

**Communication to the Aarhus Convention Compliance Committee
concerning compliance by Austria with regard to the rights under the
Convention of foreign citizens groups (ACCC/C/2019/163)**

Statement on behalf of Austria

By a communication received by the Aarhus Convention Compliance Committee Secretariat on 12 February 2019, complaint is made by the citizens group from Liechtenstein „*mobil ohne Stadttunnel*“ (“the Communicant”) in relation to an alleged failure of Austria as a Party to the Aarhus Convention concerning Article 3 (9) in conjunction with Article 3 (1), Article 2 (4) and (5), Articles 6 and 9 (2) of the Convention.

On 15 March 2019, the Committee reached a preliminary determination that the communication was admissible. This was notified to Austria by letter dated 22 March 2019 requesting that any written explanations or statements clarifying the matter referred to in the communication should be made by 22 August 2019.

Austria reiterates the concerns already raised during the audioconference at the sixty-third Committee meeting on 11 March 2019. In the aftermath of that meeting, Austria submitted a written statement.

The communication submitted by the citizens group from Liechtenstein „*mobil ohne Stadttunnel*“ mainly addresses a violation of the right to participate and the right to appeal in the Austrian environmental impact assessment procedure on the construction of an underground road infrastructure in the city of Feldkirch located in the Austrian Province of Vorarlberg.

The complaint made by the Communicant mainly addresses the Austrian Federal Act on Environmental Impact Assessment ("EIA Act")¹ which is applicable with regard to the assessment of the environmental effects of the project in question.

The Communication asserts that "*the Party concerned, by excluding citizens' groups whose members (supporters) belong to the public concerned of an affected Party from public participation and access to justice on grounds of domicile, fails to comply with its non-discrimination obligation in transboundary EIA procedures. In the present case, such discrimination results from the fact that an extra-territorially organised citizen group (Bürgerinitiative), albeit having validly constituted according to pertinent Austrian law, has been denied such public participation and access to justice [...]*" (para. 38 and 39 of the Communication, underlining added). In footnote 14 concerning para. 38 of the Communication, the Communicant holds the view that Austria as Party concerned has excluded the citizens group from participating at the EIA procedure though being member of a public concerned from an affected Party, namely Liechtenstein.

However, the Communicant has made no attempt to explain how the rights of a member of the public concerned from Liechtenstein who has not yet ratified the Aarhus Convention² and hence is not an (affected) Party to the Convention could have been violated by Austria in the context of the transboundary EIA procedure.

Also, and if the preliminary decision on admissibility is maintained, the Committee has not been provided with sufficient information to justify that Austria has denied a member of a public concerned its rights to which Art 6 and Article 9 (2) of the Convention refer. When determining the admissibility of the Communication, the Committee has not given any legal explanations with regard to the concerns raised by Austria due to the fact that Liechtenstein is not a Party to the Convention.

¹ Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000 – UVP-G 2000), BGBl Nr. 697/1993 zuletzt geändert durch BGBl I Nr. 80/2018; an English courtesy translation of the Articles in question is annexed to the statement

² https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en

For these reasons, Austria considers that there are no grounds to justify that Austria as a Party to the Convention is non-compliant with the aforementioned Articles of the Aarhus Convention.

As stated above and referred to by the Communicant in its Communication, the project "*Stadttunnel Feldkirch*" has undergone an environmental impact assessment procedure according to the EIA Act and which has been carried out by the government of the Province of Vorarlberg where the city of Feldkirch is located.

The relevant provisions which persons and entities are entitled to participate and have the right to appeal during the EIA procedure are laid down in Article 19 of the EIA Act with the title "Locus standi, right of participation and right of appeal". Article 19 of the EIA Act specifies inter alia which parties and members of the public concerned are entitled to make use of legal remedies with a view to both content and procedure and thus have the right to launch an appeal against an EIA decision at the Federal Administrative Court (*Bundesverwaltungsgericht*), the Supreme Administrative Court (*Verwaltungsgerichtshof*) and/ or the Constitutional Court (*Verfassungsgerichtshof*).

Citizens groups or "*Bürgerinitiativen*" are referred to in Article 19 (1) pt. 6 of the EIA Act. The participation of citizens groups is a particular provision within the Austrian legal system as they have a special role in relation to environmental impact assessment procedures. Concerning the proceeding, the objective to grant citizens groups legal standing is to build a common platform for individuals in order to argue their interests in relation to a specific project approval. Citizens groups mainly fulfil the function of bundling similar interests of individuals concerned by a project in order to allow the local population to submit their comments in an aggregated way to the competent authority. Especially with regard to major projects or projects of large scale their participation may well ensure the acceptance of project approvals.

