

## **Revised draft findings and recommendations with regard to communication ACCC/C/2013/92 concerning compliance by Germany**

### **Adopted by the Compliance Committee on ...**

#### **I. Introduction**

1. On 24 June 2013, a member of the public, Ms. Brigitte Artmann (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Germany to comply with its obligations under articles 1, 3, 4 and 6 of the Convention with respect to the opportunities provided to the public in Germany to participate in a transboundary environmental impact assessment (EIA) procedure concerning the proposed construction of two third generation nuclear reactors at Hinkley Point C.
2. At its forty-second meeting (24-27 September 2013), the Committee determined on a preliminary basis that the communication was admissible.
3. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 17 December 2013.
4. The Party concerned responded to the allegations on 15 May 2014.
5. The Committee discussed the communication at its forty-sixth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.
6. The communicant and the Party concerned submitted their replies to the Committee's questions on 4 December 2014 and 27 January 2015, respectively. On 14 February 2015, the communicant provided comments on the Party concerned's replies to the Committee's questions, and on 5 March 2015 the Party concerned commented on the communicant's comments.
7. The Committee agreed its draft findings at its virtual meeting on 13 September 2016, completing the draft through its electronic decision-making procedure on 18 November 2016. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 November 2016. Both were invited to provide comments by 16 November 2016.
8. On 21 November 2016, the Party concerned requested an extension to provide its comments on the draft findings. By email of 25 November 2016, the Committee granted both parties an extension until 20 January 2017. The communicant provided her comments on 24 November 2016.
9. On 9 May 2017, the Party concerned provided some additional information. On 18 May 2017, the communicant provided comments on the additional information provided by the Party concerned.
10. After taking into account the parties' comments on the draft findings and the additional information provided by the Party concerned and communicant on 9 and 18 May 2017 respectively, the Committee prepared revised draft findings and

completed through its electronic decision-making procedure on 2 June 2017. In accordance with paragraph 34 of the annex to decision I/7, the revised draft findings were then forwarded on that date to the Party concerned and the communicant for their comments by 13 June 2017.

11. At its [...] meeting on [...] 2017, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its [...] meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

## **II. Summary of facts, evidence and issues<sup>1</sup>**

### **A. Legal framework**

#### *International and European legal framework*

12. The Espoo Convention and European Union Directive 2011/92/EU (EU EIA Directive) govern the conduct of transboundary EIAs for the Party concerned.

13. Article 3(1) of the Espoo Convention establishes the obligation on the Party of origin to conduct a transboundary EIA:

‘For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity.’

14. Article 3(7) of the Espoo Convention governs the rights of a potentially affected Party when no notification has taken place:

‘When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question.’

15. Articles 2(6) and 3(8) of the Espoo Convention address public participation in the transboundary EIA procedure. Article 2(6) states that:

‘The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.’

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<sup>1</sup>This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

Article 3 (8) states that:

“The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.”

16. A similar approach is taken in Article 7 of the EIA Directive.<sup>2</sup> Article 7 of the EIA Directive provides:

“1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, *inter alia*:

- (a) a description of the project, together with any available information on its possible transboundary impact;
- (b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).

3. The Member States concerned, each insofar as it is concerned, shall also:

- (a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and
- (b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

4. The Member States concerned shall enter into consultations regarding, *inter alia*, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time- frame for the duration of the consultation period.

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<sup>2</sup> Directive 85/337/EC now consolidated as Directive 8011/92/EU, amended by Directive 2014/52/EU.

Such consultations may be conducted through an appropriate joint body.

5. The detailed arrangements for implementing paragraphs 1 to 4 of this Article, including the establishment of time-frames for consultations, shall be determined by the Member States concerned, on the basis of the arrangements and time-frames referred to in Article 6(5) to (7), and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.”

17. Article 37 of the Euratom Treaty states that every member of the European Union is required to inform the European Commission of plans to dispose of radioactive substances.

#### *National legal framework*

18. In the Party concerned, the above international and European requirements are implemented through the Environmental Impact Assessment Act (EIA Act). Section 9(b) of the EIA Act addresses the Party concerned's participation in transboundary EIAs for foreign projects. In the case of a transboundary EIA, the responsible German authority shall, after receiving notification, evaluate whether Germany's participation in the approval procedure in the Party of origin is necessary. The German authority may request an EIA procedure if Germany, as a Party potentially affected by a project in another country, was not previously involved.

## **B. Facts**

19. The United Kingdom plans to build and operate two new nuclear reactors of the European Pressurized Reactors type at Hinkley Point, a coastal headland in Somerset, south-west England and the location of an existing nuclear power plant. The project to build the new reactors is known as Hinkley Point C. The two new reactors are to be built and operated by NNB Generation Company Limited.

