the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320, constitutes a failure of the Party concerned to comply with article 8 of the Convention.

44. The Party concerned submits that no decision has been taken in this respect and that any decision taken according to the Constitutional Court practice must be subjected to a hearing prior to becoming effective.

Access to justice – article 9

45. The communicant alleges that the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320 amounts to an omission. Given that no review or appeal procedure regarding this omission is available, the communicant alleges that the Party concerned has failed to comply with article 9, paragraph 2, of the Convention.

46. More generally, the communicant alleges that the Party concerned has failed to comply with article 9, paragraph 3, of the Convention.

47. The Party concerned submits that since article 6 of the Convention does not apply to the decision-making process at stake, thus article 9, paragraph 2, and subsequently paragraph 4, of the Convention are not applicable.

III. Consideration and evaluation by the Committee

A. Legal basis and scope of considerations by the Committee

48. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

49. Noting that a number of events referred to in the proceedings took place before the entry into force of the Convention for the Party concerned, the Committee focuses on the activities that took place after 17 April 2005. The Committee notes that a number of significant events in the decision-making process have taken place since the entry into force of the Convention for Austria (ECE/MP.PP/C.1/2005/2/Add.1, para. 4) and notes that the application of the Convention was not disputed by the Party concerned.

50. The communication refers to a number of consecutive decisions and decision-making processes. Whether any one of these decisions amount to a permitting decision under article 6, or a decision to adopt a plan, programme or policy under article 7 of the Convention, must be determined on a contextual basis, taking into account the legal effects of each decision.

B. Admissibility and exhaustion of domestic remedies

51. As mentioned in paragraph 0 above, the Committee finds the communication to be admissible.

52. Given the phase of the decision-making process, the Committee concludes that the communicant has made all reasonable efforts to exhaust domestic remedies.

C. Substantive issues

Public participation in the preparation of executive regulations and/or generally applicable legally binding normative instrument – article 8

53. In line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that decision I/7 does not require the Commission to address all facts and/or allegations raised in the communication, the Committee decides not to address the allegations that executive decisions, ex article 8 of the Convention, have been taken in regard of the consideration of alternative transport solutions in the Enns Valley and the proposal to introduce a 7.5 tonnage restriction for lorries on route B 320. The Committee comes to this decision because the communicant did not clearly indicate which decisions are at stake with respect to the consideration of alternative transport solutions in the Enns Valley and a decision, subject to a hearing, is still pending regarding the proposed introduction of the 7.5 tonnage restriction for lorries on road B 320.

1. Alternative transport solutions in the Enns Valley

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

54. As for the consideration of alternative transport solutions in the Enns Valley, taking into account the advisory nature of the Regional Planning Council, the Committee concludes that the decision taken by the Regional Planning Council on 25 April 2005 does not amount to a permitting decision which authorizes a proposed activity listed in annex I of the Convention. Furthermore, taking into account the fact that the decision taken by the Styrian Provincial Government on 21 April 2008 does not authorize the construction of a road, the strategic assessment still to be conducted based on the SP-V Act and the EIA still to be conducted on the basis of the EIA Act 2000, the Committee concludes that the decision taken by the Styrian Provincial Government of 21 April 2008 does not amount to a permitting decision which authorize a proposed activity that is covered by any of the categories listed in annex I of the Convention.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

55. As to whether any one of the decisions and decision-making processes referred to by the communicant amount to the preparation of plans, programmes or policies within the purview of article 7 of the Convention, the Committee refers to its previous findings where it stated that, when it determines how to categorize the relevant decisions under the Convention, their labels under domestic law of the Party concerned are not decisive (ECE/MP.PP/C.1/2006/4/Add.2, para. 29). In this case, the Committee will thus have to determine whether any of the decisions taken amount to part of a decision-making process regarding the preparation of plans, programmes or policies, and if so, whether the conditions of article 7, in conjunction with article 6, paragraphs 3, 4 and 8 of the Convention, have been met.

56. The Committee finds that the decision of the Styrian Provincial Government on 22 January 2004, well in advance of the entry into force of the Convention for the Party concerned, initiated a planning process which is still ongoing. Within that planning process, public participation, in the sense of public debate, has taken place through the so-called Round Tables, both before and after the Convention entered into force for the Party concerned. Whether these Round Tables as such amount to public participation in accordance with the article 7, in conjunction with article 6, paragraphs 3, 4 and 8, is not for the Committee to decide in this case, given that the relevant decision was taken and that no significant events relating to the decision-making process took place after the Convention entered into force for the Party concerned.

