

REGISTERED LETTER

Mr. Jeremy Wates
Secretary to the AARHUS Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10
SWITZERLAND

Liezen, on 1st July 2008
Ref.: Verein/1 / CK 108-08

Complainant: The Organisation “NETT – Nein Ennstal Transit-Trasse; Verein für menschen- und umweltgerechte Verkehrspolitik” (*“NETT – No to the Enns Valley Transit Route; Organisation for a socially and environmentally sound transport policy”*).

represented by the chairman of the organisation:

Dr. Rolf-Michael Seiser
Parkgasse 199a
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Represented by: (Power of attorney has been granted to MMag. Johannes Pfeifer)

**COMMUNICATION
TO THE AARHUS CONVENTION'S
COMPLIANCE COMMITTEE**

Please note that the legal representative declared overleaf, MMag. Johannes Pfeifer, has been authorised to represent the complainant in the afore-mentioned complaint.

1. Information about the complainant:

The complaint is submitted by the Organisation “NETT – Nein Ennstal Transit-Trasse; Verein für menschen- und umweltgerechte Verkehrspolitik” (“NETT – No to the Enns Valley Transit Route; Organisation for a socially and environmentally sound transport policy”). The organisation is a recognised environmental organisation in accordance with § 19 section 7 of the UVP – G 2000 (*Environmental Impact Assessment Act*) according to the decision made by the Bundesministeriums für Land- Forstwirtschaft und Umwelt (*Federal Ministry of Agriculture, Forestry and Environment*) GZ: BNLFUW-UW.1.4.2/0027-V/1/2007 dated 10.07.2007.

The Organisation “NETT” was founded on 05.08.1991 and is made up of citizens who are primarily residents of the Ennstal (*Enns Valley*). The purpose of the organisation according to the Articles of Association is inter alia:

- the preservation of the natural landscape and the countryside in the Ennstal (*Enns Valley*) by means of a socially and environmentally sound transport policy
- the non-material support of the farmers in their efforts to preserve their agricultural existence in the Ennstal (*Enns Valley*)
- the protection of drinking water reserves in the central region of the Ennstal (*Enns Valley*)

2. Legal Representative

The Organisation “NETT” authorises the solicitor MMag. Johannes Pfeifer, Rathausplatz 3, 8940 Liezen to submit the complaint, to represent the organisation in the complaints procedure and to accept and receive any written communication or documents of any kind that are related to this complaints procedure.

3. Member State concerned:

The Republic of Austria.

The Republic of Austria ratified the Convention on 17.01.2005 (BGBl. III N°. 88/2005) (*Federal Law Gazette III N°. 88/2005*).

4. The facts:

Preceding events:

The complainant is aware that complaints can only be regarded as subject-matter of the complaint with regard to contract violations after the ratification of the Aarhus Convention by Austria. However, here is a short description of preceding events which will act as an explanation and for a better understanding of the situation:

A Landesstraße LB 320 (*B-road, LB 320*) traverses the Ennstal (*Enns Valley*) between Selzthal and the border of the Federal State of Styria (*Steiermark*) at Mandling forming the connection between the Tauernautobahn (A10) (*the A10 Tauern Motorway*) and the Pyhrnautobahn (A9) (*the A9 Pyhrn Motorway*).

At the beginning of the 70s, there was a plan to replace this two-lane road with a four-lane express highway (S 8). However, after tough negotiations, massive protests and demonstrations, only a rudimentary part of the planned express highway between Liezen and Trautenfels, called the "Ennsnahe Trasse" (*the Enns Valley Transit Route*), remained as a two-lane Bundesstraße (*A-road*) as a replacement for the approximately 60 km long Landesstraße (*B-road*).

In 1990, when the first building operations in the area of Stainach (the construction of the Sallabergerbrücke (*Sallaberg bridge*)) should have begun, there were protest rallies, and in 1992 a building freeze was ordered due to a water rights permit being unavailable. On 30.03.1993, the ground-breaking ceremony for one part of the "Ennsnahe Trasse" (*the Enns Valley Transit Route*) took place (Wanne Stainach) (*the Stainach Basin*), which consequently led to occupation of the building site and confrontations between the police and the demonstrators.

