

# Communication of the Citizens' Group "*mobil ohne Stadttunnel*"

## I. Information on correspondent submitting the communication

Name of organization:	Liechtenstein Citizens' Group " <i>mobil ohne Stadttunnel</i> "
Permanent Address:	c/o Ms Andrea MATT Am Gupfenbühel 3 LIE-9493 Mauren Principality of Liechtenstein
Address for correspondence:	ditto
Name of Contact Person:	Andrea Matt
Title/Position:	Appointed First Representative of the Citizens' Group <sup>1</sup>
Telephone:	+423 376 6401 or mobile +41 78 7858373
E-mail:	<a href="mailto:andrea.matt@supra.li">andrea.matt@supra.li</a>
Represented by:	Dr.iur. Stefan BECKER LL.M.-ULB <sup>2</sup>
Title/Position:	Attorney-at-Law, Altenbach 8, LIE-9490 Vaduz
Telephone:	+423 233 4444
E-mail:	<a href="mailto:stefan.becker@whlaw.li">stefan.becker@whlaw.li</a>

Name of the Party concerned: Austria

## II. Facts of the communication

1. On March 11, 2010, the Federal Government of the *Bundesland* of *Vorarlberg*, a Federal State situated in the western part of the Party concerned with a common border with both the Swiss Confederation<sup>3</sup> and the Principality of Liechtenstein, resolved that a project named „*Stadttunnel Feldkirch*“ had to undergo an Environmental Impact Assessment procedure (in the present case a so-called simplified EIA procedure). The *Stadttunnel Feldkirch* project implies the construction of wide-stretched underground road infrastructure (i.e. a network of tunnels) in the area of the host community of *Feldkirch* (Austria), whereby one of the planned exit roads shall be located next to the Liechtenstein border. Obviously, such infrastructure may cause a great deal of additional individual traffic with, in the case at hand, an associated negative impact on the environment in the northern part of Liechtenstein (the so-called lower country). The costs budgeted by the developer of the *Stadttunnel Feldkirch* project, the *Vorarlberg* Federal Government, are currently at EUR 253.000.000,00.

