

Communicant's Opening Statement in case ACCC/C/2019/163 (Austria)

Dear Chair and Members of the Compliance Committee, distinguished colleagues

In this brief Opening Statement, we would like to provide you with more details as to how the Liechtenstein citizens' group "*mobil ohne stadttunnel*" formed in 2014 and why an attempt was made to look for full recognition as an Austrian *Bürgerinitiative*. By that, we wish to highlight the key issues of the case we have brought to your attention.

Fortunately, the facts surrounding the matter are largely beyond dispute. On these grounds, we look forward to elaborating on any of these or other points and welcome your questions.

1. In their response to the Committee of August 22, 2019¹, Austria argues that by virtue of national law and for lack of a valid constitution (according to such national law)², the Communicant could not have been accepted as a party to the *Stadttunnel Feldkirch* Environment Impact Assessment procedure. The 508 individuals standing behind the Communicant, Austria argues, were people residing within Liechtenstein and could not, for that very reason, participate in municipal elections³. Accordingly, Communicant could not acquire the legal status of a Citizens' Initiative within the meaning of the Austrian EIA Act. Based on these arguments, the decision issued by the Government of the Federal State of Vorarlberg on September 12, 2014 (*Exhibit 3*)⁴ was annulled in April 2015⁵.
2. As from that moment, the Communicant was denied access to the procedure, so that it could no longer inspect the file, comment on material or procedural elements or lodge a complaint. As from April 2015 until the end of the procedure in 2019, the 508 individuals supporting the July 2014 comments⁶ were deprived of any legal standing and, as a consequence, of any participation. They were basically told that their initiative had never been anything other than a legal nothing.
3. Whilst we do not believe that this appreciation is in line with Austria's obligations under the Convention, we now turn to the particulars of Communicant's inception in 2014.
4. In the last paragraph of page 7 of its response, Austria rightfully asserts that prior to the commencement of the procedure, "*it issued a notification of the project to Liechtenstein*",

¹ Hereinafter referred to as "*Austria's response*".

² Paragraph 15 of the ruling of the Austrian Verwaltungsgerichtshof of June 19, 2018 (*Exhibit 5*); Section 25. of the Communication.

³ Austria's response page 9, third paragraph.

⁴ Sections 13. to 19. of the Communication; Austria's response page 9, first paragraph.

⁵ Section 25. of the Communication; Austria's response page 9, third paragraph.

⁶ Section 6. of the Communication, Austria's response page 8, last paragraph.

and that it did so "*in accordance with the provisions of the Espoo Convention ...*". Given the transboundary character of the matter, such notification was of course mandatory.

5. Austria's notification gave rise to a *Bekanntmachung* that was publicized in the Liechtenstein Official Journal on May 22, 2014⁷. A copy of that announcement is attached as *Exhibit 7*.
6. The wording relevant for the present case flows from the penultimate paragraph of the announcement where it is correctly stated that "*the public may submit comments with respect to the project and the documents submitted*".
7. The pertinence of this note becomes clear when considering the contents of the statute law referred to, which is Article 19 lit. b of the Liechtenstein EIA Act⁸ read together with Article 5 para 1 lit. c of the same act, which defines the notion of "*public*" as "*one or more natural or legal persons and their associations, organizations or groups*" (emphasis added).
8. From these provisions it follows that Liechtenstein law does effectively incorporate the concept of an ad hoc group of people as a subset of the "*public*" within the meaning of Article 2(4) of the Convention. Essentially, the Liechtenstein understanding of the term "*public*" is identical to the one set forth in that article, merely omitting "*in accordance with national legislation or practice*".
9. In a domestic EIA procedure, a Liechtenstein ad hoc group of people can acquire legal standing and even the right to appeal.
10. Accordingly, in a letter dated August 12, 2014, that has been referenced on the last page of the September 12, 2014 decision (*Exhibit 3*), the Liechtenstein Government confirmed that an ad hoc group of people falls within the scope of Article 32 para 1 lit. d UVPG, according to which provision any natural or legal person may apply to the Office for the Environment for the granting of the right to appeal in a given EIA procedure.
11. In May 2014, the Communicant was thus validly invited to advance its comments as a "*group*" of people belonging to the "*public*". When filing its comments to the developer of the *Stadttunnel Feldkirch* project two months later⁹, the Communicant acted in full conformity with domestic (i.e., Liechtenstein) law as a conglomerate of individuals inter-

⁷ Identification Number 8244/2014.