In June 1994, it transpired that no water rights decision for the "Ennsnahe Trasse" (*the Enns Valley Transit Route*) could be issued by the competent authorities, due to the fact that there was danger of flooding on certain parts of the route and the road operating company did not have the land at their disposal which would have been necessary in order to safeguard the road against this danger.

In May 1995, the “Ennsnahe Trasse” (*the Enns Valley Transit Route*) was denied approval in a decision made on the grounds of nature protection regulations. Furthermore, in May 1995, a water rights decision, which, in principle, was positive, was issued. However, it contained a significant stipulation, namely the acquisition of a certain strip of land which was directly difficult to redeem. The Republic of Austria, represented by the Bundesstrassengesellschaft (*federal road operating company*), filed a complaint with the Verwaltungsgerichtshof (*Administrative Court*) against the negative decision made on the grounds of nature protection regulations.

In May 1996, a favourable decision was issued for the “Ennsnahe Trasse” (*the Enns Valley Transit Route*) pursuant to environmental regulations.

On 19.12.1996, the European Union instituted proceedings against Austria for contract violation because of the failure to comply with European Community regulations concerning the protection of birds (Vogelschutz Richtlinie) (*A Special Protection Area or SPA - a designation under the European Union directive on the Conservation of Wild Birds*). Areas were affected by the “Ennsnahe Trasse” (*the Enns Valley Transit Route*) where the protected bird species “der Wachtelkönig” (*the Corn Crake (Crex crex)*) resides. Subsequently, the Steiermärkische Landesregierung (*the Federal State Government of Styria*) announced that the Ennsnahe Trasse (*the Enns Valley Transit Route*) would be reviewed in accordance with nature protection regulations regarding the protection of “der Wachtelkönig” (*the Corn Crake (Crex crex)*).

On 22.04.1999, the proceedings instituted against Austria by the European Union for contract violation were suspended after the Federal State of Styria agreed to conduct the project according to European Community regulations in future.

On 07.07.2000, the former Austrian Minister for Infrastructure, Schmied, announced that the Ennsnahe Trasse (*the Enns Valley Transit Route*) was not feasible due to minor procedural prospects. Instead, a by-pass for Stainach and a sub-surface route near Liezen was planned. The reason for the discontinuation was also that the resettlement of the bird species “der Wachtelkönig” (*the Corn Crake (Crex crex)*), which was necessary for the approval of the Commission, would be too expensive in view of the fact that success was uncertain.

In 2001, the former Landeshauptmannstellvertreter (*similar to a deputy governor*) Schögggl promised an environmental mediation procedure after the completion of a comprehensive corridor traffic investigation.

On 02.06.2003, the former Styrian transport advisor and Landeshauptmannstellvertreter (*similar to a deputy governor*) Leopold Schögggl newly presented the results of a tender regarding a further course of action concerning an Ennsstraße (*an Enns Valley Route*), whereby the Swiss Institute “Basler and Partners” recommended the improvements of the existing development of the Ennstalstraße (*the Enns Valley Route*). Approximately € 30,000,000 had been spent on planning and the execution of construction work so far.

By ratifying the traffic protocol of the Alpine Convention (BGBl III 234/2002) (*Federal Law Gazette III 234/2002*), the Republic of Austria also declared that Austria would avoid building new large-capacity routes for transalpine traffic.

In 2004, discussions forums were set up by the Federal State of Styria, namely a state forum, a regional forum and a municipal forum instead of the promised environmental mediation procedure. These forums were made up as clearly shown in the addenda:

Based on § 17 of the Steiermärkischen Raumordnungsgesetzes (*Regional Planning Act for the Federal State of Styria*), a regional planning committee was convened, to which, according to § 17 section 3 of the Raumordnungsgesetz (*Regional Planning Act*), among others, persons who have special knowledge which is of importance for spatial planning in the planning regions, and one representative sent from each municipality, were appointed. More detailed stipulations about the formation of the regional planning committees were determined according to § 17 section 3 of the Steiermärkischen Raumordnungsgesetzes (*Regional Planning Act for the Federal State of Styria*) according to the regulations stipulated, whereby the relevant regulation was passed by the Federal State of Styria in 1995 (i.e. long before the ratification of the Aarhus-Convention). This advisory committee was made up as follows:

