Amt der Vorarlberger Landesregierung

Docket Number: Ib-314-2013/0001

Bregenz, 12.09.2014

Consultations:
MMag Christian Berger
[redacted]

Concerning: Land Vorarlberg, City of Feldkirch, Vorarlberger Energienetze GmbH:
EAI procedure Feldkirch city tunnel.
Application for party status - decision

**D e c i s i o n**

Within the framework of the EIA approval procedure for the "Stadttunnel Feldkirch", which was initiated with the application of the Province of Vorarlberg, the City of Feldkirch and Vorarlberger Energienetze GmbH of 11.07.2013, the citizens' initiative "mobil ohne Stadttunnel", represented by Ms Andrea Matt, applied for the granting of party status with the statement submitted on 17.07.2014 (dated 15.07.2014) and with the letter of 23.06.2014, received on 24.07.2014.

Hereby is issued the following

**D i c t u m**

**I.**

Pursuant to § 19 para. 1 subpara. 6 and para. 11 and § 39 of the EIA Act 2000 (UVP-G), Federal Law Gazette No. 697/1993, as amended by Federal Law Gazette I No. 14/2014, in conjunction with Article 11 of the EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU, and § 57 of the General Administrative Procedure Act, Federal Law Gazette I No. 51/1991, as amended by Federal Law Gazette I No. 161/2013, it is hereby established that the citizens' initiative "mobil ohne Stadtunnel" has the status of a party in the simplified EIA procedure in question.

**II.**

Pursuant to §§ 1 f of the Administrative Levies Act, LGBl.No. 10/1974 as amended, LGBl.No. 44/2013, in conjunction with TP 114 of the Administrative Levies Ordinance, LGBl.No. 67/2013, administrative levies in the amount of **€ 78** are payable:

**R e a s o n s**

Re dictum I:
Pursuant to § 19 para 1 subpara. 6 UVP-G 2000, citizens' initiatives (CI) have party status pursuant to para 4 leg. cit., except in the simplified procedure. Para. 2 leg. cit. specifies this in so far as in the simplified procedure citizens' initiatives may participate in the procedure as parties with the right to inspect files pursuant to para. 4. In general, para. 4 leg. cit. stipulates that a statement in the EIA procedure can be supported by entering it in a signature list, whereby the name, address and date of birth must be stated and the dated signature attached. The signature list shall be submitted at the same time as the statement. If a statement has been supported by at least 200 persons who, at the time of support, were eligible to vote in municipal elections in the municipality where the project is located or in a municipality immediately adjacent to it, then this group of persons (citizens' initiative) shall participate in the procedure for granting the permit for the project and, pursuant to § 20, as a party or as an interested party (para. 2).

With the decision of the provincial government of 11.03.2010, Zl. IVe-415.46, it was determined that an environmental impact assessment must be carried out for the Feldkirch city tunnel in a simplified procedure. On the basis of this - legally binding - determination, it can be assumed in accordance with the aforementioned provision that citizens' initiatives do not have the right to be parties to the EIA procedure in question.

On 17.07.2014, the citizens' initiative "mobil ohne Stadttunnel" submitted a statement including a list of signatures to the EIA authority. The verification of the signature list resulted in 508 valid signatures, so that the citizens' initiative - using the relevant provisions for Austrian citizens' initiative - could be assumed to be valid pursuant to § 9 para. 3 subpara. 4 in conjunction with § 19 para. 4 UVP-G.

On the question of whether the requested party status should be granted, the EIA authority considered:
The provision on public participation in EIA procedures, which implies participation of the so-called "public concerned", goes back to the "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Convention). After the European Union ratified this Convention, the objectives and contents of the Aarhus Convention were implemented in Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (EIA Directive), and in the EIA Directive. Separate from the binding effect under European law, the Republic of Austria also ratified the Aarhus Convention in 2005. In the UVP-G, the regulatory content was implemented in § 19, whereby the Austrian legislator decided to specifically standardise concrete additional party positions, instead of generally provide the "public