According to Article 19 (4) of the EIA Act, the competent authority has to check whether the citizens live in the municipality affected by the project or in the municipality nearby. Persons who have the right to vote in municipal elections in accordance with the federal law

on the registration of voters (*Wählerevidenzgesetz*) are entitled to establish a citizens group with legal standing. Therefore, only citizens groups who have been established under Austrian law are granted the rights according to the EIA Act. Their main interest, however, might not be to promote the protection of the environment but to promote their interests as individuals in relation to a specific project, sometimes even favouring a project approval which is for example the case for road construction. With regard to the planning and constructing of bypass roads in Austria for example, citizens groups often promote a relocation of roads away from city centres whereas environmental organizations often bring forward their concerns with regard to possibly affected nature protection areas.

According to the EIA Act, a citizens group is a special institution in the interest of procedural economy where citizens who are individually affected by a project can raise similar concerns in form of a common platform. This has to be seen in contrast to other members of the public concerned such as environmental organisations whose main objective is to protect the environment.

Also, a similar particularity of the Austrian Environment law concerns the Austrian institution of Environmental Ombudsmen who have legal standing in some environmental procedures but cannot be compared – according to the findings and recommendations by the Committee in case ACCC/C/2010/48 – with environmental organisations and their general interest in promoting environmental protection under the Convention. When evaluating the compliance of Austrian law with the Convention, the Committee did consider the Austrian Ombudsman system as valuable institution with the aim of promoting environmental protection but only additionally to the rights of access to justice for the public as referred to in Article 9 (3) of the Convention.

When it comes to persons living abroad who are affected by a project located in Austria, the EIA Act foresees two possibilities of involvement of the public concerned in a specific environmental impact assessment procedure: either as neighbour and individually affected person by a given project or as an environmental organisation.

According to Art. 19 (1) pt. 1 of the EIA Act every person who might be threatened or disturbed or whose rights *in rem* might be harmed – regardless whether in Austria or abroad – are granted legal standing and have the right of appeal. This means that also persons living in the EU or in the European Economic Area (where Liechtenstein is part of) legally have the right to participate and the right of appeal – independently of their citizenship. This means that the point of reference is the area where these persons live and which might be affected by the project but not the nationality or citizenship.

Against that background of Austrian law, it has to be noted that the institution of citizen groups is neither mentioned in the Aarhus Convention nor in the Espoo Convention nor at European level, especially its EIA Directive. As stated above, a citizens group is lawfully established only when the preconditions as set out in Article 19 (4) of the EIA Act are met. In case of a foreign citizens group, there is no legal provision or requirement in place that authorises national authorities to check whether citizens from abroad are actually living in that foreign municipality. The data and information given by its citizens can only be validated by the competent authorities of Liechtenstein but not by Austrian authorities. Therefore, Austrian authorities are not legally empowered to examine whether the personal data concerning citizens or inhabitants of Liechtenstein are correct or not. This is the reason why the EIA Act refers to the federal law on the registration of voters (*Wählerevidenzgesetz*). This allows the EIA authorities to ask the authorities of the municipalities in question whether the persons indicated on the supporting list are actually living in the municipality where the project is located or in the neighbouring municipality and whether they have also the required active voting age.

With regard to Articles 6 and 9 (2) of the Convention, there is no obligation that Austria as Party to the Convention is required to establish a mechanism for the checking of personal data given by members of the public concerned who are located in Liechtenstein and being from a State who is not Party to the Convention.

According to Article 3 (9) of the Aarhus Convention, the non-discrimination provision has its aim to make sure "*that all persons, regardless of origin, have the exact same rights under the*

Convention as citizens of the Party concerned".³ For the purposes of the allegations in question, the requirements set out in Article 19 (4) of the EIA Act are only applicable to citizens living in Austria, regardless of their origin or nationality. However, this provision should not be interpreted in that way that a State as Party to the Convention would be forced to check the same preconditions for the public concerned of a State not being a Party to the Convention and where no authorisation is set neither at international level nor by a bilateral agreement.

In general, citizens or inhabitants of Liechtenstein as "members of the public concerned" have the right – according to the Austrian EIA Act – to participate and the right to appeal in environmental impact assessment procedures equally as citizens or inhabitants of Austria. Pursuant to the established case law, the nationality of citizens is not decisive but the area that is or might be affected by the impacts of the project in question.