20. The United Kingdom conducted an assessment as to whether the project required a transboundary EIA in accordance with the Espoo Convention and article 7 of the Directive 2011/92/EU. On 11 April 2011, the United Kingdom concluded that the 'proposed development is not likely to have a significant effect on the environment in another EEA State'.<sup>3</sup> Prior to taking the decision to approve the construction, the United Kingdom's authorities carried out a national-level EIA, but in line with the above assessment no transboundary EIA process was carried out.

21. On 9 August 2011, in accordance with article 37 of the Euratom Treaty, the United Kingdom submitted to the European Commission "general data" relating to the plan for the disposal of radioactive waste arising from the two reactors proposed for Hinkley Point C. On 3 February 2012, the European Commission issued its opinion under Article 37 of the Euratom Treaty. It concluded that the implementation of the plan for the disposal of radioactive waste was not liable to result in a radioactive contamination of the water, soil or airspace of another member state that would be significant from the point of view of health.

22. In letters of 8 October and 16 November 2012, the United Kingdom granted Austria the opportunity to comment on the proposed activity.<sup>4</sup> The opportunity was granted following a request from the Austrian government under the Espoo

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<sup>3</sup> See Annex 1 of the Party concerned's response to the communication.

<sup>4</sup> See Annex 2 and 3 of the Party concerned's response to the communication.

Convention after the United Kingdom's national EIA process had been completed. The United Kingdom's letter to Austria of 16 November 2012 stated, inter alia:

“Under the Planning Act, we expect to be reaching a decision on development consent in relation to the Hinkley Point C project within three months of receiving a report from the Planning Inspectorate on EDF's application on or before 21 December 2012. I would be grateful if you could bear that timetable in mind in directing any comments Austria wishes to make [...]”

23. As a result of Austria's request under the Espoo Convention, the public in Austria was given the opportunity to participate in the decision-making on the Hinkley Point C NPP until 5 March 2013.<sup>5</sup> This was after the national EIA process was completed by the United Kingdom.

24. In February 2013, the public in Germany was informed by members of the public in Austria of the existence of the EIA procedure for Hinkley Point C.

25. On 21 February 2013, the letters of 8 October and 16 November 2012 from the United Kingdom to Austria were made available to the Party concerned at the latter's request, following a question by a member of the German parliament to the German government during parliamentary question time regarding nuclear projects in other countries including Hinkley Point C.

26. On 25 February 2013, a petition was sent by the communicant and other members of the public in Germany jointly via email to the NNB Generation Company Limited and the European Commission Directorate-General Environment, protesting against the proposed construction of the two new reactors at Hinkley Point C and requesting to participate in the EIA process on the basis of the Aarhus and Espoo Conventions and the EIA Directive.

27. On 28 February 2013, the communicant sent an email to the Federal Minister of the Environment for Germany requesting that the public of the Party concerned be given the opportunity to participate in an EIA on Hinkley Point C. The communicant's email, inter alia, stated:

- “Hereby I demand public participating on EIA Hinkley Point C”
- “I want you hereby, as representative of the public, ... demand quickly initiate an EIA procedure in Germany!”
- “Germany would have had to be notified to this EIA process. If Britain did not do this by itself, so the BMU should have urged”
- “Formally, the public can be given an opportunity to express an opinion, because formally the matter is not quite finished: Austria has - AFTER the EIA process in the UK has actually already come to an end last year - got a kind of “after- period”
- “it is in the German Government's responsibility to demand a transboundary EIA procedure”<sup>6</sup>

28. The communicant enclosed the petition referred to in paragraph 26 above to her email.

29. On 19 March 2013, the decision approving the proposed construction of Hinkley Point C was taken.

30. On 27 March 2013, the Federal Ministry for the Environment (BMU) replied to the communicant's letter of 28 February 2013, refusing the communicant's request that Germany initiate a transboundary EIA procedure on the basis that both the United Kingdom and the European Commission had concluded that the Hinkley

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<sup>5</sup> United Kingdom's response to communication ACCC/C/2012/91 concerning its compliance, para. 28.

Point C project would have no serious impact on neighbouring states. BMU's reply in particular informed the communicant that the European Commission, in its opinion (OJ 33/1 page 1 from 7-2-2012) under the Euratom Treaty, had concluded that, both in normal operation and in the event of an accident, the plan for the disposal of radioactive waste from the two reactors on the Hinkley Point C NPP was not liable to result in a radioactive contamination of the water, soil or airspace of another member State that would be significant from the point of view of health. BMU's reply concluded by stating that Germany saw no reason to doubt the United Kingdom and the European Commission's evaluations.

31. On 10 April 2013, the European Commission informed the communicant and others that their petition on 25 February 2013 (see para. 26 above) had been registered as a formal complaint.