concerned" with rights. Thus, in para. 1 an additional line 7 "environmental organisations recognised pursuant to para. 7" was included. Para. 6 to 10 subsequently standardise the requirements that a recognised environmental organisation must fulfil in order to be a party to an EIA procedure (organised as an association or foundation according to its statutes, environmental protection as a primary objective, non-profit status, 3 years of existence, recognition by the Federal Ministry of Agriculture, Forestry, Environment and Water Management). Environmental organisations based abroad may also acquire party status under certain circumstances (para. 10). In contrast, citizens' initiatives were already regulated in the original version of the UVP-G in 1993, which standardised the party status of citizens' initiatives with all the associated rights. In the course of the comprehensive amendment of the UVP-G in 2000, which introduced the distinction between the normal and the simplified EIA procedure, the party status of the citizens' initiatives was restricted to the normal EIA procedure, while they were given the status of participants in the simplified procedure. In this way, the national legislator seems to grant citizens' initiatives a special procedural status that differs from that of the "public concerned".

Given this background, the question to be examined in the present declaratory proceedings was whether this differentiation is permissible or whether citizens' initiatives are to be regarded as groupings covered by the Aarhus Convention and the relevant provisions of the EIA Directive based on it. In the latter case, the question of an incomplete implementation of the Convention would arise, while in the former case, it would seem reasonable to conclude that the UVP-G contains an overbroad regulation in this respect.

For this purpose, the regulatory content of the Aarhus Convention was to be considered in more detail. The objective of Article 1 of the Convention is: "In order to contribute to the protection of the right of every male/female person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall ensure the right of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention".

In the context of the present proceedings, the following definitions according to Article 2 of the Convention are of interest:

*“The public”* means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups;

*"The public concerned"* means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

With regard to the procedural rights to be granted to the public concerned, Article 9 para. 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. To this end, the interest of any non-governmental organization meeting the requirements referred to in Article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The Aarhus Convention thus obliges the Contracting States to grant members of the public concerned rights that enable them to challenge a decision affecting the environment. To do so, members of the public must demonstrate a sufficient interest or allege a violation of rights. More detailed provisions on what constitutes a sufficient interest and under which circumstances a "group" is to be considered as an interested public admitted to the proceedings can be determined by the Contracting States. However, it is important to ensure that the public concerned has wide access to the courts. It is not clear from the Convention's text whether a certain degree of organisational structure or duration of existence is required for a group to be subsumed under "the public". Although only non-governmental organisations are mentioned expressis verbis as "the public concerned", the fact that "the public" also includes "associations, organisations or groups" opens up a wide field. The definition is subsequently concretised in that the public must be affected in the sense that there must be an environmental interest in the subject matter of the decision. The Convention assumes such an interest for non-governmental organisations (NGOs) active in the field of environmental protection. Even if no demonstrative naming can be derived from the wording, an exclusive naming seems very unlikely, because in this case the general definition in the preceding sentence would be dispensable. Furthermore, it is striking that the general definition presupposes an "environmental interest in the subject matter of the decision", whereas NGOs should be active in the field of environmental protection. The fact that Article 9, which deals with sufficient interest, again explicitly refers to NGOs, creates additional uncertainty, but at the same time is also due to the inherent vagueness of such agreements, which can be

used in the context of national implementation. As a result, an understanding suggests to regard NGOs as a typical, but not exclusive case of the public concerned.

In the EIA Directive, the definitions of "the public" and "the public concerned" and of access to justice have been taken over from the Aarhus Convention with almost identical wording. There is no need for further discussion on this and what has been said about the Convention applies in the same way.

Mention should be made, however, of the 4th recital of the PP Directive, according to which participation involving associations, organisations and groups - in particular non-governmental organisations promoting environmental protection - should be encouraged. This choice of words expresses the intention that non-governmental organisations are to be understood in a demonstrative sense.

