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Austrian Report

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Part A

I. How is the SEA-directive (Directive 2001/42/EC) implemented in your country? What is the scope of its implementation?

Austria is a federal state and jurisdiction regarding environmental protection is fragmented. Both the federation and the federal provinces (*Laender)* have legislative and administrative powers in this field.[1] Consequently there is **no general SEA-Act in Austria**. The SEA-directive is implemented in **many different federal and federal state laws.** Hence implementation of the directive is fragmented and inhomogeneous.

Regional planning laws of the *Laender* make a major contribution to the implementation of the SEA-directive. Regarding federal law, SEA is implemented in different laws concerning water, waste, noise protection and transport (Wasserrechtsgesetz, Abfallwirtschaftsgesetz, Bundes-Umgebungslärmschutzgesetz, Bundesgesetz über die strategische Prüfung im Verkehrsbereich, Immissionsschutzgesetz-Luft). In general, **only plans and programmes that are required by legislative provisions** are subject to a strategic environmental assessment. However, many important strategic plans, like for example the General Masterplan on Transport (*Generalverkehrsplan*), are not required by legislative provisions and are therefore not subject to SEA; a fact that has often been criticised by environmental and planning experts.

For an overview on the relevant legislation see: http://hw.oeaw.ac.at/6631-3

II. What types of public plans and programmes are subject to a strategic environmental assessment in accordance with the SEA-directive?

A variety of plans and programmes are subject to a strategic environmental assessment in Austria. The most **relevant examples** are:

- Regional and local development programmes (Regionale und örtliche Raumordnungsprogramme)
- Development and Zoning Plans
- Waste Management Plans of the *Laender* and the Federal Waste Management Plan
- National Water Management Plan and Action Programmes

1. Legislative competences of the federation are predominant in environ-mental matters. The most important competences of the federal provinces in the field of environmental protection encompass nature preservation legislation and zoning law.

- Ordinances (drafts) concerning the designation of new high-speed railroad lines and draft legislation on the designation of new federal roads
- Actionplans on Noise Reduction

III. What kind of authority (local, regional, central) is responsible for performing the duties arising from the SEA-directive?

Depending on the applicable laws, different authorities are responsible for conducting a strategic environmental assessment. Concerning regional planning laws, the state government (*Landesregierung*) is the competent authority in most cases. In case of federal law, the respective federal minister is the competent authority in the majority of cases.

IV. Does the competent authority normally ask other authorities on different administrative levels in the process of a strategic environmental assessment for their opinion or consultation?

Additionally to the information of the public, all relevant laws lay down the participation of other authorities and administrative bodies. The Federal Water Management Act (*Wasserrechtsgesetz)* for example lays down the participation of various authorities depending on the fields affected by the plan (e.g. nature conservation authorities, aviation authorities). Regarding regional planning law of the Laender, for example the Lower Austrian Regional Planning Act (*NÖ Raumordnungsgesetz)* states i, that the Lower Austrian Chamber of Commerce and municipalities inter alia, may submit a comment on the strategic assessment.

V. What types of decisions are resulting from a strategic environmental assessment proceeding?

In general the SEA proceedings are integrated in the **preparation and drafting** of plans and programmes. When the plan is finally **adopted by ordinance**, the relevant authorities have to take into consideration the environmental report and the comments by the public and other authorities. For example the Federal Minister of Agriculture and Forestry, Environment and Water Management adopts the National Water Management Plan by ordinance which is generally binding. The same procedure applies to the adoption of the Federal Waste Management Act (*Abfallwirtschaftsgesetz*) or the adoption of Regional development programmes of the *Laender* by the competent authority.

VI. How does the authority ensure the public access to environmental information in the proceedings based on the SEA-directive?

As the SEA directive does not provide detailed specifications about the procedures for public consultation, many **different methods** are laid down in the laws applicable. The most important methods are public announcements and publications in the press or on the internet. The duration of the public consultation differs; in general the consultation period lasts at least one month. The Federal Water Management Act for example lays down consultation periods up to six months.

VII. Who is authorized to take part in a strategic environmental assessment proceeding? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

In general neighbours, NGO´s and different authorities (see also question IV above) can submit comments on the proceeding. These comments have to be taken into consideration but are not binding for the competent authority.