32. On 24 April 2013, the communicant wrote to the European Commission claiming that, by failing to ensure opportunities for the public in Germany to participate in the decision-making on Hinkley Point C, the United Kingdom and Germany had violated the Aarhus and Espoo Conventions and the EIA Directive.

33. On 31 May 2013, the European Commission wrote to the communicant to inform her that it saw no grounds on which to open an infringement action against the United Kingdom and Germany as she had requested and that it therefore proposed to close her complaint.

34. At its twenty-eighth session (10-12 September 2013), the Espoo Implementation Committee began its consideration of information provided by a German Member of the Parliament and Friends of the Irish Environment, an Irish non-governmental organization, regarding the planned construction of Hinkley Point C by the United Kingdom (EIA/IC/INFO/12). The Espoo Implementation Committee considered, among other issues, whether or not a notification of other Parties to the Espoo Convention, including Germany, was required with regard to the project. In its findings adopted at its thirty-fifth session (15-17 March 2016), the Espoo Implementation Committee found that:

“the characteristics of the activity and its location warrant the conclusion that a significant adverse transboundary impact cannot be excluded in case of a major accident, an accident beyond design basis or a disaster. The Committee also finds that, as a consequence of its conclusion concerning the likely significant adverse transboundary impact, the United Kingdom is in non-compliance with its obligations under article 2, paragraph 4, and article 3, paragraph 1, of the Convention.”<sup>7</sup>

35. On 21 December 2016, following the recommendations of the Espoo Implementation Committee, the United Kingdom wrote to the Party concerned seeking its opinion whether notification was still useful at the current stage of the development of Hinkley Point C.

36. By letter of 9 March 2017, the Party concerned replied to the United Kingdom, noting the interest of the German public in nuclear plants in the vicinity of Germany and stating that it considered that notification under the Espoo Convention would still be useful at the current stage of the development of Hinkley Point C in order to provide an opportunity for the authorities and the public of other Parties to the Convention to comment on the project.

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<sup>7</sup> ECE/MP.EIA/IC/2016/2, para. 66.

## C. Domestic remedies

37. No domestic remedies were used by the communicant.<sup>8</sup> She did however complain to the European Commission on 24 April 2013. This complaint was dismissed by letter of 31 May 2013 (see paras. 32 and 33 above).

## D. Substantive issues

38. The communicant alleges that the Party concerned failed to identify the public in Germany as being among the public concerned and therefore did not provide it with opportunities to participate in a transboundary environmental impact assessment procedure concerning the proposed construction of two nuclear reactors at Hinkley Point C. For these reasons, the communicant alleges that the Party concerned fails to comply with article 1, 3, 4, 6 of the Convention.

### *Admissibility*

39. The Party concerned submits the communication should be considered to be inadmissible. The Party concerned asserts that it has not violated any of its obligations resulting from the Aarhus Convention. The matter deals with a decision-making process that did not take place in Germany and in which German authorities were not to make any decisions concerning the approval of the proposed activity. The Party concerned did not influence or limit the participation of the German public in the participation procedure in the United Kingdom in any way.<sup>9</sup>

40. The Party concerned submits that to the extent that the core issue is whether the German authorities should have demanded the United Kingdom to carry out a transboundary EIA procedure, only the provisions of the Espoo Convention are relevant to that decision. In this regard, the Espoo Convention, as the dedicated convention on transboundary EIAs takes precedence over the Aarhus Convention. It submits that for the decision in question, the Implementation Committee of the Espoo Convention was thus responsible.

41. The Party concerned submits that, in the light of the above, the communication should be found inadmissible on the grounds of being manifestly unreasonable under paragraph 20 of the annex to decision I/7.

### *Article 1*

42. The communicant alleges that the lack of inclusion of the public of Germany in the decision-making on Hinkley Point C infringes article 1 of the Convention.<sup>10</sup>

43. The Party concerned refutes the communicant's allegations. It submits that article 1 lays out the basic goals of the Convention and that a right to the implementation of public participation in a specific case cannot be derived in isolation from this provision.<sup>11</sup>

### *Article 3, paragraph 1*

44. The communicant alleges that the Party concerned is in breach of article 3, paragraph 1 of the Convention by failing to take the "necessary measures" and "proper enforcement measures" required by that provision.

45. The Party concerned refutes the communicant's allegations. It asserts that it has implemented the requirements of the Convention in its national law and applies

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<sup>8</sup> Communication, page 2.

<sup>9</sup> Response to communication, page 6.

<sup>10</sup> See communication, page 3.

<sup>11</sup> See Response to the communication, page 11.

them.<sup>12</sup> In support of its allegations, the Party refers to the Committee to its national implantation report submitted to the secretariat of the Convention in December 2013.

**Article 3, paragraph 2**

46. The communicant alleges that the Party concerned is in breach of article 3, paragraph 2, of the Convention for failing to “facilitate participation” as required by that provision.