In its decision C-115/09, the ECJ also did not explain in detail which characteristics the public concerned should fulfil, but it did clarify that an NGO within the meaning of Article 1 para. 2 of the EIA Directive, which promotes environmental protection, can derive from Article 10a para. 3 sentence 3 leg. cit. the right to assert the infringement of national law stemming from Union law in the context of an appeal against a decision in an EIA procedure before a court, although national procedural law does not permit this ( ... ). This suggests that a group of the public concerned to be recognised under Article 1 may rely on the direct applicability of Article 10a (now Article 11) to bring an appeal in the proceedings. In ruling C-263/08, it emphasised that the national provisions must ensure broad access to the courts for the public concerned. The case in question concerned a local environmental protection association that had already been in existence for more than three years and which the ECJ recognised as an NGO.

If one compares the contents of the Aarhus Convention and the EIA Directive with the Austrian UVP-G, the following questions arise in the case at hand: 1) whether a citizens' initiative, as it can be constituted according to § 19 para. 4 UVP-G, is to be regarded as a "public" and 2) whether such a citizens' initiative fulfils the criteria of a "public concerned". If both questions are answered in the affirmative, it would then have to be examined whether the purely participatory status in the simplified procedure is to be regarded as compatible with the aforementioned regulations.

Pursuant to § 19 para. 4, a citizens' initiative is formed by at least 200 persons who, at the time of support, were eligible to vote in municipal elections in the municipality where the project is located or in a municipality directly adjacent to it, supporting a statement pursuant to § 9 para. 5 by entering it in a signature list (name, address, date of birth, dated signature) and simultaneously submitting a statement with the signature list. Such a citizens' initiative is thus a spontaneously organised community of interest of citizens who join on the occasion of a concretely planned project. A statute or similar documenting the interests and goals of the citizens' initiative in general terms is not usually drawn up. The existence of the citizens' initiative in this sense is typically limited to the period during which the project subject to EIA is within or outside the

procedure. Accordingly, the interest is usually limited to the project. The Constitutional Court considers citizens' initiatives as a collective entity with a minimal degree of organisation (V 14/06), but so far sees no obligation under EU law to recognise them as members (concerned) of the public within the meaning of the Aarhus Convention and to grant them party status. The reasoning, however, is of only limited relevance, because it is based on the legal situation before the entry into force of the Public Access Directive (VfSlg. 17808 with reference to VtSlg. 15.226). The same applies to the previous case law of the Environmental Senate, which, referring to § 19 (2), denied a party status of citizens' initiatives in the simplified procedure without further discussion (US 4B/2005/I-49, 4B/2008/12-22). In the literature, however, there is no uniform view on this question, with a critical assessment of the current legal situation predominating. Schmelz/Schwarzer (UVP-G, 2011, § 19 para. 177) deny a subsumption under "public", while Altenburger/Berger (UVP-G2, § 19 para. 52) and Ennöckl/Raschauer/Bergthaler (UVP-G3, § 19 para. 99) regard the current legal situation as critical. In any case, the latter consider a citizens' initiative to be a legal entity under private law similar to an association, with a position comparable to that of NGOs. The fact that the ministerial draft of the 2004 amendment to the Environmental Impact Assessment Act itself also provided for party status for citizens' initiatives in the simplified procedure, which was then apparently limited at short notice to the ordinary EIA procedure (Meyer, Jahrbuch Umweltrecht, 2006. pp. 139-155), shows that the current differentiation is not supported at the level of the public administration either. On the grounds that citizens' initiatives must have a minimum organisational structure and consist of at least 200 supporters, and that the explicit mention of NGOs is to be understood in a demonstrative sense, the EIA authority takes the legal view that citizens' initiatives are to be regarded as "the public" within the meaning of Article 1(2)(d) of the EIA Directive.

Proponents of the party status of citizens' initiatives cite the EU's Public Participation Directive and argue that the persons participating in the citizens' initiative are affected in any case. This view is shared by the authority insofar as the Aarhus Convention and the PP Directive do not primarily refer to an activity in the environmental field, but to an environmental impact of the decision-making process. Such an impact is certainly present in the case of citizens who are entitled to vote and thus reside in the siting municipalities and neighbouring municipalities. Furthermore, on closer examination, no convincing justification can be found as to why the concern for projects that are to be treated according to the simplified procedure is lower than that of those according to the "normal" EIA procedure. Typically, projects in areas particularly worthy of protection (column 3 of Annex 1 of the UVP-G 2000) are to be treated in the simplified procedure. In order to avoid an unjustified differentiation, it is therefore to be assumed that a citizens' initiative that has been validly established in the sense of § 19 para. 4 UVP-G is also to be regarded as a "public concerned" in the simplified procedure.