As stated above, SEA-procedures often lead up to the adoption of a plan by ordinance. Under certain and exceptional conditions, that is, if this ordinance directly and immediately infringes legal rights of individuals concerned, they can file a complaint against an ordinance at the constitutional court (*Verfassungsgerichtshof*).

To what extent are the SEA and EIA procedures integrated in your country? If a new industrial project also needs a change of the building plan, can the same documentation be used for the assessment of both the project and the plan? Are there problems related to the integration or the lack of integration for different actors (such as the public, the operator of the project, the municipality or authorities)? Can you give examples?

In general SEA- and EIA-proceedings are **separate**. Nonetheless, it is of course possible and desirable to use the same documents or parts of them in both proceedings. The Austrian EIA Act 2000 lays down (Art 6.2) that certain **documents** that were used in a strategic assessment can be reused in the environmental impact assessment. This only works, if there is no time lag between the proceedings, as documents have to be up-to-date.

Part B

I. How is the EIA-directive implemented in your country? What is the scope of its implementation?

Before EIA was introduced in Austria, operators had to address multiple administrative agencies on federal, state and local level in order to obtain environmental permits. Over the years, considerable efforts have been made to unify the permit system. Following years of discussion, with the process of joining the European Union, a breakthrough was finally achieved. An amendment to the Austrian Constitution unified legislative and administrative powers in the field of EIA. The Federal Act on Environmental Impact Assessment fundamentally reformed environmental permit procedures for major installations and activities in Austria.[2] In contrast to the SEA-directive, the EIA-directive is not implemented in different federal and state laws. The **EIA-procedure is integrated into a consolidated development consent procedure**, thus assuring comprehensive review of environmental impacts. The authority competent for the EIA (Landesregierung, State Government) is required to apply all relevant legislation both at the state and federal levels and to determine if the criteria of the relevant legislation are met. Also the EIA-Act provides for some permit requirements. This means, that although the permit standards and regulatory framework are not unified in a single act, each matter is dealt with by one single authority in one procedure[3]. If the EIA authority grants the permit, a single permit is issued instead of the multiple permits usually required by federal or state law. **The final development consent encompasses all applicable requirements of all relevant environment legislation**.

However, **regarding high-level traffic-projects** (high-capacity railroad lines and highway sections) **the situation is different**. Those project are not subject to a fully consolidated permitting procedure. In those cases EIA is integrated into the permit procedure for the construction consent. Consent regarding matters of water management or nature conservation is granted in seperate procedures. The competent authorities have to take the EIA-decision into consideration.

Regular EIA-procedure - Overview

1) **Scoping** (not mandatory)
2) **Application** for development consent **including Environmental Impact Statement**
3) **Public Announcement** of the project

   Anybody may submit written comments on the project and on the environmental impact statement. By support of 200 citizens, ad hoc citizens groups can gain locus standi.

2. Bundesgesetz über die Prüfung der Umweltverträglichkeit und die Bürgerbeteiligung [UVP-G] [Environmental Impact Assessment and Citizens's Participation Act], BGBl No. 1993/697, as last amended by BGBl I No. 2009/87 (Austria). As amended by BGBl I No. 2000/89 (Austria), the title of the Austrian EIA Act was changed to Umweltverträglichkeitsprüfungsgesetz 2000 [UVP-G 2000].

[3] § 3 (3) and § 17 EIA-Act.

4) **Environmental impact expertise**

The competent authority commissions experts to prepare an environmental impact expertise. This expertise evaluates and complements the Environmental Impact Statement and also discusses the statements received from the public.

5) **Public announcement** of the Environmental Impact Expertise

6) **Hearing of the parties**

7) **Decision** on the application for development consent

The authority has to decide, wheter all relevant permit standards and requirements are met. The decision has also to **take account of the results of the environmental impact assessment procedure**(in particular, environmental impact statement, environmental impact expertise, comments of the public including the comments and the results of tansboundary consultations). The decision has to includ**e** conditions, deadlines, monitoring, measuring and reporting duties. In any case, if an overall assessment shows that, when considering public interests, in particular that of environmental protection, serious environmental harm is to be expected due to the project and its impact, including, in particular, interactions, cumulative effects or shifts that cannot be prevented or reduced to a tolerable level by conditions, deadlines, the application has to be rejected

8) **Inspection for compliance with the development consent**

Inspection before operations of the development starts.