1) *The advisory committee is made up of the following members:*

a) *five members named by the parties represented in the Landtag (legislative assembly of a federal state) according to the highest averages method (D'Hondt method) resulting from recent federal state parliamentary election results in the municipalities located in the planning regions. At least one delegate from each party should be nominated for the Landtag (legislative assembly of a federal state). In addition, parties represented in the Landtag (legislative assembly of a federal state) who are entitled to a seat in the federal state government, are entitled to nominate a member if they do not have nominating rights according to aforementioned regulations;*

b) one member from each of the following, via nomination

- Kammer für Arbeiter und Angestellte für Steiermark (The Chamber of Labour in Styria, representing the interests of labourers and employees),
- Kammer der gewerblichen Wirtschaft für Steiermark (Federal Economic Chamber in Styria),
- Kammer für Land- und Forstwirtschaft für Steiermark (Chamber of Agriculture and Forestry in Styria),

c) one member named by the Österreichischen Gewerkschaftsbund (the Austrian Trade Union Federation);

d) one member from each of the branches of the Arbeitsmarktservice (Public Employment Service) located in the planning region;

e) one member named by the Vereinigung Österreichischer Industrieller (the Federation of Austrian Industry);

f) one community councillor of the planning region named by the Österreichischen Städtebund, Landesgruppe Steiermark (Association of Austrian Cities and Towns, Styrian regional committee) and one named community councillor of the planning region named by the Steiermärkischen Gemeindebund (Styrian Association of Municipalities);

g) one member named by the Ingenieurkammer für Steiermark und Kärnten (Chamber of Architects and Chartered Engineering Consultants for Styria and Carinthia);

h) the Bezirkshauptmann (District Commissioner - head of local government) and if applicable the Expositurleiter (head of a certain administrative office);

i) one representative from each of the municipalities located in the planning region.

No NGOs (such as the complainant) were invited to any of these forums.

On 25.04.2005, it became known that this regional planning committee was in favour of a large capacity route from the intersection Selzthal to Trautenfels, on 19.10.2005 a relevant regional traffic concept was unanimously decided, and on 30.01.2006 the relevant regional traffic concept for Liezen was decided by the Steiermärkischen Landesregierung (*Federal State Government of Styria*). The public found out about these decisions in the media at a later date, and according to statements made by some of the members of the planning committee, the decisions had never been decided in the manner in which they had been publicised.

Furthermore, this complaint will show above all, that the formation of this regional planning committee according to the regulations of the Steiermärkischen Landesregierung (*Federal State Government of Styria*) dated 27.11.1995, does not conform to the principles of the Aarhus-Convention, in particular, in one of the open planning procedures stipulated by the

Convention, the interests of the public should be taken into account, in particular by admitting NGOs such as the complainant, the Organisation "NETT", in order to be able to effect a planning procedure where the outcome is not known in advance or is not predefined.

On 06.06.2005, DI Raderbauer / freiland Umweltconsulting (*open land environment consulting*) informed the representatives of the NGOs: "We have accepted the assignment to review the solutions to the traffic problems for the section of road between the Selzthal intersection and the Trautenfels intersection (2-lane, 4-lane, improvements of the existing development etc.). In the meantime, another team of planners has compiled a regional traffic concept and based on this, the regional planning committee has decided on a 4-lane solution for this section of road. Consequently, the marginal conditions for our planning assignment have also been also altered. This decision expresses a clearly defined wish made by the regional planning committee that we have to acknowledge."

On 21.11.2005 /2-3pm

The newly appointed Verkehrslandesraetin (*member of the federal state government responsible for transport*) Edlinger-Ploder predetermines "a motorway" through the Ennstal (*Enns Valley*): in a radio phone-in programme, Edlinger-Ploder answered the question as to what the transport policy in the Ennstal (*Enns Valley*) should look like: "It has to be a high-capacity road." "It should be a 4-lane toll-road."

2006: Intermodal traffic planning: The efforts for intermodal traffic planning to form the basis of the planning procedure fails because of the authorities and the politicians responsible.