47. The Party concerned refutes the communicant’s allegations. The Party concerned submits that the request of the communicant was mainly that the Party concerned should have requested a transboundary EIA under the Espoo Convention, and thus at best indirectly a question of the right to participation in the sense of the Aarhus Convention.<sup>13</sup>

48. The Party concerned submits moreover, that article 3, paragraph 2 could only apply if its competent authorities had failed to provide any support or guidance at all to the public, in particular to the communicant, in the current case. It states that it did however respond to the complainant’s letter of 28 February 2013 and provide guidance, and that its response was also clear and comprehensible, providing adequate support and guidance, and more could not be required of its authorities.<sup>14</sup>

49. The Party concerned states that after the legally incontestable decision not to submit a request under the Espoo Convention had been made, it was not possible for the Party concerned to give more support than that provided in its letter of 27 March 2013. It submits that its obligation under article 3, paragraph 2 of the Aarhus Convention to “endeavour to ensure” support and guidance was not violated.<sup>15</sup>

**Article 3, paragraph 9**

50. The communicant alleges that the public in Germany was not identified by the relevant authorities of the United Kingdom and the Party concerned as being among the public concerned in the case of a “Beyond Design Base Accident” and was therefore discriminated against.<sup>16</sup> For these reasons, the communicant alleges that the Party concerned fails to comply with article 3, paragraph 9 of the Convention.

51. The Party concerned refutes the communicant’s allegations. It states that the process of public participation took place in the United Kingdom. The fact that the public in Austria was involved in addition to the public of the United Kingdom is due to a separate request for participation by Austria. As Germany did not request it, the Party considers that it cannot be accountable for it in any way.<sup>17</sup>

**Article 4, paragraph 7**

52. The communicant alleges that the United Kingdom’s Ministry should have told the public and the natural persons who signed the submission lists, in written form, why their submissions were refused. For these reasons it alleges a violation of article 4, paragraph 7.<sup>18</sup>

53. The Party concerned refutes the communicant’s allegations. First, it questions whether this allegation is also directed against Germany, as the communication does not make that clear.

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<sup>12</sup> See Response to the communication, page 12.

<sup>13</sup> See Response to the communication, page 13.

<sup>14</sup> See Response to the communication, page 13.

<sup>15</sup> See Response to the communication, page 13.

<sup>16</sup> See Communication, page 5.

<sup>17</sup> See Response to the communication, page 14.

<sup>18</sup> See Communication, page 4



54. Moreover, the Party concerned submits that in the letter sent to the Federal Environmental Minister on 28 February 2013, the communicant did not request access to environmental information available to Germany, as provided for by article 4. The Party concerned asserts that the communicant only requested the Federal Government to ensure that the United Kingdom conduct a transboundary EIA in which the German public could be involved and the BMU responded to this request on 27 March 2013.<sup>19</sup> The Party concerned submits no potential violation of article 4, paragraph 7 of the Convention has been presented by the communicant.

#### ***Article 6***

55. The communicant alleges that the Party concerned did not provide the public concerned in Germany with opportunities to participate in a transboundary EIA procedure. For this reasons, it alleges that the Party fails to comply with article 6, paragraphs 1, 2, 4, 5, 6 and 7 of the Convention.

56. The Party concerned submits that there can be no violation of the Aarhus Convention by failure to demand a transboundary EIA process. The Party concerned considers that if neither the Party of origin nor the potentially affected Party deem that a specific case requires the implementation of a transboundary EIA, this is an inter-state process governed by the Espoo Convention and there is no ground to apply the provisions of the Aarhus Convention to this inter-state process.<sup>20</sup> If a specific case requires the implementation of a transboundary EIA under the Espoo Convention, then both the Espoo Convention and the procedural guarantees of the Aarhus Convention apply. However, if neither the Party of origin nor the potentially affected Party deem that a specific case requires the implementation of a transboundary EIA, there are no grounds to apply the provisions of the Aarhus Convention to this inter-state process governed by the Espoo Convention.

57. In support of its allegations, the Party concerned refers to the Aarhus Convention Implementation Guide<sup>21</sup> and the Committee's findings on communication ACCC/C/2008/24 concerning Spain in which the Committee found that the decision by a contracting Party for or against the necessity of an EIA cannot be considered a failure to comply with article 6 of the Convention.<sup>22</sup>

#### ***Article 6, paragraph 1***

58. The communicant alleges that nuclear power plant (NPP) is expressly referred to in annex I to the Convention and thus the decision-making on Hinkley Point C NPP is subject to article 6, paragraph 1 of the Convention.