9) **Post-project analysis**

Inspection takes place 3 – 5 years after completion of the development.

II. What types of public and private projects are subject to an environmental impact assessment in accordance with EIA-directive?

The projects subject to an EIA are listed in an **annex to the EIA Act**. (Annex 1, EIA Act 2000). There is **no differentiation between public and private projects**. The EIA Act covers a rich **spectrum of projects**, including large infrastructural projects such as urban-development projects, roads, railroads, airports, power-lines, power plants, waste-incinerators and other waste management installations, extractive industries like the extraction of mineral raw material, water management installations. Also smaller projects likely to have significant local environmental impact such as intensive livestock installations, ski lifts, shopping malls or holiday villages may be subject to an EIA**. In practice** it is mostly **infrastructural projects** (roads, power lines, shopping malls, golf and ski resorts), and projects from **energy industry** and **waste management** that are subject to an EIA in Austria.

Major projects have to be examined in a **regular procedure** (Column 1, Annex 1 EIA Act; e.g. installations for the treatment of hazardous waste). **Other projects**, which are listed in column 2 and 3 of Annex 1, can be examined by applying a **simplified procedure** (about 50% of EIA procedures so far). Main features of the simplified procedure are: summary assessment of environmental impacts, ad hoc citizen´s groups do not have locus standi (NGO´s do have locus standi) and decisions on the development consent have to be delivered within six months after the application has been filed.

III. What are selection criteria that should be applied by the developer or the competent authority to identify projects requiring an EIA because of their potentially significant environmental effects?

Primarily, there are **quantitative criteria/thresholds** which have to be applied by the authority, for example the capacity of a waste management installation (tonnes/year); the size of a shopping centre or the number of parking lots or hotel beds. These quantitative criteria are listed in Annex 1. **For projects listed in column 1 and 2 of Annex 1 an EIA is mandatory**.

Furthermore, **certain projects (listed in Annex 1 column 3)** may require an EIA because the project is located in specific **protected or sensitive areas**. These areas (e.g. Alpine Region, Nature Protection Areas, Areas subject to air pollution) are listed in Annex 2. In that case the project is subject to a **case by case screening-procedure (Einzelfallprüfung**). If the project is likely/supposed to cause substantive negative effects, it will require an EIA.

If projects listed in Annex 1 are below the threshold values or do not fulfil the criteria defined therein but are spatially related to other projects and, together with them, reach the relevant threshold value the authority has to examine on a case-by-case basis whether significant harmful, disturbing or adverse effects on the environment are to be expected due to a **cumulation of effects** and therefore an EIA has to be carried out. Such a case-by-case examination will however not be carried out if the capacity of the project submitted is less than 25% of the relevant threshold value.

The **modification of projects** listed in Annex 1 is usually subject to a case-by-case screening procedure. If however the modification amounts to a capacity increase of at least 100% of the threshold, an EIA is mandatory.

IV. What kind of authority (local, regional, central) is responsible for performing the duties arising from the EIA-directive?

Authorities and competences are listed in § 39 EIA Act 2000.

State Government (Landesregierung) is the competent authority for the majority of projects subject to the EIA Act[4].

Concerning high-level transport infrastructure projects (federal roads and high-speed railroads), the **Federal Minister of Transport, Innovation and Technology** is the competent authority[5].

For matters regarding EIA and development consents, a special tribunal, the Environmental Senate (*Umweltsenat*), has been established. The Environmental Senate is the **authority of**

[4] Section 1 and 2 of the EIA Act 2000.

[5] Section 3 of the EIA Act 2000.

appeal with substantive jurisdiction. The *Umweltsenat* has unlimited jurisdiction. It may change the decision of the administrative authority in any respect. The effects of the decison are suspended *ex lege* during the appelate procedure unless there is express provision to the contrary.In summary, although the decisions of the *Umweltsenat* have the characteristics of an administrative action, they have the force of res judicata: they must state reasons; they are delivered in open court; they are enforceable; and they may be contested only before the Administrative Court (*Verwaltungsgerichtshof*) or the Constitutional Court (*Verfassungsgerichtshof*). The *Umweltsenat* is considered a court or tribunal for the purposes of Article 267 TFEU which can refer questions for preliminary ruling to the ECJ (C-205/08, Umweltanwalt von Kärnten v. Kärntner Landesregierung).