ZUKUNFT ENNSTAL (*The future of the Enns Valley*) – ARGE (*working group*) intermodal traffic planning project – comes into being. On 21.11.06, the start of the intermodal traffic planning project procedure takes place. Many municipalities and bodies support this project and they see a chance therein to terminate the traffic conflict in the Ennstal (*Enns Valley*) that has been in progress for over thirty years, and to find a lasting and durable solution, a solution which would benefit not only the public but also the environment and the economy of the Ennstal (*Enns Valley*). University Professor Knoflacher from the Vienna University of Technology is assigned with the ARGE intermodal traffic planning project. As a consequence, a broadly based co-operation develops between municipalities in the Ennstal (*Enns Valley*), citizens' initiatives, farmers, tradespersons and businesspersons.

In 2007, "NETT" is recognised as an environmental organization according to § 19 section 7 of the Umweltverträglichkeitsprüfungsgesetz (*Environmental Impact Assessment Act*) (UVP-

G 2000). The Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (*Federal Minister for Agriculture and Forestry, and Water Management*), in agreement with the Bundesminister für Wirtschaft und Arbeit (*Federal Minister for Economic Affairs and Employment*), granted the application made by the Organisation “NETT – Nein Ennstal Transit-Trasse; Verein für menschen- und umweltgerechte Verkehrspolitik” (“*NETT – No to the Enns Valley Transit Route; Organisation for a socially and environmentally sound transport policy*”) to be recognised and acknowledged as an environmental organisation.

The first household survey in the Ennstal (*Enns Valley*): the 4th October 2007 was the deadline set for the citizens of the Ennstal (*Enns Valley*) to actively participate and be involved in the planning procedure for the first time. In the survey the citizens were asked a variety of questions including questions relating to personal mobility behaviour and mobility requirements by means of an internationally recognized and standardized questionnaire.

2008: Presentation of the results of the traffic survey in the Ennstal (*Enns Valley*) which showed unusually high participation with above average response rates and clear statements regarding the rejection of a 4-lane road and the desire for traffic restrictions. See www.zukunft-ennstal.at for further information.

The planning committee refuses to participate in discussions. On 27.02.2008, the planning committee argued predominantly against the presentation of the interim results of the intermodal traffic planning project: “The planning committee will not study Professor Knoflacher’s intermodal traffic planning project any more closely.”

The application made by the environmental organization “NETT” for admission into the regional planning committee is rejected. In the decision it is acknowledged that NGOs have specialised knowledge of their core theme which could be of importance for regional planning. However, the Landesregierung (*Federal State Government*) had already regulated the formation of the regional planning committees as implemented in the regulations in the LGBl 95/1995 (*State Law Gazette*). Therefore the application cannot not be granted.

“NETT” appeals against the rejection for the following reasons: The decision is illegal in regards content due to the fact that it violates the immediate regulations of the Aarhus-Convention. The regulations issued and the directly applicable European Community regulations were, in their implementation, not complied with.

31.03.2008: The Landesregierung (*Federal State Government*) unanimously agrees to the “middle option”. On her third attempt, the Verkehrslandesraetin (*member of the federal state government responsible for transport*) obtained approval for her plans within the government.

29.05.2008: The city of Schladming, situated on the B320, was awarded the Ski World Championships to be held in 2013. Even according to the federal state government’s plans, the earliest commencement of construction of the 4-lane road could be 2016. In order to be able to cope with the increased amount of traffic in 2013, only the realization of the expansion of the existing B320 favoured by the Organisation “NETT” and by the citizens of the Ennstal (*Enns Valley*) in their household survey, would be feasible, and only these improvements would be feasible in accordance with the FIS “Mainauer Manifest” (*Mainau Manifesto*) which was approved in 1994.

As from 2004: Review of the 7.5 ton weight limit on the section of the LB 320 road between Liezen and Mandling: Since 25.04.2004, proceedings for the review of the legal requirements for the imposition of a ban on lorries of over 7.5 ton Gross Vehicle Weight on the section of the LB 320 road between the municipality of Liezen and the border of the federal state of Salzburg in the vicinity of Mandling have been pending, due to requests submitted by the market town of Haus and the townships and municipalities of Aich, Rohrmoos Untertal and Schladming. On 14.02.2008, the Organisation “NETT” submitted an application to be party to the proceedings in this procedure. On 10.07.2007, the organisation was recognised as an environmental organization according to § 19 section of the UVP-G (*Environmental Impact Assessment Act*) by the Ministry of the Interior. The negative decision stated that the Organisation “NETT” had an actual, but no legal interest in the outcome of the proceedings, and that the requirements which were to be reviewed for the imposition of a ban in accordance with § 43 of the StVO (*road traffic regulations*), were to be officially observed. Permission to be party to the proceedings in this procedure would only be awarded to the organisation in accordance with the UVP-G 2000 (*Environmental Impact Assessment Act*), which is why the application was rejected in the decision. An appeal was lodged against this decision.