59. The Party concerned refutes any allegation by the communicant that it has breached its obligations under article 6, paragraph 1. It asserts that article 6, paragraph 1 does not apply in the current case because there was no decision-making procedure in which German authorities would have had to decide on the approval of a concrete project at issue.<sup>23</sup>

#### ***Article 6, paragraph 2***

60. The communicant alleges that BMU should have requested from the United Kingdom authorities relevant information and made it available to the public

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<sup>19</sup> See Response to the communication, page 14.

<sup>20</sup> Response to communication, page 10.

<sup>21</sup> Aarhus Convention Implementation Guide, second edition, page 122.

<sup>22</sup> See Response to the communication, page 10, with reference to: ECE/MP.PP/C.1/2009/8/Add.1, para. 82.

<sup>23</sup> See Response to the communication, page 15.

concerned in Germany.<sup>24</sup> The communicant alleges that the Party concerned therefore fails to comply with article 6, paragraph 2, of the Convention.

61. The Party concerned refutes the communicant's allegations. It asserts that article 6, paragraph 2, is based on article 6, paragraph 1, and that if no decision-making procedure within the meaning of article 6, paragraph 1, is being implemented in Germany there can be no violation of article 6, paragraph 2.<sup>25</sup>

**Article 6, paragraph 4**

62. The communicant alleges that the Party concerned failed to ensure public participation when all options were option as required by article 6, paragraph 4.

63. The Party concerned refutes this allegation. The Party submits that since there was no decision-making procedure within the meaning of article 6, paragraph 1, in Germany in this case, there can be no violation of article 6, paragraph 4.<sup>26</sup>

**Article 6, paragraph 5**

64. The communicant alleges that the Party concerned should have encouraged the prospective applicants (e.g. NNB Generation Company Limited and the United Kingdom government) to identify the public concerned, including the public that may be affected in case of a "Beyond Design Base Accident". For this reason, the communicant alleges that the Party concerned fails to comply with article 6, paragraph 5, of the Convention.

65. The Party concerned refutes the communicant's allegations. It asserts that this article expressly refers to prospective applicant and considers that it cannot have violated this regulation because at the time of the communicant's letter of 28 February 2013 it was no longer a question of a prospective authorisation procedure, rather the authorisation process in the United Kingdom was already very advanced and completed shortly thereafter.<sup>27</sup>

66. Moreover, the Party concerned submits that as there was no German decision-making process within the meaning of article 6, paragraph 1, there can be no violation of article 6, paragraph 5.<sup>28</sup>

**Article 6, paragraph 6**

67. The communicant alleges that by its refusal to call on the Espoo Convention and to require a transboundary EIA, the German authorities *de facto* refused access to all information relevant to the decision-making.<sup>29</sup> For these reasons, the communicant alleges that the Party concerned failed to comply with article 6, paragraph 6 of the Convention.

68. The Party concerned refutes the communicant's allegations. First, it states that German authorities had no documents to provide.<sup>30</sup> Secondly, the Party concerned submits that because there was no German decision-making process within the meaning of article 6, paragraph 1, there can be no violation of article 6, paragraph 6.<sup>31</sup>

**Article 6, paragraph 7**

69. The communicant alleges that by its refusal to call on the Espoo Convention and to require a transboundary EIA, the German authorities blocked the possibilities

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<sup>24</sup> See Communication, page 1-2.

<sup>25</sup> See Response to the communication, page 16.

<sup>26</sup> See Response to the communication, page 16.

<sup>27</sup> See Response to the communication, page 16-17.

<sup>28</sup> See Response to the communication, page 17.

<sup>29</sup> See Communication, page 2.

<sup>30</sup> See Response to the communication, page 17.

<sup>31</sup> See Response to the communication, page 17.

for the public concerned to submit its comments, information, analyses and opinions.<sup>32</sup> For these reasons, the communicant alleges that the Party concerned fails to comply with article 6, paragraph 7 of the Convention.

70. The Party concerned refutes the communicant's allegations. First, the Party concerned notes that the communicant does not charge Germany with a direct violation of article 6, paragraph 7, but rather solely critiques Germany's failure to take advantage of its rights resulting from the Espoo Convention. The Party considers therefore that the allegation of a violation of the Aarhus Convention would be only an indirect consequence.<sup>33</sup>

71. Furthermore, the Party concerned asserts that the population of a country potentially affected by the project may be entitled to participation rights under the Aarhus Convention concerning the decision-making process in the foreign country itself, regardless of the implementation of a transboundary EIA as provided for by the Espoo Convention. The Party considers those rights are not affected by whether the potentially affected country calls for a transboundary EIA or not.<sup>34</sup>

### **III. Consideration and evaluation by the Committee**

72. Germany deposited its instrument of ratification of the Convention on 15 January 2007, meaning that the Convention entered into force for Germany on 15 April 2007, i.e. ninety days after the date of deposit of the instrument of ratification.