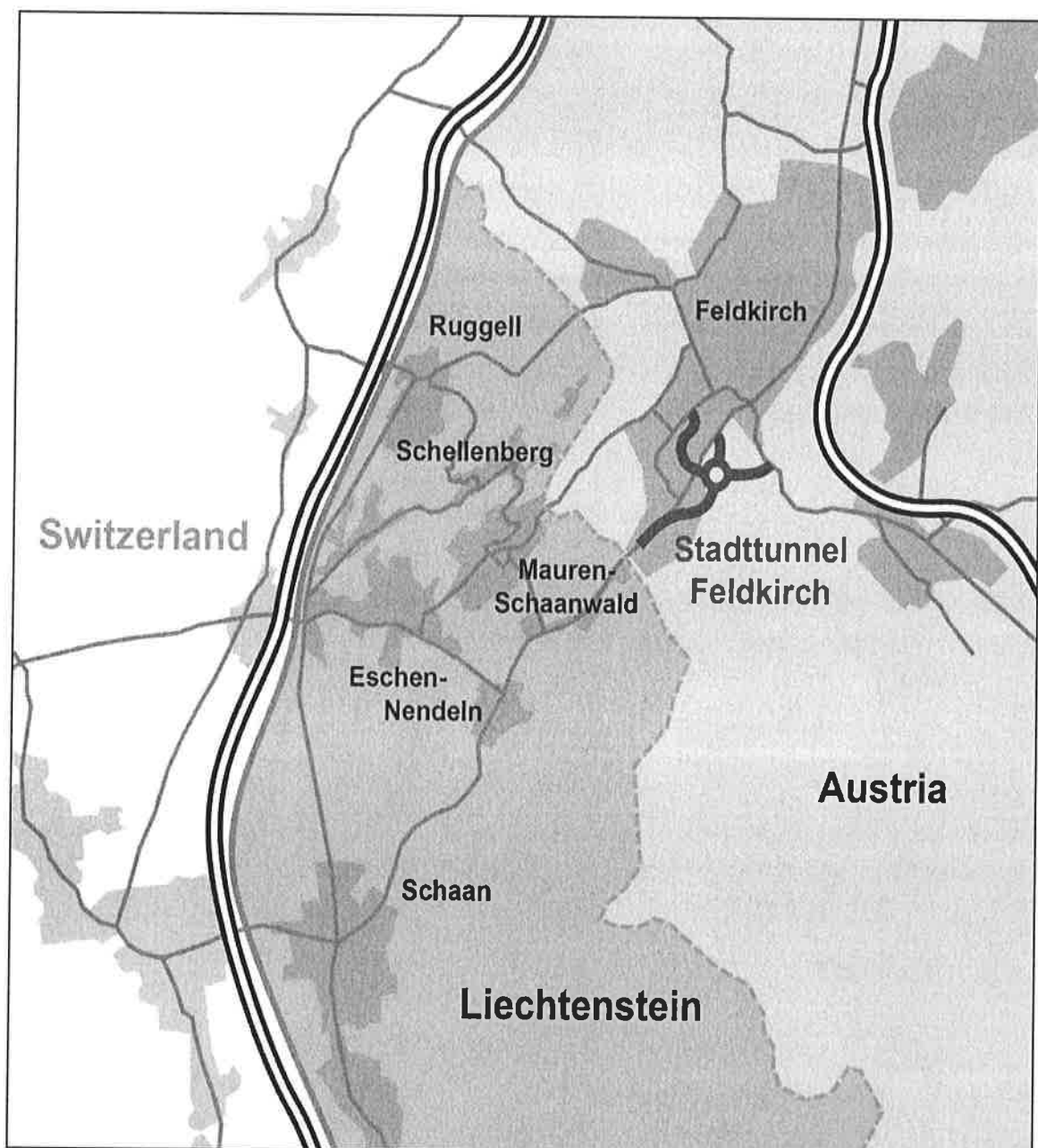
---

<sup>1</sup> Section 10. of this communication.

<sup>2</sup> A copy of the Power of Attorney as of October 29, 2018 is attached to this communication.

<sup>3</sup> Canton of St. Gallen.

2. Further details can be retrieved from the website [www.mobilohnestadttunnel.org](http://www.mobilohnestadttunnel.org), an online information platform operated by the Contact Person on behalf of the "mobil ohne Stadttunnel" citizens' group, i.e. the Liechtenstein citizens' group submitting this Communication (hereinafter: "Correspondent").
3. The *Stadttunnel Feldkirch* project's basic set-up and the surrounding geographical situation may be visualized as follows (the aforementioned exit road located next to the Liechtenstein border is being pictured as a red leg connecting the Liechtenstein municipality of *Mauren-Schaanwald* with the project's core element, characterized as a red circle in the middle of the planned underground road infrastructure. Existing roads are highlighted as grey lines; existing motorways [on Swiss territory next to the Liechtenstein border and in the north-eastern part of *Feldkirch*] as double-framed dark lines):



4. The request for approval of the *Stadttunnel Feldkirch* project was submitted on September 11, 2013 according to the rules of the pertinent Austrian national law, the *Umweltverträglichkeitsprüfungsgesetz 2000* (Environmental Compatibility Assessment Act; UVP-G 2000)<sup>4</sup>.
5. Based thereupon, pursuant to the Espoo Convention<sup>5</sup> and the Alpine Convention (that are applicable to both Austria and Liechtenstein), a transboundary EIA procedure involving Austria as the Party of origin and Liechtenstein as the affected Party was instigated in 2014. In Liechtenstein, the official environmental impact assessment documentation was publicly available between May 26, 2014 and July 18, 2014.
6. On July 17, 2014, both Correspondent and a like-minded Austrian citizens' group formed under the denomination "*stattTunnel*"<sup>6</sup> addressed almost identical comments to the developer of the *Stadttunnel Feldkirch* project. According to the UVP-G 2000, such a submission (in German: "*Stellungnahme*") marks the first step of statutory public participation both in domestic and cross-border EIA procedures. A sample of the submissions filed on July 17, 2014 by both citizen's groups (*Unterschriftenbogen*) is attached to this communication as *Exhibits 1* and *2*.
7. In this context, it should be noted that in its § 19(1)(6.), the UVP-G 2000 provides for the official (i.e. statutory) acknowledgment of informally organized groups of individuals intending to participate in EIA procedures; and it labels such groups "*Bürgerinitiativen*" (citizens' groups). As such, *Bürgerinitiativen* enjoy the procedural right to inspect the file in simplified EIA procedures like the present one<sup>7</sup> and a full set of procedural rights in all other instances, i.e. in cases where a 'regular' EIA procedure is being conducted (e.g. the right to be recognized a Party to the proceedings; right to appeal etc.).
8. In order to evidence their standing, i.e. the legitimation to take part in the *Stadttunnel Feldkirch* EIA procedure as a *Bürgerinitiative* within the meaning of § 19(1)(6.) UVP-G 2000, more precisely in order to demonstrate their sound and proper constitution according to the relevant provision of Austrian national law (which is § 19(4) UVP-G 2000), the submission filed by Correspondent on July 17, 2014 was accompanied by an officially authenticated signature list.
9. In a free English translation, the first two sentences of § 19(4) UVP-G 2000 read as follows (in this context please equally refer to the findings and recommendations with regard to

---

<sup>4</sup> Austrian Federal Gazette (BGBl.) No. 697/1993, as amended (BGBl. No. 14/2014).