Furthermore, this complaint will show that the principles of the Aarhus-Convention have been violated due to the rejection of the application to be party to the proceedings in this procedure pertaining to the 7.5 ton restriction. According to case law, the Austrian Supreme Courts (VwGH and VfGH) (*Administrative Court and Constitutional Court*) state that if such a 7.5 ton restriction is not issued, no complaint against this decision is permissible. Therefore, this means that an omission made by the authorities to impose such a restriction cannot be

reviewed in regards content. Due to the fact that the imposition of such a 7.5 ton restriction undoubtedly concerns an environmentally relevant issue, the absence of the opportunity to make a complaint against such an omission made by the authorities also contradicts the Aarhus-Convention.

5. Convention Violations:

As previously stated, the explanations given in this complaint show that the Aarhus-Convention has been violated and no planning procedure for the solution of the traffic problems for the Ennstal (*Enns Valley*) involving the complainant was effected where the outcome was not known in advance or was not predefined. This is therefore of particular importance because the planned route affects protected areas according to the FFH-Richtlinie (*Habitats Directive or Council Directive EEC*), and in the event of legal action being taken against the Republic of Austria by the European Commission, the European Court of Justice would have to examine whether the least impairing solution for this protected area had been found, and furthermore, whether the public concerns about the solution to these traffic problems vindicated the adverse affects on the protected area.

In the case of a planning procedure involving NGOs, where the outcome of the planning procedure is not known in advance or is not predefined, the possibility of alternative options could have emerged, for example improvements of the existing development, which would have impaired the development of the protected areas to a considerably lesser extent. Furthermore, it will be explained that the rejection of the NGO's application to be party to the proceedings in the procedure pertaining to the imposition of the 7.5 ton restriction means that the organisation's rights were also violated according to the Aarhus-Convention, likewise according to case law in Austria, the omission made by the authorities to impose this 7.5 ton restriction is neither legally contestable nor is it verifiable through a legal process with respect to unlawfulness or procedure deficiencies.

The following provisions of the Aarhus-Convention were violated:

5.1. Article 7 Public Participation concerning plans, programmes and policies relating to the environment:

Article 7 of the Convention reads as follows:

Article 7

*PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES
RELATING TO THE ENVIRONMENT*

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

In accordance with this article, paragraphs 3, 4 and 8 of article 6 apply:

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

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3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

.....

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

According to article 7 and article 6 paragraph 4, each Party shall provide for early public participation, when **all options are open** and effective public participation can take place. At the latest with the decision dated April 2008 made by the Steiermärkischen Landesregierung (*Styrian Federal State Government*) to further review **only** the 4-lane alternative, and not the improvements of the existing development as favoured by the citizens, or the zero-option, there are no other alternatives open for a solution to the traffic problems in the Ennstal (*Enns Valley*). According to the decision made by the regional planning committee dated 25.04.2005, all other transit route alternatives were ruled out except for the 4-lane solution.

The planning committee meetings were not open to the public in accordance with the regulations of the Steiermärkischen Raumordnungsgesetzes (*Regional Planning Act for the Federal State of Styria*), and the public were not informed of the decision about the 4-lane alternative until a later date. Due to non-participation of the complainant, the Organisation "NETT", as well as the public in general, article 7 and article 6, section 4 of the Convention were violated. By not informing the public about the planned decisions, article 7 in conjunction with article 6 paragraph 3 of the Convention were violated before amendment. The very fact that representatives from the municipalities were on this planning committee, all possible alternatives in the planning procedure should have been communicated to the public, including the option of improvements of the existing development, in order to be able to have an impact on the planning committee via the representatives of the municipalities and other interested parties.

According to article 7 and article 6 paragraph 8 of the Convention, each Party shall ensure that in the decision due account is taken of the outcome of public participation. This public participation is defined in article 6 as follows:

Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

Public participation in the planning procedure for a solution to the traffic problems did not take place to the extent demanded by the Convention. The refusal to present the results of the household survey to the regional planning committee was a crass violation of the procedure of public participation.