#### *Admissibility*

73. The Party concerned submits the communication should be considered to be inadmissible for being manifestly unreasonable under paragraph 20 of the annex to decision I/7 because it deals with a decision-making process that did not take place in Germany and in which German authorities were not to make any decisions concerning the approval of the proposed activity. The Committee observes that the allegations made in the communication concern not only article 6 of the Convention but also provisions of article 3 and 4 of the Convention. Bearing in mind the wide scope of the obligations contained in these provisions, while taking into account the view of the Party concerned in its comments on the draft findings, the Committee does not consider the communication to be manifestly unreasonable under paragraph 20 of the annex to decision I/7.

74. The Party concerned further alleges that the communicant's claims are governed by the Espoo Convention and that therefore the Espoo Convention takes precedence over the Aarhus Convention in the present case. The Committee disagrees with the Party concerned. The communicant alleges breaches of specific provisions of the Aarhus Convention, and the Committee examines only these alleged breaches – and not any alleged breaches of the Espoo Convention – in the present findings.

#### *Scope of considerations*

75. In accordance with its practice, the Committee generally does not consider new information submitted after the completion of its draft findings unless the information is of fundamental importance to its findings. The events described in paragraphs 35 and 36 above postdate the Committee's draft findings. In this case, the Committee considers that the Party concerned's letter of 9 March 2017 (see

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<sup>32</sup> See Communication, page 2.

<sup>33</sup> See Response to the communication, page 17.

<sup>34</sup> See Response to the communication, page 17.

para. 36 above) constitutes a new development of fundamental importance and the Committee therefore takes it into account.

#### **Article 6**

76. Given that the main allegations in the communication concern article 6 of the Convention, the Committee examines compliance with that provision first. As a preliminary point, the Committee notes that a nuclear power station is an activity referred to in item 1 of Annex 1 to the Convention and therefore the requirements of article 6 apply to the decision-making to permit the construction of the two new nuclear reactors at Hinkley Point C.

77. The next question is whether, with respect to the decision-making to permit Hinkley Point C, article 6 bestows obligations on the authorities of the Party concerned. On this point, the Committee recalls its findings on communication ACCC/C/2012/71 (Czech Republic) in which it stressed that “whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the requirements of article 6 lies with the competent authorities of the Party of origin”.<sup>35</sup>

78. It is common ground between the Party concerned and communicant that the authorities competent to take the decision to permit the Hinkley Point C NPP are those of the United Kingdom and not Germany. Furthermore, there was no transboundary procedure under the Espoo Convention or EIA Directive within which the German authorities were required to carry out tasks under the joint responsibility of the “concerned Parties” (i.e., the Party of origin and the affected Party).

79. Accordingly, the Committee finds that article 6 does not impose any obligations on the Party concerned with respect to the decision-making to permit the Hinkley Point C NPP. The Committee therefore finds that the Party concerned did not fail to comply with article 6 of the Convention.

#### **Article 1**

80. With respect to the communicant’s allegation that the lack of inclusion of the public in Germany on the decision-making to permit Hinkley Point C amounts to a breach of article 1 by the Party concerned, the Committee concurs with the Party concerned’s submission that a right to public participation in the decision-making to permit the specific activity of Hinkley Point C cannot be derived in isolation from article 1 of the Convention. The Committee thus finds this allegation to be unsubstantiated.

#### **Article 3, paragraph 1**

81. Regarding the communicant’s allegation that the Party concerned is in breach of article 3, paragraph 1 of the Convention by failing to take the “necessary measures” and “proper enforcement measures” required by that provision, the Committee finds that the communicant has not provided sufficient evidence to substantiate her allegation.

#### **Article 3, paragraph 2**

82. With respect to the communicant’s allegation under article 3, paragraph 2, of the Convention, the Committee must first determine whether the obligation to “endeavour to ensure that officials assist and provide guidance to the public...in

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<sup>35</sup> Findings on communication ACCC/C/2012/71 (Czech Republic), para. 69.

facilitating participation in decision-making” applies also to decision-making procedures outside the Party concerned and for which authorities of the Party concerned are not competent to take decisions.

83. There is nothing in the wording of article 3, paragraph 2 or elsewhere in the Convention to imply that the obligation to “endeavour to ensure that officials assist and provide guidance to the public...in facilitating participation in decision-making” applies only with respect to the authorities competent to take a decision under article 6, 7 or 8 of the Convention. Likewise, there is nothing in its wording to imply that the obligation applies only with respect to decision-making procedures inside the Party concerned. Rather, it is apparent to the Committee that the provisions in article 3 contain a number of obligations (such as those in article 3, paragraphs 2, 3, 4, 7 and 8) that stand alone as well as complement the other articles of the Convention. Moreover, in the light of the eighth recital in the preamble to the Convention which was invoked by the Party concerned in its comments of 15 April 2014, it is clear to the Committee that this obligation must be seen in the context of rights of the public under the Convention generally. In this regard, the Committee notes that the twenty-third preambular paragraph to the Aarhus Convention specifically refers to various UNECE instruments, including the Espoo Convention, which envisage public participation in decision-making in the transboundary context. The Committee considers that in doing so, the Convention’s preamble recognizes the importance of including the public concerned across borders in relevant decision-making (see also the Aarhus Convention Implementation Guide).<sup>36</sup>

