

Opening Statement of Austria in the case ACCC/C/2019/163

Dear Chair and Members of the Compliance Committee,

In this opening statement, we would like to explain why in the present case there are **no valid grounds to justify a finding by the Committee that Austria is in non-compliance of the Aarhus Convention**.

In order to form **a citizen group under Austrian law** a comment must be sent during the public inspection period of a project and it must be supported by at least 200 persons who have the right to vote in municipal elections in the host municipality or in a directly adjoining municipality.

The purpose of a citizen group is to bundle similar interests of individuals concerned by a project.

This institute was found to be in violation of the Aarhus Convention by the Communicant. We do however see **no violation of the Convention for the following reasons**:

1) Liechtenstein has not yet ratified the Aarhus Convention

The Communicant did not explain how the rights the public concerned from Liechtenstein who has not yet ratified the Aarhus Convention and is therefore not a Party to the Convention could have been violated by Austria.

2) The citizen group is a special institute granted by the Austrian legal system

has already been **part of the Austrian legal system since 1993**. So over 10 years before Austria ratified the Aarhus Convention in 2005. **It is neither mentioned nor obliged** under the Aarhus Convention, the Espoo Convention or at European level. It is only **additional**.

Article 3(5) of the Aarhus Convention states that the provisions of the Aarhus Convention **shall not affect the right of a Party to maintain or introduce measures providing for broader access** to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

The Austrian provision in the EIA Act regarding citizen groups **does give such a broader access** and Austria as a Party to the Convention should therefore have the right to maintain it.

The question arises why this institute should be treated with the **same severity** as instruments that have to be provided under the Convention and why a state should be **punished** for providing an extra form of participation that is not even required neither by EU nor by International Law?

3) The provision itself is not discriminatory and it can be justified for practical reasons

According to **Article 19(4) Austrian EIA Act** only persons who have the right to vote in municipal elections in the municipalities referred to in that provision are entitled to establish a citizens group with legal standing. This does mean that **only persons residing in Austria can establish a citizens group**. However, **it includes Austrian and European citizen regardless of their nationality**. In addition, **it is equally not possible for Austrian nationals residing outside of these municipalities to be part of a citizen group**.

Furthermore, the rule can be justified because it wants to **ensure that only the interests of the persons that are affected** by a project are taken into account. This can only be ensured if the competent authority has the possibility to check whether the data provided is correct. Unfortunately,

Austrian authorities are **not legally empowered to examine whether the personal data concerning citizens or inhabitants of Liechtenstein are correct or not**. The **data and information given by citizens from Liechtenstein can only be validated by the competent authorities of Liechtenstein** but not by Austrian authorities.

4) There are several possibilities to participate in the decision-making process of an EIA authority under Austrian law:

Anyone can submit a written comment

It is important to note that under the Austrian EIA Act **anyone can submit a written comment regarding a project and all these comments must be considered by the EIA authority when making its decision** (Article 9(5) and Article 17(4) Austrian EIA Act).

Several members of the public are granted party status

Additionally according to Article 19 of the Austrian EIA Act several members of the public are granted party status. This also includes **foreign neighbours** as well as **foreign environmental NGOs**

Foreign neighbours are granted party status insofar as they have filed written complaints concerning the infringement of their rights during the period of public inspection. This criterion applies independently of nationality or domicile.

For foreign environmental NGOs there are two possibilities to be granted party status: They can either **meet the criteria of the EIA Act Austrian environmental NGOs** have to meet in order to be recognized as an NGO and get party status or they are granted party status if they meet the conditions of Article 19(11) of the Austrian EIA Act.

5) The concerns of the Communicant were considered by the EIA authority

First of all – as mentioned above - **anyone is able to submit comments and all these comments must be considered by the EIA authority.**

Secondly, the Communicant was **granted party status** at the environmental impact assessment procedure of first instance, which was conducted by the Government of the Province of Vorarlberg.

Thirdly, also the **Austrian citizen group “statt Tunnel” was granted party status** in the procedure and raised similar concerns as the Communicant.

Lastly, 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.

A representative of the EIA authority confirmed that the Communicant – because he had been granted party status by the EIA authority - had full access to the files from the start, took part in the oral hearing and raised its objections and concerns. In addition, his submissions were also taken into account by the experts in the first instance proceedings and acknowledged accordingly by the EIA authority when taking its decision. The decision of first instance dated July 15, 2015 was also sent to the Communicant.

6) A correct procedure according to the ESPOO Convention took place

Austria issued a **notification of the project to Liechtenstein and Switzerland**. Accordingly, **public participation and consultations took place**.

7) No impacts of the decision of the Supreme Administrative Court regarding the Austrian citizen group (Ro 2015/06/0008) for the present case.

The Supreme Administrative Court ruled that the Austrian citizen group “statt Tunnel” **must be considered as a party irrespective of the character of a procedure** (whether the proceedings are being conducted as a “simplified” or as a “regular” EIA procedure)

However, **the party status of a citizens group that is composed of persons not residing in Austria was not subject of the decision.**

On the contrary, the Supreme Administrative Court declared in its decision regarding the Communicant (Ro 2015/06/0009) **that only persons who have the right to vote in municipal elections are entitled to establish a citizens group and that since the members of the Communicant lived in Liechtenstein a legitimate constitution of a citizens group did not materialize.**

8) The European Commission had initiated infringements proceedings against Austria on the matter but they were closed after Austria’s argumentation why the institute of the citizen group is not discriminatory.

9) In the case ACCC/C/2009/39 the ACCC did not consider problematic that only Austrian municipalities are given party status in an EIA procedure and not foreign ones as well.

In conclusion, it can be said that there are **no grounds to justify a finding by the Committee that Austria is in non-compliance** with the Aarhus Convention.

The citizen group is a **special institute granted by the Austrian legal system**, that goes beyond what is required according to the Aarhus Convention and a Party to the Convention is **allowed to maintain according to Article 3(5) of the Convention.**

It is **not required neither under European nor under International Law** and should therefore not be forced to fulfil certain criteria, above all if its current criteria are **not discriminatory** and are **justified** by objective reasons.

If the institute were required by the Aarhus Convention **all parties to the Convention not having this institute in place would be in violation of the Convention.**

There must be a **possibility for the public concerned to participate in the procedure and get access to justice**, where the Convention requires so. However, if this is provided for by a Party in some way then this should be considered sufficient to secure the rights that are granted under the Convention.

There is **no obligation to provide for endless forms of access** and with regard to the implementation of the Convention some **discretion** is given to the Parties of the Convention.

The Austrian EIA Act **ensures the participation and the right to appeal of foreign citizens as well as foreign environmental organisations**, which in our opinion is what is **sufficient** to secure the rights of the public concerned.