⁸ UVPG; Liechtenstein Legal Gazette 2014 No. 19 (<https://www.gesetze.li/konso/>)

⁹ Section 6. of the Communication.

ested in voicing their concerns in a highly contentious transboundary EIA procedure. Under local rules, the Communicant could do so *as such*, i.e., without being required to, say, re-constitute itself as a NGO or adopting any other legal form.

12. Moreover, because the 508 individuals supporting the comments filed on July 17, 2014¹⁰, were residing in municipalities neighboring the planned exit road¹¹, they undoubtedly belonged to the (Liechtenstein) "public concerned" within the meaning of Article 2(5) of the Convention¹².
13. Consequently, the Communicant may still legitimately claim to have acted as an (deliberate) aggregate of the Liechtenstein public affected or likely to be affected by the *Stadttunnel Feldkirch* project, validly formed under local rules and fully recognized by Liechtenstein legislation and practice as an ad hoc "group" of people.
14. Notwithstanding, with effect as from April 21, 2015, the Communicant was denied access to the procedure. As from that date, 508 Liechtenstein residents affected or likely to be affected by the *Stadttunnel Feldkirch* project were excluded from exercising whatever right the Convention entangles. We cannot believe this to be justified.
15. I now turn to the reasons for which Andrea Matt in 2014 resolved to form a Liechtenstein citizens' initiative in line with Austrian legislation and practice.

"Dear Chair and Members of the Compliance Committee,

thank you for granting me the opportunity to explain the motivations behind the citizen group I formed together with other Liechtenstein activists.

As a citizen of Mauren, where the road traffic between Austria and Liechtenstein crosses the border, the idea of a city tunnel in Feldkirch had been of great concern to me. As a member of the Liechtenstein Diet from 2005 to 2009 and as the managing director of the Liechtenstein Association for Environmental Protection, I have explored the environmental impact of the project in all detail.

Once the environmental impact report was published in May 2014, my intention was to assert my knowledge directly and independently with an aim to optimize a project which will be of fateful importance for Liechtenstein.

¹⁰ Section 6. of the Communication, Austria's response page 8, last paragraph.

¹¹ Section 1. of the Communication.

¹² Section 16. of the Communication.

To render our participation as effective as possible, we founded a Liechtenstein citizens' initiative modelled on Austrian law, and we have provided the competent Austrian authority with a list of 508 residents who shared our concerns. The fact that our citizens' initiative was granted all procedural rights in the first instance enabled us to stand up for our interests on our own. The fact that we lost all such entitlements only ten months later was an even greater disappointment.

In the last paragraph of page 8 of their response, Austria refers to a supplementary application that was filed on behalf of the "mobil ohne Stadttunnel" Bürgerinitiative in July 2014. I have authored that motion and I herewith take the liberty to pass it on to you as Exhibit 8. I kindly invite you to pay due regard to the considerations set out therein.

I thank you for your attention and hand the floor back to Stefan".

16. After having submitted the list of its supporters for review¹³ in July, 2014¹⁴, the Communicant on this basis joined the *Stadttunnel Feldkirch* EIA procedure as an extraterritorially organized ad hoc group of people representing a substantive share of the Liechtenstein population affected or likely to be affected.
17. In the Communicant's view, (i) by not taking into account this capacity, (ii) by ignoring Communicant's legal standing as an extraterritorially organized ad hoc group of people and (iii) by denying the ensuing procedural rights in the *Stadttunnel Feldkirch* EIA procedure with effect as from April 21, 2015¹⁵, Austria has disregarded the duties it must observe as a member state of the Convention.
18. Going forward, an extraterritorially organized ad hoc group of people such as the Communicant which (i) represents a significant portion of a neighboring country's public concerned and which (ii) in a transboundary context objectively fulfills all requirements (of local law¹⁶) that can be applied *non-discriminatorily*¹⁷ should benefit from the same procedural rights as a citizens' group active on the other side of the border (i.e., within the State of origin), including, but not limited to, the *locus standi* as a party.

¹³ Sections 11. to 13. of the Communication.

¹⁴ Section 16. of the Communication.

¹⁵ Sections 20. ss of the Communication.

¹⁶ in the present case Austrian law.

¹⁷ e.g., minimum number of supporters (at least 200), factual and legal properties of such individuals (age; capacity to act; voting rights in municipal matters at the place where they live) etc.