Due to the fact that the planning committee was made up in accordance with the regulations stipulated by the Landesregierung (*Federal State Government*) in 1995, the principles of the Aarhus-Convention were also violated because the public was not represented in this planning committee in an appropriate way. Furthermore, there was an omission to provide opportunities for public participation in the preparation of policies relating to the environment.

According to article 2 paragraph 5, the complainant, the Organisation "NETT", is ex lege due to the organisation being acknowledged and recognised as a Party according to the UVP-G (*Environmental Impact Assessment Act*) with notification from 2007, and is to be classified as a representative of the public affected due to the fact that the complainant has an ex lege interest in environmental decision-making according to the provisions of the Convention. By

not involving the complainant, the Organisation “NETT”, article 7 in particular, in conjunction with article 2 paragraph 5 of the Convention, has been violated. Article 2 paragraph 5 reads as follows:

5. The public concerned means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

5.2. Violation of article 8 of the Convention:

Article 8 of the Convention reads as follows:

Article 8

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

- (a) Time-frames sufficient for effective participation should be fixed;*
- (b) Draft rules should be published or otherwise made publicly available; and*
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.*

The result of the public participation shall be taken into account as far as possible.

In this article it is noted that effective public participation is to be promoted while options are still open. According to Austrian law, the route and the alternative route would be determined by means of a decision and the planning procedure is to be assessed, also a preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. Regarding the decision that only a 4-lane alternative was planned, the public was not given the opportunity to participate in the planning procedure nor to comment on this decision, neither was the public given the opportunity to comment on the decision made by the Landesregierung (*Federal State*

Government) regarding the 4-lane alternative, thus article 8 of the Convention was also violated.

5.3. Violation of article 9 paragraph 2 of the Convention (Access to Justice)

Article 9

ACCESS TO JUSTICE

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(2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

(3) In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

(5) In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

According to Austrian national law, the complainant, the Organisation "NETT", has no access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission, namely the non-participation in the planning procedure, the refusal of the planning committee to be able to report on the results of the public survey as well as for the narrowing down of the alternatives for the solution to the traffic problems to the 4-lane alternative. Therefore, with regard to the section of this paragraph in which the organisation as an NGO has a sufficient interest *ex lege*, article 9 paragraph 2 has also been violated. Even if the complainant, the Organisation "NETT", had the opportunity to contest the formation of the regional planning committee in an Administrative Court as being illegal or unconstitutional, this procedure would in no way be timely, because according to case law, the organisation would have to apply for admission into the planning committee (which it did), and would have to challenge a negative decision in stages of appeal before an appeal could be made to an Administrative Court, and such a procedure would take at least three to four years. Furthermore, the Steiermärkische Landesregierung (*Styrian Federal State Government*) rejected the application for admission into the regional planning committee not by means of official notification, but only by means of a letter. For this reason, it is questionable whether an appeal against this "letter" is permissible at all, and the rejection of the right to public participation in the planning committee by presenting the results of the household survey was not decided in a legally contestable manner.

According to the Convention, the public is to be involved not only in the decision-making procedure, for example within the scope of a SUP-Verfahren (*Strategic Environmental Assessment (SEA)*), but also in the planning procedure.

This makes sense, because in this particular planning procedure decisions will be made about the manner of the solution to the traffic problems, for example the 4-lane alternative or the improvements of the existing development, which are not revisable within the scope of the SUP-Verfahren (*Strategic Environmental Assessment (SEA)*), and in view of the enormous costs of the planning of alternatives, which ultimately prove to be not realisable due to the resistance put up by the public who were not sufficiently involved in the planning procedure.

In the afore-mentioned pre-history, it emerges that at the beginning of the 90s, attempts were made to enforce this solution to the traffic problems by means of the construction of structures (the building of the Sallaberger Brücke, Stainacher Wanne (*Sallaberg bridge, the Stainach basin*)), even in the absence of necessary national approvals (water law, environmental protection), so that the public were prevented from participating in the decision-making procedure. The public were not involved in the current planning project for the solution to the traffic problems to the extent stipulated, and were again presented with a *fait accompli*, namely the decision about the 4-lane alternative, and expert opinions have been commissioned so that it is to be feared that frustrating planning costs will be incurred for a solution that cannot be realised, like at the beginning of the 90s.