Appeals against permits regarding **high-level traffic projects** cannot be brought before the *Umweltsenat*. However the Austrian Administrative Court recently decided (VwGH, Sept. 30, 2010, Docket No. 2009/03/0067, 0072) that in order to fully apply community law and to protect the rights conferred there under on the public by the public participation provisions of the EIA Directive, the *Umweltsenat* also is to be regarded as the competent authority to hear appeals against permits for high-level traffic projects. The Constitutional Court rejected this interpretation. According to the Constitutional Court European Union Law does not require courts having „full jurisdiction" in order to protect individual´s right granted by the EIA-Directive.

V. When should an environmental impact assessment take place during the investment procedure?

The EIA is integrated in the permit procedure. Before passing the EIA a project must not be permitted or established. If the developer lodges an application for consent, the application must also include the environmental impact statement. It is the **responsibility of the investor to decide**when the permit procedure and therefore also the EIA process should start. As the investor has to hand in many different materials and documents in order to guarantee a detailed impact assessment, he or she should already have detailed information about the project at that point of time. Usually an informal scoping procedure takes place before the application is lodged. Regarding **large infrastructural projects** it takes **about one year of preparation** to be ready to start the EIA.

VI. Does the decision resulting from an environmental impact assessment grant the final development consent?

Yes, the decision resulting from an impact assessment grants the final development consent.

However, the investor has to notify the (near) completion of the approved project. Subsequently the competent authority controls the compliance with the development consent. After this procedure, the project can be taken into operation (Art 20 EIA Act 2000).

VII. How does the authority ensure the public access to environmental information in the proceedings based on the EIA-directive?

The competent authority has to communicate one copy of the application - including the environmental impact statement - to the host municipality. The host municipality has to ensure that these documents are made available for the public for at least six weeks. Everybody (regardless of citizenship, nationality or domicile) can submit written comments on the project and on the impact statement to the authority within six weeks. (Art 9 EIA Act 2000).

VIII. Who is authorized to take part in an environmental impact assessment proceeding? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

As stated above (Q. III) an EIA- screening decision is required for projects in sensible areas. Under the Austrian EIA Act the general public is not allowed to participate in the EIA screening procedure in which the competent authority assesses whether an EIA is required and therefore an EIA development procedure has to take place.

For projects that are subject to a mandatory EIA (because the meet the criteria/thresholds in Annex 1 to the EIA Act), the situation can be summarized as follows:

In the EIA development procedure the **general public** is authorized to comment on the project and on the environmental impact statement. These comments have to be taken into consideration by the competent authority.

Furthermore the EIA Act 2000 contains possibilities of legal protection for different kinds of interested parties and persons concerned. Many **parties have *locus standi***, which means that they have the right right to inspect the files and to participate in the hearing. They have the opportunity to take notice of the result of the evidence taken and to comment on it. They also have the right to appeal. Locus standi is granted to (e.g.):

- the **neighbours**,

  Their rights are dependent on their concernment. Generally they may claim health risks, heavy nuisance and property rights, whereas for example, permit conditions on emission limit values according to BAT or obligations concerning nature preservation are considered public interest legislation that is not subject to neighbour rights

- other persons whose legal interest or title is affected (e.g. fishery rights)

- certain public authorities, eg the inspectorate for the protection of health at the work place

- the **ombudsman for environment (Umweltanwalt**)

  The Environmental Ombudsmen of the *Laender* have been established by state law to defend environmental interests in administrative proceedings, notably in proceedings concerning nature preservation legislation. The EIA Act conferred to the Environmental

Ombudsmen the right to act as party in EIA proceedings and entitled to claim the observance of EIA procedure and all environmental provisions

- **citizens´ groups**

  Ad hoc citizens´ groups (*Bürgerinitiativen*) which fulfill certain criteria (200 local supporters, written statement of support giving specific reasons) have the right to act as party in EIA proceedings (not in EIA-simplified procedures, see Question III above) and are entitled to claim the observance of EIA procedure and all environmental provisions.