<sup>5</sup> 1991 Convention on Environmental Impact Assessment in a Transboundary Context.

<sup>6</sup> a semantic modification of "*Stadttunnel*" with the meaning of "*in stead of a tunnel*".

<sup>7</sup> § 19(2) UVP-G 2000.

communication ACCC/C/2010/48 concerning compliance by Austria, adopted by the Compliance Committee on December 16, 2011 [ECE/MP.PP/C.1/2012/4 section 19]):

*"A submission within the meaning of § 9(5) may be supported by insertion into a list of signatures, whereby name, address and date of birth have to be indicated alongside a dated signature. The list of signatures is to be filed on the same date as the submission. In case a submission has been supported by at least 200 people who, at the time when expressing their support, enjoyed voting power in municipal elections in the host municipality or in a directly adjacent municipality, this group of people (Bürgerinitiative) shall have locus standi in the approval procedure and in the procedure according to article 20 as a Party or as a Participant (paragraph 2) ...".*

10. The "stattTunnel" citizens' group's submission was endorsed by 800 people entitled to vote in (Austrian) municipal affairs.
11. In turn, Correspondent's submission found the support of a total number of 508 individuals living within Liechtenstein who, at the time when expressing their support, had voting power in those Liechtenstein municipalities that are located directly adjacent to the host municipality of Feldkirch (*Eschen-Nendeln, Mauren-Schaanwald, Ruggell, Schaan* and/or *Schellenberg*). Andrea Matt was appointed Correspondent's First Representative, a Liechtenstein citizen by the name of Rainer BATLINER Second Representative.
12. Correspondent wishes to stress that a *Bürgerinitiative*, in order to being allowed to participate in a given (Austrian) EIA procedure, does not have to assert (or even evidence) any individualized harm or any other kind of personal prejudice to one of its 'members', i.e. to one (or all) of the individuals supporting a submission by applying their signature on it. Rather, in its aforementioned § 19(1)(6.), the UVP-G 2000 presupposes that people living in a municipality directly adjacent to the host municipality may be adversely affected as matter of law.
13. Upon Correspondent's demand, the *Amt der Vorarlberger Landesregierung*<sup>8</sup> engaged in a verification of the 508 signatures associated with its July 17, 2014 submission.
14. Following that scrutiny, in a decision dated September 12, 2014 which is attached to this communication as *Exhibit 3* and which will be referred to further on, the *Amt der Vorarlberger Landesregierung* confirmed the conclusiveness of the signatures respectively the

<sup>8</sup> The *Amt der Vorarlberger Landesregierung* is an agency of the developer of the *Stadttunnel Feldkirch* project, the Federal State of Vorarlberg.

validity of the support expressed therewith. In a free English translation, the findings on page 2, third paragraph, of that decision read as follows<sup>9</sup>:

*"On July 17, 2014, the Citizens' Group 'mobil ohne Stadttunnel' has filed a submission and a signature list with the EIA Authority. The verification of the signature list showed 508 valid supports, so that for the Citizens' Group – in case one would rely on the pertinent provisions for Austrian Citizens' Groups – a valid constitution according to § 9 Para 3 Section 4 in connection with § 19 para 4 UVP-G 2000 would have to be assumed".*

15. The correctness of this conclusion – which, most notably, was inferred from Austrian national law, more particularly from § 19(4) UVP-G 2000, and which confirms that all 'numeric' requirements of the same Austrian national law have been met by Correspondent (i.e. filing of a list comprising the signatures of at least 200 people residing in an area likely to be adversely affected by the project and enjoying voting power in municipal affairs at the place where they live) – has not been doubted by either of the parties involved in the *Stadttunnel Feldkirch* EIA procedure. It for obvious reasons represents the determining factual circumstance of the affair that underpins this communication.
16. It thus has to be highlighted that because of having filed 508 signatures of people (i) residing within an area likely to be adversely affected by the *Stadttunnel Feldkirch* project (i.e. the northern part of Liechtenstein) and (ii) supporting the July 17, 2014 submission, Correspondent has been set up in conformity with the respective 'numeric' requirement resulting from the law of the Party of origin (Austria).
17. Would these people, at the time when expressing their support, have been living within the Austrian borders (instead of in one of the aforementioned Liechtenstein municipalities<sup>10</sup>), Correspondent would have been entitled to participate in the *Stadttunnel Feldkirch* EIA procedure automatically (§ 19(4) UVP-G 2000); i.e. in the same manner as its 'sister' citizen group, the *Bürgerinitiative "stattTunnel"*. The only parameter that differentiates Correspondent from the "*stattTunnel*" citizens' group is the fact that its supporters ('members') have voting power (in municipal affairs) not in Austria, but in Liechtenstein.
18. Strikingly, in its aforementioned September 12, 2014 decision, the *Amt der Vorarlberger Landesregierung* not only confirmed Correspondent's valid constitution according to the terms and conditions of Austrian national law, but furthermore granted Correspondent access to justice according to § 19(1)(6.) and (11.) UVP-G 2000 in connection with § 39