To summarize, it has been made clear that according to the legal framework of the EIA Act, especially Article 19, there are several members of the public or public concerned who are granted legal standing and party status. This is not only the case with regard to affected persons, independently of their citizenship, but also the municipalities nearby as well as Environmental Ombudsmen and environmental organisations either from Austria or from a foreign state.

Accordingly, Article 2 (5) of the Convention allows that Parties to the Convention may set requirements under national law for environmental organisations as long as they are based on objective criteria and are not unnecessarily exclusionary.⁴

According to Article 19 (11) of the EIA Act there are no further criteria to meet for environmental organisations from a foreign state to participate in an environmental impact assessment procedure in an transboundary context: If the effects of the project in Austria impact that part of the environment in the foreign state whose protection is pursued by the environmental organisation and if the environmental organisation could participate in an

³ see the "The Aarhus Convention: An Implementation Guide", page 72.

⁴ see the "The Aarhus Convention: An Implementation Guide", page 58.

environmental impact assessment procedure in this foreign state too they have the same rights as an environmental organisation who is active in Austria and meets the criteria for recognition as set out in Article 19 (7) of the EIA Act. This means that also environmental organisations from abroad obtain legal standing and party status either according to Article 19 (7) or according to Article 19 (11) of the EIA Act.

For these reasons, the Communication does not claim to justify that Austria has not complied with Article 3 (9) of the Convention since members of the “public concerned” of Liechtenstein have according to Art. 19 (1) pt. 1 of the EIA Act the right to participate and to appeal as affected persons in proceedings with regard to projects in Austria where an environmental impact assessment is required.

Consistently with the analysis of the Austrian EIA Act above, the Communication has not provided the legal grounds to justify a denial of rights to which Articles 2 (4) and (5), Article 6 and Article 9 (2) of the Convention refer.

As mentioned by the Communicant in its Communication, the citizens group „*mobil ohne Stadttunnel*“ had been granted legal standing in the environmental impact assessment procedure at first instance which was conducted by the Government of the Province of Vorarlberg. All comments by the public presented in the oral hearing, also the comments by the citizens group „*mobil ohne Stadttunnel*“, were taken into account by the authority in its EIA decision. Also, the concerns raised by the Communicant were similar to those raised by the Austrian citizens group established according to the EIA Act and named “*statt Tunnel*”.

With regard to the project also environmental organisations from Liechtenstein participated as parties in the environmental impact assessment procedure of first instance, such as the *Liechtensteinische Gesellschaft für Umweltschutz* and the *Verkehrsclub Liechtenstein*.

Furthermore and in accordance with the provisions of the Espoo Convention on EIA in a transboundary context Austria issued a notification of the project to Liechtenstein and Switzerland. Accordingly, public participation and consultations took place taking into

account the obligations of the Alpine Convention as well: the Principality of Liechtenstein was by letter of 9 May 2014 invited to participate under the Espoo and Alpine Conventions since the project was considered to have potentially transboundary environmental effects and therefore a cross-border EIA procedure was carried out. On 12 March 2015 the consultation talks between the Province of Vorarlberg and the Principality of Liechtenstein pursuant to Article 10 (3) of the EIA Act (corresponding to Article 5 of the Espoo Convention) and Article 8 (2) of the Transport Protocol of the Alpine Convention took place. By letter dated 1 June 2015, the additional findings since the oral hearing took place were forwarded to the Parties of the proceedings and to the Principality of Liechtenstein with the possibility to submit comments.

This makes clear that Austria has fulfilled its obligations with regard to the involvement of the public concerned in the transboundary EIA procedure.

The Communicant refers in its Communication and in the Addendum to its Communication (dated 29 October 2018) to rulings which were taken by the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) in two different decisions on 19 June 2018 and on 27 September 2018.

In the following, the chronology of these decisions with regard to the project "*Stadttunnel Feldkirch*" and its relevance for the allegations as laid down in the Communication will be summarized:

In July 2014, within the time period of public display for comments, the Communicant, the citizens group "*mobil ohne Stadttunnel*", submitted a comment with reference to Article 19 (4) in conjunction with Article 9 (5) of the EIA Act and filed an application for party status in the EIA procedure. The Communicant presented the EIA authority its written comment and supporting lists. On 24 July 2014 (letter dated 23 July 2014) the Communicant made a supplementary application in order to gain legal standing in the EIA procedure.

The EIA authority (Government of the Province of Vorarlberg) granted the Communicant legal standing by its decision from 12 September 2014 in the context of a simplified EIA approval procedure.