57. The Committee notes that the planning process is still ongoing. Important in this respect is the assurance of the Party concerned that during the strategic assessment, still to be conducted based on the SP-V Act, all options will be open and considered and participation in accordance with the Convention will be afforded. In this context, the Committee, however, expresses concern in respect of the motion adopted by Styrian Provincial Government of 21 April 2008 and the document dated 27 March 2008 which provides the basis for this motion. These documents express a strong presumption in favour of the 4-lane option (corroborated by information available on the website of the Styrian Government),³ which may de facto narrow down the available options and thus hamper participation at an early stage when all options are still open and due account can be taken

³ See <http://www.verkehr.steiermark.at/cms/beitrag/10930541/11163579/> (last accessed 17 June 2009).

of the outcome of the public participation. Similarly, the Committee expresses concern with respect to the statements of the member of the provincial government, Mag. Kristina Edlinger-Ploder on public television and in newspapers that the 4-lane road will be built, excluding the consideration of other options.⁴

Access to justice – article 9

58. Given that none of the decisions taken amount to a permitting decision under article 6 of the Convention, the Committee finds that article 9, paragraph 2, and subsequently paragraph 4 of the Convention, do not apply to the phase of the decision-making process considered in the present case with respect to the consideration of alternative transport solutions in the Enns Valley.

59. The Committee, while aware of the information available in the public domain with respect to the limited manner in which the Party concerned has implemented article 9, paragraph 3, of the Convention,⁵ finds that the communicant has insufficiently substantiated its allegation that article 9, paragraph 3, of the Convention has not been complied with in the present case with respect to the consideration of alternative transport solutions in the Enns Valley.

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

60. The Committee concludes that not introducing the 7.5 tonnage restriction for lorries on route B 320 does not amount to a decision to permit a proposed activity listed in annex I of the Convention.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

61. The Committee concludes that the decision-making process regarding the proposal to introduce a 7.5 tonnage restriction for lorries on route B 320 does not constitute a decision-making process regarding a plan, programme or policy. As mentioned the Committee has decided not to deal with article 8 issues.

Access to justice – article 9

62. Given that no permitting decisions within the purview of article 6 of the Convention are at stake, the Committee concludes that article 9, paragraph 2, and consequently paragraph 4 of the Convention, does not apply in the present case, with respect to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320.

63. The Committee, while aware of the information available in the public domain with respect to the limited manner in which the Party concerned has implemented article 9, paragraph 3, of the Convention,⁶ finds that the communicant has not sufficiently substantiated its allegation that article 9, paragraph 3, of the Convention has not been complied with in the present proceedings, with respect to the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320.

⁴ See <http://oesterreich.orf.at/steiermark/stories/272397/> (last accessed on 23 September 2009).

⁵ Country Report for Austria, Measures on access to justice in environmental matters (Article 9(3)), Study prepared by Milieu Ltd. for the European Commission, DG Environment, 2007.

⁶ Ibid.

3. Link between the two decision-making processes

64. As to the possible link between the two decision-making processes (see para. 0 (c) above), the Committee suggests that it would be logical to examine this possible link early on in the decision-making process, when all options are still open. The strategic assessment to be conducted pursuant to the SP-V Act might well provide opportunities in this respect.

IV. Submission by the OEKOBUERO

65. The Committee considered the submission by the Oekobuero asserting, inter alia, that the Austrian laws on EIA and SEA might in general not be in conformity with the Convention. The Committee noted that in the present communication the specific facts of the case were at stake and no decisions pursuant to either the EIA or SEA have yet been taken.

IV. Conclusions

66. The Committee concludes that, given the present phase of the decision-making process, the Party concerned has not failed to comply with the Convention. The Committee, however, notes that at least in part its conclusion is related to the fact that the planning process in the present case commenced well in advance of the entry into force of the Convention for the Party concerned. It is in this context that the Committee considers it important to reiterate its concern expressed in paragraph 0. The Committee emphasizes that participation in accordance with article 6 and article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention, should take place and that such participation does not only require formal participation. Importantly, participation is to include public debate and the opportunity for the public to participate in such debate at an early stage of the decision-making process, when all options are open and when due account can be taken of the outcome of the public participation.