<sup>9</sup> „Am 17.07.2014 hat die Bürgerinitiative ‚mobil ohne Stadttunnel‘ eine Stellungnahme samt Unterschriftenliste bei der UVP-Behörde eingereicht. Die Überprüfung der Unterschriftenliste ergab 508 gültige Unterstützungen, sodass für die Bürgerinitiative – unter Heranziehung der einschlägigen Bestimmungen für österreichische BIs – gemäß § 9 Abs. 3 Z. 4 iVm § 19 Abs. 4 UVP-G ein gültiges Zustandekommen anzunehmen wäre“.

<sup>10</sup> Eschen-Nendeln, Mauren-Schaanwald, Ruggell, Schaan and/or Schellenberg.

UVP-G 2000 and Article 11 of the EIA Directive 2011/92/EU, as amended. Reference is made to section I of the attached "*Bescheid*" issued in proceedings Ib-314-2013/0001.

19. Thereby, within the simplified *Stadttunnel Feldkirch* EIA procedure, Correspondent was officially recognized a Party to these proceedings. Unsurprisingly, the same holds true for its Austrian counterpart, the "*stattTunnel*" citizens' group.
20. The September 12, 2014 decision ("*Bescheid*") was challenged by the Federal State of *Vorarlberg*, by the host municipality (*Feldkirch*) and by *Vorarlberger Energienetze GmbH*, a local utility equally promoting the *Stadttunnel Feldkirch* project, on October 6, 2014 with the (Austrian) Federal Administrative Court (*Bundesverwaltungsgericht*); giving rise to proceedings W193 2012936-1/11E.
21. On April 21, 2015, the *Bundesverwaltungsgericht* annulled section I of the September 12, 2014 "*Bescheid*" issued by the *Amt der Vorarlberger Landesregierung*.
22. In its reasoning, the *Bundesverwaltungsgericht* found that since § 19(4) UVP-G 2000 referred to the Austrian municipality constitution („*österreichische Gemeindeverfassung*"), Correspondent would not have come into existence ‚validly', given that its members – the aforementioned total number of 508 individuals supporting its July 17, 2014 submission by applying their signatures on it – were Liechtenstein (and not Austrian) residents. Consequently, Correspondent would not have been orderly constituted and could therefore not participate in the proceedings encompassing the *Stadttunnel Feldkirch* project at all.
23. Despite, Correspondent was authorised to take the case to the upper court, the (Austrian) *Verwaltungsgerichtshof* (Supreme Administrative Court), equally domiciled in Vienna. A copy of the *Bundesverwaltungsgericht* April 21, 2015 ruling is attached to this communication as *Exhibit 4*.
24. Correspondent in fact challenged that ruling with the *Verwaltungsgerichtshof* on July 5, 2015. In its complaint (*Revision*) as of that date, Correspondent claimed that both (i) Article 9(2) of the Convention, i.e. the entitlement for the public concerned residing in a third but adjacent state to have access to justice at the place where the EIA procedure is being conducted, and (ii) the non-discrimination principle enshrined in Article 3(9) of the Convention and Article 2(6) of the Espoo Convention were likewise infringed.
25. In a decision handed down on June 19, 2018 in proceedings Ro 2015/06/0009-5 that is attached to this communication as *Exhibit 5*, the *Verwaltungsgerichtshof* endorsed the ruling of the *Bundesverwaltungsgericht* as of April 21, 2015 and dismissed Correspondent's complaint on grounds that because its members were not residents of Austria but residents of Liechtenstein, it were not lawfully incepted and could therefore not enjoy any procedural

rights. For more detail, reference is made to sections 13 until 15 of the *Verwaltungsgerichtshof*'s reasoning.