84. With respect to the Party concerned’s claim that article 3, paragraph 6 of the Convention gives precedence to the Espoo Convention,<sup>37</sup> the Committee stresses that article 3, paragraph 6, of the Convention requires that there be no derogation from existing rights of the *public* — not the rights of Parties under any international agreements — and it therefore cannot be interpreted as giving precedence to any right of the Party concerned under the Espoo Convention. The same facts trigger different obligations under the different domestic or international legal instruments. While indeed under the Espoo Convention it is within the discretion of the potentially affected Party to decide whether or not to reply positively to the notification and enter into the transboundary procedure, the Party is free to have domestic criteria and procedures instructing its decision in this respect. Bearing in mind the role of transboundary procedures in ensuring the participation of the public concerned on both sides of the borders in the relevant decision-making, it seems inconceivable to the Committee for the Parties to the Aarhus Convention to exclude such procedures from the ambit of the obligation to “endeavour to ensure that officials assist and provide guidance to the public [...] in facilitating participation in decision-making.

85. In the light of the above, it is clear to the Committee that the obligation on the Party concerned to “endeavour to ensure that officials assist and provide guidance to the public... in facilitating participation in decision-making” applies also to decision-making procedures outside the Party concerned where authorities of the Party concerned are not competent to take decisions.

86. For the avoidance of doubt, the Committee points out that this means that both the Party of origin and the affected Party have obligations under article 3, paragraph 2, to endeavour to ensure that their officials assist and provide guidance to the public concerned of the affected Party to facilitate their participation in the

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<sup>36</sup> United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide (second edition, 2014), p. 37, available online at: [https://www.unece.org/env/pp/implementation\\_guide.html](https://www.unece.org/env/pp/implementation_guide.html).

<sup>37</sup> Party concerned’s response to communication, page 6.

relevant decision-making. Obviously, it is the obligations of the affected Party (i.e. Germany) that are the focus of the present case.

87. Article 3, paragraph 2 of the Convention requires that “Each Party shall *endeavour* to ensure that officials and authorities assist and provide guidance to the public [...] in facilitating participation in decision-making” (italics added). While this is an obligation of effort, rather than of the result, nevertheless the efforts taken may be subject to due diligence scrutiny. Moreover, while the obligation to “endeavor to ensure”, just like all other obligations in the Convention, is addressed to the Party concerned, the Committee may examine in specific cases whether a public authority or an official, as a representative of the Party concerned, took the efforts needed to meet the requirement of this provision.<sup>38</sup>

88. In cases concerning ultra-hazardous activities, such as nuclear power plants, it is clear to the Committee that, generally speaking, the possible adverse effects in case of an accident can reach far beyond state borders and over vast areas and regions (see Committee’s findings on ACCC/C/2011/71 (Czech Republic), para.74). The obligation to take efforts to ensure that officials facilitate the public’s participation in decision-making concerning these activities, being activities invariably of wide public concern, must be seen in this context.

89. While the Committee considers that the obligation in article 3, paragraph 2 of the Aarhus Convention to “endeavour to ensure that officials assist and provide guidance to the public ... in facilitating participation in decision-making” should not be interpreted as requiring a Party to necessarily always use all of the rights and competences that it has under international or national law with respect to a decision-making procedure in another country, a level of effort appropriate to the actions open to it in the particular context is required. For instance, whether or not a Party should facilitate the participation of its public, if its public so requests, by itself requesting to enter into a transboundary procedure under applicable international or EU regimes may differ depending on whether the Party was formally notified or not.

90. In the case of a formal notification from another country, the Committee considers that when deciding whether to enter into a transboundary procedure under applicable international or EU regimes, a mere awareness by the Party of a strong interest by its own public in the outcome of the decision-making subject to the EIA procedure is a relevant consideration to be taken into account, even without a clear request from its public, when deciding whether to enter into the transboundary procedure in order to facilitate the participation of its public in that decision-making.