According to Ennöckl/Raschauer/Bergthaler (see above), § 19 para. 2 UVP-G 2000 violates the currently applicable Union law and the national authorities are obliged to leave the provision unapplied. Against the background of the decision ECJ C-115/09, accord-

ing to which Article 11 of the EIA Directive is open to direct application, this results in the direct application of the EIA Directive. This means that a citizens' initiative had to be granted the possibility to challenge the decision also in the simplified procedure. Since under Austrian administrative procedural law a challenge to an administrative decision can only be made by a party to the proceedings, the national citizens' initiatives duly constituted in these proceedings are granted party status. As a result, the EIA authority had to grant party status to the national citizens' initiative "mobil ohne Stadttunnel", which had been legally constituted in accordance with § 19 para. 4 UVP-G.

With reference to the question of a possible party status of foreign citizens' initiatives:
Pursuant to § 19 para. 4 UVP-G, a statement pursuant to Article 9(5) may be supported by entering it in a list of signatures, stating name, address and date of birth and enclosing the dated signature. The signature list shall be submitted at the same time as the statement. If a statement has been supported by at least 200 persons who, at the time of support, were eligible to vote in municipal elections in the siting municipality or in a municipality immediately adjacent thereto, then this group of persons (citizens' initiative) shall participate in the procedure for granting the permit for the project and, pursuant to § 20, as a party or as an interested party (para. 2).

According to the decision of the US IA/2009/6-142, only a national, but not a foreign citizens' initiative can have party status within the meaning of this provision if the above-mentioned requirements are met. This results from the fact that, on the one hand, the eligibility to vote in the (Austrian) municipal elections is taken into account and, on the other hand, from the fact that § 19 does not contain a special provision with regard to citizens' initiatives - in contrast to neighbours and environmental organisations - with reference to foreign countries. This view is shared in the literature (Schmelz/Schwarzer, Altenburger/Berger and Ennöckl/Raschauer/Bergthaler, see above).

Given the above considerations on the party status of citizens' initiatives from the perspective of European law, the EIA authority felt compelled to also examine the question of the admission of foreign citizens' initiatives in more detail.

It should be noted at the beginning that the addressees of national norms are first and foremost the citizens of the state in question, on whose territory the legislative competence is limited. As a rule, this is only deviated from in special cases if there is a valid, usually bilateral or multilateral legal basis for this. Such a legal basis is generally based on the principle of reciprocity under international law, according to which a right is granted to another state or its citizens if the same right is granted in the same way by the other state in return.

The anchoring of the party status of foreign NGOs in the national EIA procedure (§ 19 para. 11 UVP-G) is based on Article 9 para. 2 of the Aarhus Convention under international law and, based on this, on Article 11 of the EIA Directive (or Article 3 of the EIA Directive) under European law. § 19 para. 11 UVP-G 2000 stipulates, that an NGO from

another state may exercise the rights of a party to the proceedings if the other state has been notified pursuant to § 10 para. 1 subpara 1, the effects extend to that part of the environment of the other state which the environmental organisation seeks to protect, and the environmental organisation in the other state could participate in the environmental impact assessment procedure and the approval procedure if the project were to be realised in that state. The UVP-G does not provide for a comparable regulation for citizens' initiatives. Against the background of the considerations of the EIA authority on the party status of citizens' initiatives in the simplified EIA procedure, however, the question had to be examined whether § 19 para. 11 leg. cit. can or must be applied in an analogous manner to foreign sites in order to comply with the international legal framework.