5.4. Procedure regarding the 7.5 ton restriction:

Some municipalities submitted applications for the imposition of a 7.5 ton restriction on the existing LB 320 Ennstal Landesstraße (*Enns Valley B-road*). There is no doubt that if this ban were imposed, the traffic situation would be eased on the existing Landesstraße (*B-road*). Furthermore, this 7.5 ton restriction would call for a re-evaluation of the traffic situation in the Ennstal (*Enns Valley*), in particular, whether a 4-lane road would be necessary if this ban were imposed, or whether the provisions of selective improvements of the existing development, which would, moreover, have impaired the areas protected by the FFH-Richtlinie (*Habitats Directive - more formally known as Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora*) (Natura 2000) to a lesser extent, were sufficient. The complainant, the Organisation "NETT", submitted an application to be party to the proceedings in this procedure. The application was rejected by formal notification and an appeal was lodged against this decision. The decision made by the Bezirkshauptmannschaft Liezen (*Regional Administrative Authorities in Liezen*) is in compliance with case law which states that nobody may be party to the proceedings in such a procedure according to § 43 of the StVO (*Road Traffic Regulations*), and that no complaint against the non-imposition of the suggested restriction was permissible, consequently, an omission made by the authorities to impose this 7.5 ton ban is not contestable in a legal process in Austria on a national level, neither because of process deficiencies nor because of unlawfulness in regards content.

The refusal of the right to be party to the proceedings and the refusal of the right of appeal against a possible decision made by the authorities not to impose this ban, also constitutes a serious violation of the rights of the complainant, the Organisation "NETT", according to the

Aarhus-Convention, namely article 8 of the Convention, because according to case law in such a procedure, absolutely no public participation is intended or envisaged. Furthermore, there is no opportunity for the public to comment according to article 8 (c) and therefore no results of public participation shall be taken into account. In addition, the refusal of the right to be party to the proceedings, the refusal for the public to participate and the elimination of the right to appeal, constitutes a massive violation of article 9 of the Convention, in particular paragraph 2, according to which the complainant, the Organisation "NETT", must have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any omission (non-imposition of the ban), whereby the complainant, the Organisation "NETT", has a sufficient interest according to article 9.

Given that the examination of the requirements which were to be reviewed for the imposition of this ban constitutes the preparation of a plan and programme relating to the environment, by excluding the public from this procedure, the provisions of article 7, as well as the provisions of article 6, paragraphs 3, 4 and 8, have been violated.

5.5 Violation of Public Participation Principles:

Furthermore, it is to be considered that according to the principles of the Aarhus-Convention, public participation is not confined to the mere right to consultation. **Consultation** means that the public can react to plans and proposals developed by the authorities. However, **active participation**, which is both encouraged and demanded by the Convention, means that interested parties or "stakeholders" shall actively participate in the planning procedure by discussing issues and by contributing to their solution. Essential to active participation is the potential for participants to influence the procedure. Active participation means that interested parties or "stakeholders", such as NGOs, are invited to contribute actively to the planning procedure by discussing issues and contributing to their solution. By participating in the planning procedure, a wider consensus as possible can be achieved, taking into consideration that later objections or appeals against the plans delay their realisation, and high costs will be incurred that are to be borne by the authorities involved as well as by the public. At the very least, the right to participate in the planning committee's meetings should have been granted to the complainant, the Organisation "NETT". It goes without saying that the solution to traffic problems will be all the more successful if the public is involved in the planning procedure, due to the fact that as a result, support for the solution to the traffic problems and the fulfilment thereof can be achieved by the encouragement and promotion of

identification, acceptance and cooperation, decision-making is more efficient when conflicts are recognised and solved at an early stage as far as possible, the solutions are more effective, lasting and more balanced if they are based on a broader spectrum of knowledge and perception, and in the long term, the relationship between the authorities and interest groups or “stakeholders” will be strengthened in the sense of “good governance”. Active participation also promotes and encourages the sensitisation of a spectrum of interest groups or “stakeholders” for specification and analysis procedures, data acquisition, information and opinions.

One example of such public participation is the IIVR Project in the Netherlands:

The project has chosen a cooperative style in which the different authorities and nongovernmental organisations (NGOs) (and interest groups or “stakeholders”) work together and have an equal say in the final outcome.