26. In order to clarify the legal nature of the present case, Correspondent would like to draw the attention to the main argument used by the *Verwaltungsgerichtshof*. In a free English translation, this argument (set forth in section 15 of the attached June 19, 2018 ruling) reads as follows<sup>11</sup>:

*"Since pursuant to the findings in the ruling challenged which remained uncontested, the members of the Appellant are domiciled in Liechtenstein, in the present case a rightful constitution of a citizen's group did not occur ..."*

27. As under Austrian national law, there are no further legal means admissible, it results from the judgment of the *Verwaltungsgerichtshof* as of June 19, 2018 that Correspondent, albeit having been recognised as a Party initially<sup>12</sup>, may not participate in the *Stadttunnel Feldkirch* EIA procedure for the sole reason that it is constituted not by residents/citizens of the Party concerned (Austria), but by people living in a third (albeit directly adjacent) state (Liechtenstein).
28. Generally speaking, the present case demonstrates that Austrian law (in its application by both the *Bundesverwaltungsgericht* and the *Verwaltungsgerichtshof*) does not accept (but rebuts) the participation of extra-territorially organised citizens' groups (such as Correspondent) in transboundary EIA procedures even in a situation where those citizens' groups (*Bürgerinitiativen*) have complied with all 'numeric' requirements of national law that applies to citizens' groups that are organised domestically.

### III. Provisions of the Convention alleged to be in non-compliance

29. **Article 2(4)** "the public" means one or more natural or legal persons, and in accordance with the national legislation or practice, their associations, organizations or groups;
30. **Article 2(5)** "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making (...)
31. **Article 3(1)** Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implement-

<sup>11</sup> „Da nach den unbestritten gebliebenen Ausführungen im angefochtenen Erkenntnis die Mitglieder der Revisionswerberin in Liechtenstein wohnhaft sind, kam fallbezogen eine rechtmässige Konstituierung einer Bürgerinitiative nicht zustande ...“.

<sup>12</sup> Sections 8. to 16. of this communication.

ing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

32. **Article 3(7)** Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

33. **Article 3(9)** Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective center of its activities.

34. **Article 6(4)** Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

35. **Article 6(7)** 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.

36. **Article 9(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.

(...)



#### IV. Nature of alleged non-compliance

37. Correspondent alleges that the Party concerned failed to comply with its obligations, in particular, under Article 3(9) in conjunction with Article 3(1) and (7), Article 2(4) and (5), Article 6 and Article 9(2) of the Convention.
38. More concretely, Correspondent opines that the Party concerned, by excluding citizens' groups<sup>13</sup> whose members (supporters) belong to the public concerned of an affected Party<sup>14</sup> from public participation and access to justice on grounds of domicile, fails to comply with its non-discrimination obligation in transboundary EIA procedures.
39. In the present case, such discrimination results from the fact that an extra-territorially organised citizen group (*Bürgerinitiative*)<sup>15</sup>, albeit having been validly constituted according to pertinent Austrian national law, has been denied such public participation and access to justice for the sole reason that its members, at the time when expressing their support, had been precluded from participating in Austrian municipal elections because of their domicile within Liechtenstein (respectively within a number of Liechtenstein municipalities directly adjacent to the Party concerned).

#### V. Use of domestic remedies

40. Correspondent has exhausted all administrative and/or judicial review procedures within the meaning of Article 9(2)(b) of the Convention. No further domestic remedies are available. In this respect, reference is made to Sections 20. to 27. of this communication.

#### VI. Use of other international procedures

41. n/a

#### VII. Confidentiality

42. n/a

---

<sup>13</sup> in the present case *Bürgerinitiativen* within the meaning of § 19(4) UVP-G 2000 that comply with all 'numeric' requirements of the national law of the Party concerned.

<sup>14</sup> in the present case Liechtenstein.

<sup>15</sup> in the present case Correspondent.

### **VIII. Supporting documentation**

- 43. *Exhibit 1*: Submission filed by the „*stattTunnel*“ Citizen Group on July 17, 2014 (sample)
- 44. *Exhibit 2*: Submission filed by Correspondent on July 17, 2014 (sample)
- 45. *Exhibit 3*: Decision („*Bescheid*“) of the *Amt der Vorarlberger Landesregierung* as of September 12, 2014 in proceedings Ib-314-2013/0001
- 46. *Exhibit 4*: Ruling of the *Bundesverwaltungsgericht* as of April 21, 2015 in proceedings W193 2012936-1/11E
- 47. *Exhibit 5*: Ruling of the *Verwaltungsgerichtshof* as of June 19, 2018 in proceedings Ro 2015/06/0009-5

### **IX. Signature**

A handwritten signature in blue ink, consisting of several stylized, overlapping loops and strokes, positioned below the 'IX. Signature' heading.

Vaduz, 29 October 2018