In § 19 para. 11 leg. cit. it is noticeable that with the last-mentioned sub-criterion the principle of reciprocity under international law has not been implemented in a typical manner. This would be the case if the Austrian legislator required that an Austrian NGO also be granted party status in a Liechtenstein EIA procedure. The fact that the legislator has taken a different path could be due to the diction of the Aarhus Convention: Article 9(2) of the Convention does not refer to the public concerned in the Contracting States, but simply to the public concerned. Similarly, Article 11 of the EIA Directive stipulates that the members of the public concerned must be involved, without explicitly referring to the EU member states (in contrast to Article 7, in which the Espoo Convention followed suit). The Austrian UVP-G was implemented with the special feature that a link was also established to the notification under the Espoo Convention. This is remarkable insofar as no direct reference between the two conventions is recognisable. However, it is very noticeable that the national legislator - as expected - standardised reciprocity when implementing the Espoo Convention, whereas this is not the case for the Aarhus Convention. This is of - at least fundamental - relevance insofar as the Principality of Liechtenstein has not ratified the Aarhus Convention. A legally anchored mutual granting of participation of the public concerned in procedures can therefore not be assumed.

Nevertheless, this was not to be pursued further because no illegality can be seen in the disregard of the principle of reciprocity.

Rather, it was relevant to the decision that the UVP-G 2000 provides for the participation of the foreign public under more detailed conditions. The EIA authority therefore had to examine whether these conditions were met in the case at hand and whether the applicant foreign citizens' initiative could be considered a party. In this regard, it should be noted that the EIA procedure in question was notified to the Principality of Liechtenstein pursuant to § 10 UVP-G and that it is therefore a transboundary EIA procedure. The second question, whether the effects of the project extend to that part of the environment which the NGO, or in this case the citizens' initiative, is trying to protect, had to be assessed in a differentiated manner. As already stated, citizens' initiatives are usually founded on an ad hoc/project-related basis, and they do not have protection

goals anchored in their statutes. However, since the Aarhus Convention is primarily based on the fact that a person is affected by an environmentally relevant decision-making procedure (see above), and this can be assumed in the same way for residents in neighbouring foreign municipalities as for residents in Liechtenstein, the status of a "public concerned" was permissibly assumed. Finally, the question had to be examined whether the citizens' initiative "mobil ohne stadttunnel" would have party status in an EIA procedure in Liechtenstein. In a letter dated 12.08.2014, the Liechtenstein Government stated that citizens' initiatives are not explicitly mentioned in the Liechtenstein EIA Act. However, they fall within the scope of Article 32(1)(d) of the Liechtenstein EIA Act, according to which any natural or legal person may apply to the Office for the Environment for the right to appeal within the specified period. The granting of the right to appeal depended on whether the individual's concern could be inferred on the basis of technical criteria. The persons entitled to appeal determined in the recognition procedure were fully involved in the EIA procedure in Liechtenstein.

If, as explained in more detail above, the EIA authority takes the legal view that a national citizens' initiative is to be granted party status in the present proceedings in direct application of Article 11 of the EIA Directive, this must apply in the same way to a foreign citizens' initiative in analogous application of § 19 para. 11 UVP-G 2000 if - as is the case here - the conditions standardised there are met.

Re dictum II:
Pursuant to § 1 para. 1 of the Administrative Duties Act, the parties shall pay provincial administrative duties in matters of provincial administration and municipal administrative duties in matters of municipal administration for the granting of authorisations and other official acts of the authorities that are essentially in their private interest. Pursuant to § 2, the amount of the administrative charges to be paid pursuant to § 1 shall be determined by ordinance in fixed rates (tariffs), which may be graduated according to factual characteristics. Pursuant to TP 114 of the Provincial Administrative Fees Ordinance, a fee of € 78 shall be paid for all other permits, authorisations, other decisions and official acts essentially in the private interest of the party pursuant to the Environmental Impact Assessment Act.

On the basis of these considerations, a decision was to be made in accordance with the ruling.

**Information on legal remedies**

*[...]*

On behalf of the Government of Vorarlberg

*[signature]*
Mmag Christian Berger