91. In the present case, the Party concerned was not formally notified by the United Kingdom about the decision-making for Hinkley Point C prior to the grant of development consent. Moreover, the Party concerned was requested by the communicant to initiate a transboundary procedure only at the very end of February 2013 when the domestic EIA procedure in the United Kingdom had already been completed and, as further clarified in its comments on the draft findings, the Party concerned was aware, in the light of the letters provided by Austria (see paras. 22 and 25 above), that the United Kingdom had to take the decision within the ensuing three weeks.<sup>39</sup> While these letters were annexed to the Party concerned’s response to the communication, it was only through the Party concerned’s comments on the draft findings that the Committee was pointed to the fact that, under the United

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<sup>38</sup> See, for instance, the Committee findings on communications ACCC/C/2008/23 (United Kingdom), para. 54; ACCC/C/2008/30 (Moldova), para 39; ACCC/C/2009/38 (United Kingdom), para, 68; and ACCC/C/2010/51 (Romania), paras. 75-77.

<sup>39</sup> See Party concerned’s comments on the Committee’s draft findings, p. 3.

Kingdom's Planning Act, the development consent indeed had to be granted by no later than 19 March 2013.

92. The Party concerned has not disputed that the interest of the German public in decision-making regarding construction of nuclear power plants, including Hinkley Point C, was well known to the German authorities. If the communicant's request of 28 February 2013 was not received so close to the date when the decision on Hinkley Point C was required to be taken under the United Kingdom's law, the Committee considers that, given that the Party concerned was aware (not least due to the petition sent on 25 February 2013) of the strong interest of members of its public in the decision-making on Hinkley Point C, it would have been obliged by article 3, paragraph 2, of the Convention to at least inquire with the United Kingdom what could be done to facilitate the participation of the German public in the decision-making. If, as a result of those efforts, it ultimately became clear that nothing further to facilitate the participation of the German public could be done, the Party concerned's refusal of Ms. Artmann's request should have clearly demonstrated that due account had been taken of her concerns and not only of the views of the authorities. Moreover, at a minimum it should have provided the links to where the relevant information and contact details concerning the public participation procedure could be found on the United Kingdom's website.

93. However, taking into account that the obligation in article 3, paragraph 2, of the Convention is to "endeavour to ensure" rather than "to ensure", and bearing in mind the factual circumstances of the case, in particular the awareness of the Party concerned that the decision on Hinkley Point C NPP was required to be taken in less than three weeks, and noting the fact that the Party concerned has subsequently informed the United Kingdom that it wishes to be notified for the purposes of a transboundary EIA procedure under the Espoo Convention which will include the opportunity for the German public to comment on the project (see para. 36 above), the Committee does not find the Party concerned to be in non-compliance with article 3, paragraph 2, in this case.

#### ***Article 3, paragraph 9***

94. The communicant alleges that the Party concerned discriminated against the public in Germany under article 3, paragraph 9, of the Convention because the public in Germany was not identified by the relevant authorities of the United Kingdom and the Party concerned as being among the public concerned in the case of a "Beyond Design Base Accident".<sup>40</sup> The communicant bases her allegation on the fact that, in contrast to the public in Germany, the public in Austria were entitled to participate in the decision-making on Hinkley Point C. The Committee considers that the communicant has not shown how the fact that the public concerned in Austria was entitled to participate in a decision-making procedure carried out by United Kingdom authorities can amount to discrimination by Germany. The Committee notes that the involvement of the public in Austria was due to a request from Austria to the United Kingdom. The fact that the public in Germany, as opposed to the public in Austria, did not therefore have the possibility to participate in the decision-making regarding Hinkley Point C, and that the German authorities, as opposed to the Austrian authorities, did not make use of their right to initiate the transboundary procedure under the Espoo Convention or otherwise, does not amount to discrimination by the German authorities against the public in Germany in favour of the public in Austria. The Committee thus finds that the Party concerned is not in non-compliance with article 3, paragraph 9 of the Convention in this case.

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<sup>40</sup> Communication, page 5.

*Article 4, paragraph 7*

95. Regarding the communicant's allegation that the Party concerned breached article 4, paragraph 7 of the Convention because the United Kingdom should have told the public and the natural persons who signed the submission lists, in written form, why their submissions were refused, the Committee notes that the communicant's allegation is expressly made against the United Kingdom, which is not a party to the communication.<sup>41</sup> The communicant has provided no evidence that she at any time requested this information from the Party concerned.<sup>42</sup> The Committee thus finds the allegation concerning article 4, paragraph 7 of the Convention to be unsubstantiated.

## **IV. Conclusions**

96. Taking into account that the obligation in article 3, paragraph 2, of the Convention is to "endeavour to ensure" rather than "to ensure", and bearing in mind the factual circumstances of the case, in particular the awareness of the Party concerned that the decision on Hinkley Point C NPP was required to be taken in less than three weeks, and noting the fact that the Party concerned has subsequently informed the United Kingdom that it wishes to be notified for the purposes of a transboundary EIA procedure under the Espoo Convention which will include the opportunity for the public to comment on the project (see para. 36 above), the Committee does not find the Party concerned to be in non-compliance with article 3, paragraph 2, in this case.

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<sup>41</sup> Communication, page 4.

<sup>42</sup> Communication, page 4.