The interaction is organised through:

- *A steering committee formed by heads of the different government bodies. They give direction to the procedure and make decisions. The steering committee is supported by the initiative group.*
- *An initiative group is made up of experts, government employees and members of NGOs and discusses the content of the planning procedure.*
- *Consultations of citizens and interest groups or “stakeholders”. In addition, several meetings are organised over a period of two years in which citizens and interest groups or “stakeholders” are consulted and given the chance to share and exchange their perceptions and to generate ideas.*

(Source: LEITFADEN ZUR BETEILIGUNG DER ÖFFENTLICHKEIT IN BEZUG AUF DIE WASSERRAHMENRICHTLINIE (GUIDANCE ON PUBLIC PARTICIPATION IN RELATION TO THE WATER FRAMEWORK DIRECTIVE))

The restriction of public participation to the presentation of the route option and the option for the solution to the traffic problems, which had already been decided without public participation, which took place in the Volkshaus in Liezen (report in the Kleine Zeitung newspaper, 07.05.2008), displays a fundamental misunderstanding of the goals of the Aahrus-Convention.

6. Legal Remedy at national level:

Legal remedy at national level is insufficient in the matter of non-participation of the public and the complainant, the Organisation "NETT", in the planning procedure concerning the solution to the traffic problems in the Ennstal (*Enns Valley*), in particular in the procedure concerning the choice of options and concerning the review of improvements of the existing development. There is no possibility of preliminary injunctive relief as stipulated in article 9 paragraph 4 of the Convention, which would be necessary in this case in particular, due to the fact that enormous costs are incurred due to the continuing planning procedure. As previously stated, only one complaint to the Administrative Court is possible against the decision of non-admission to the planning committee, and this procedure cannot be described as timely as stipulated in article 9 paragraph 4 of the Convention, because after exhaustion of the stages of appeal, the whole procedure would take at least three to four years. Furthermore, the Steiermärkische Landesregierung (*Styrian Federal State Government*) rejected the application for admission into the regional planning committee not by means of official notification, but only by means of a letter. For this reason, in the absence of the issue of a notification, it is questionable whether an appeal procedure at national level is possible at all. This also applies to the refusal of the planning committee to make it possible for the public to comment, for example by presenting the household survey.

Regarding the 7.5 ton restriction, it has already been stated that according to case law, the complainant, the Organisation "NETT", is not entitled to be party to the proceedings in this procedure, and no legal remedy against the omission made by the authorities to impose this ban is available to either the complainant or any other parties.

In the report regarding the implementation of article 9 paragraph 3 of the Convention in Austria from March 2007 by Milieu Ltd. on behalf of the European Commission, it was determined that no legislation exists or is planned, in particular to implement article 9 paragraph 3 of the Convention. It may be quoted from the report as follows:

Regarding Article 9(3) of the Aarhus Convention, Parliament and the Federal Ministry for the Environment state there is no imperative need for action since there is an existing system of protecting individual interests and other remedies (e.g., ombudsman). But this existing system is quite restrictive. Individuals are entitled to appeals only if they are party to the procedure. Third parties do not have any legal claims; they can only report the (presumptive) violation of environmental law to the administrative authorities and only the latter decide whether or not to withdraw or modify an illegal decision. In exceptional cases an official liability (Amtshaftung) is issued if the inaction causes the complainant harm. Only specific NGOs in very few cases have the right to assert environmental law and to appeal to the next

instance, and they cannot appeal to the Administrative Court or the Constitutional Court. Access to justice for NGOs is the exception, not the presumption. Environmental organisations are blocked across a wide range of environmental issues.

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.

7. Confidentiality:

The complainant, the Organisation "NETT", does not request confidentiality regarding the content of the complaint or regarding the identity of the complainant and the complainant's legal representative.

8. Supporting documents and addenda:

- *Articles of Association of the Organisation "NETT"*
- *Extract from the Register of Associations*
- *Formation of the federal state forum, the regional forum and the municipal forum*
- *Press release, the Organisation "NETT" 30.04.2008*
- *Press reports April/Mai 2008*

9. Signatures:

Liezen, dated 01.07.2008

NETT – Nein Ennstal Transit-Trasse