- **Non-governmental-organisations (NGOs)**

  if they meet the **specific criteria** of Art 19 (6) EIA Act (non profit orientation, environmental goals, at least 3 years of existence) and have therefore been accepted by order of the Federal Minister of Agriculture and Forestry, Environment and Water Management, NGOs have the right to act as party in EIA proceedings and are entitled to claim the observance of EIA procedure and all environmental provisions. Also **NGOs from abroad** have *locus standi* if that state has been notified pursuant to the transboundary effects of the project (Art 10 para 1 no. 1 of the EIA) and if the environmental organisation would be entitled to participate in an EIA and a development consent procedure if the project was implemented in this foreign state

- the **water management planning body** to protect the interests of water management

- the **host municipality** and the directly adjoining Austrian municipalities

IX. In what way are questions concerning the application of the EIA-directive brought to court? Please give one example of the proceeding and the judgement.

In general, questions of the application of the EIA-directive can be raised in an appeal to the *Umweltsenat* or in a complaint to the Administrative Court and to the Constitutional Court. In several proceedings questions of the scope of the implementation of the EIA-directive have been raised, for example regarding the interpretation and implementation of Annex I, II of the EIA-directive.

In a case concerning the **construction of a power line** connecting Austrian and Italian networks in the Alpine Region an EIA screening procudure took place. The competent authority (The Kärntner Landesregierung) determined that no environmental impact assessment was required for the project at issue because the length of the Austrian part of the project did not reach the minimum 15 kilometre **threshold stipulated in the Austrian EIA Act**. The Environmental Ombudsman filed an appeal to the Environmental Senate (*Umweltsenat*) against the decision seeking the annulment of the contested decision. The Ombudsman argued that according to the aims of the EIA-directive the project as whole (and not only the Austrian part) has to be taken into consideration in the screening procedure. The *Umweltsenat* refered the question to the ECJ. The ECJ decided that the total length of a project is relevant, even if it is a transboundary project

(US, May 8, 2008, Docket No. 8B/2008/2-8; C-205/08, Umweltanwalt von Kärnten v. Kärntner Landesregierung, 2009 E.C.R.).

In a case concerning the EIA-screening decision for a waste management facility, the Administrative Court decided on a complaint by the project developer that the EIA directive was directly applicable because the thresholds of the EIA-directive were exceeded and implementation in the EIA-Act was insufficient (VwGH, Docket 2003/07/0127, see also Docket No. 2001/07/0171).

Recently, in a proceeding concerning the **EIA-development consent for two high-speed railway projects** (Angertalbrücke and Brenner Basistunnel), an NGO and the Environmental ombudsman failed a complaint against the decision of the competent authority (Ministry of Transport). The petitioners held that the **implementation of Art 10a EIA-directive** in Austria was **insufficient** because the EIA-development consent for a high-speed railway is not subject to full judicial review. For high-level transport projects the Environmental Senate does not act as authority of appeal, the decision can only be contested by a complaint to the Administrative Court.
The Administrative Court is a court of cassation, it can squash a decision if, inter alia, substantial procedural provisions have been neglected or if an essential part of the facts needs to be amended; the Administrative Court has however no competence to ascertain the relevant facts of the case on it´s own and hear evidence. The **Austrian Administrative Court** shared the viewpoint of the petitioners that the implementation of Art 10a EIA-directive was insufficient and decided[6] that in order to fully apply community law and protect the rights conferred there under on the public by the public participation provisions of Art 10a of the EIA Directive, the Umweltsenat also is to be regarded as the competent authority to hear appeals against permits for high-level traffic projects. The **Constitutional Court** rejected this interpretation in a recent decision[7]. According to the Constitutional Court the Administrative Court is a tribunal in line with Art 6 ECHR; the law of the European Union does not require courts having „full jurisdiction" in order to protect individual´s right granted by the EIA-Directive.

X. What are the specific characteristics of the transboundary environmental impact assessment of certain public and private projects?

The competent authority shall notify the project and its environmental impact to the state concerned as early as possible (Art 10 EIA Act 2000). Furthermore, the competent authority has to publish the relevant information in order to inform the state concerned. Subsequently, the competent authorities of both countries have to hold consultations if necessary (i.e. the project may have relevant transboundary environmental impact). If the state informs the authority that it wishes to participate in the EIA procedure it shall be provided with the environmental impact expertise.

Consultations aim at appropriate measures to prevent transboundary pollution; they may result i.a. in project modifications, specific monitoring obligations or inspection rights.

[6] VwGH, Sept. 30, 2010, Docket No. 2009/03/0067, 0072.

[7] VfGH, June 28, 2011 B-254/11