By means of a simplified procedure, for certain projects that are listed in columns 2 and 3 of Annex 1 of the EIA Act a more flexible organisation of the procedure (e.g. preparation of a summary assessment instead of an expertise on environmental impacts) is taking place as compared to the regular EIA procedure. This applies for example to projects such as waste treatment plants, infrastructural projects, intensive livestock installations and industrial plants. However, the same standards with regard to the protection of the environment according to the EIA Act do apply regardless whether the approval is given in a normal or in a simplified EIA procedure.

With regard to the decision of 12 September 2014, an appeal was filed against the decision granting legal standing in the simplified EIA approval procedure. The Federal Administrative Court (*Bundesverwaltungsgericht*) decided on 21 of April 2015 on the appeal that the decision taken by the Government of the Province of Vorarlberg granting legal standing to the citizens group „*mobil ohne Stadttunnel*“ was not correct. The Court stated that due to the fact that members of the citizens group „*mobil ohne Stadttunnel*“ are citizens from Liechtenstein and not from Austria they do not have the right to vote in municipal elections in accordance with the federal law on the registration of voters (*Wählerevidenzgesetz*) and may therefore not establish a citizens group with legal standing according to Article 19 (4) of the EIA Act. Hence, the decision of the EIA authority that the citizens group has legal standing in the simplified EIA approval procedure was cancelled.

In the following, the Supreme Administrative Court decided on 19 June 2018 on the citizens group's revision against the decision of the Federal Administrative Court of 21 of April 2015 regarding the question of legal standing. According to that decision, a group of persons can only participate in an EIA procedure in accordance with Article 19 (4) EIA Act as a citizens group if they consist of a sufficient number of people (200) that are entitled to vote in the relevant municipality or in of the municipalities nearby. Moreover, they need to support a written comment in accordance with Article 9 (5) of the EIA Act with a list of their names,

birth-date, address and signature. The Court stated that it follows from the clear wording of that provision that only people who are entitled to vote under the municipal code of municipalities in municipal elections in the municipalities referred to in that provision are entitled to support with their signature a citizens group comment in an EIA procedure. Since – according to the undisputed statements in the findings of the Federal Administrative Court – the members of the citizens group live in Liechtenstein a legitimate constitution of a citizens group did not materialize. Accordingly, the revision made on behalf of this group therefore proved to be inadmissible.

On the project itself, the EIA authority gave an approval for the construction of the project "*Stadttunnel Feldkirch*" on 15 July 2015. Appeals were filed against that decision as well. By its ruling dated 19 June 2019 the Federal Administrative Court confirmed the EIA approval for the construction of the project "*Stadttunnel Feldkirch*" including all parts of the project according to the decision of the Government of Vorarlberg dated 15 July 2015. Nevertheless, the Court amended the EIA approval due to the appeals in order to have additional conditions e.g. for transport and transport safety, nature and landscape protection, air quality, noise technology, environmental health and other auxiliary provisions. However, the procedure on EIA approval has not been finalized, revision was filed against the Court ruling by end of July 2019.

In the interests of completeness and as referred to by the Communicant in its Addendum to the Communication, the Supreme Administrative Court had to decide on the role of citizen groups in simplified and regular EIA approval procedures. By its ruling of 27 September 2018 the Court stated that the Austrian legislation as laid down in the EIA Act concerning the different role of the citizens groups in simplified EIA approval procedure and regular EIA approval procedures is not applicable. However, it restates that it follows from the clear wording of Article 19 (4) of the EIA Act that only persons who are eligible to vote under the municipal code of local councils in municipalities designated in this provision can sign a comment in accordance with Article 9 (5) of the EIA Act in accordance with the law. By this ruling, it is stated that citizens groups have in both procedures the simplified as well the regular EIA procedure party status with legal standing under Austrian law. However, this

jurisdiction did not refer to the legal question of citizens group composed of persons not living in Austria.

In summary, it can be noted that even though the legal standing of the citizens group "*mobil ohne Stadttunnel*" was rejected by the Austrian Courts their arguments were taken into account in the EIA approval decision as they were similar to those of the Austrian citizens group named "*statt Tunnel*"; a fact which has been confirmed also by the Communicant (see para. 6 of the Communication).

For the above reasons, the Communication does not disclose any valid grounds to justify a finding by the Committee that Austria is in non-compliance especially with Articles 3 (9), 6 and 9 (2) of the Aarhus Convention since the Austrian EIA Act does allow for participation and the right to appeal for citizens from Liechtenstein as well environmental organisations from a foreign state such as Liechtenstein.