Response of the Federal Republic of Germany to the draft findings and recommendations with regard to communication ACCC/C/2013/92 concerning compliance by Germany

I. Introduction

On 18 November 2016, the Federal Republic of Germany received the draft findings and recommendations of the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) to the communication of Ms. Brigitte Artmann (the communicant).

The Compliance Committee concludes on several allegations made by the Communicant that they are unfounded.

With regard to one allegation of the Communicant the Compliance Committee finds that Germany fails to comply with Article 3, paragraph 2 of the Aarhus Convention[1]:

- by not undertaking any efforts to facilitate the participation of the German public in the decision-making procedure regarding Hinkley in the face of a clear request from its public to do so.

The Compliance Committee has granted our request to extend the deadline for the response to 20 January 2017 taking into account the workload of the competent division and the language service of the Federal Environment Ministry. We would like to thank the Compliance Committee for this extension.

In the text below a response will be given to the main finding of the Compliance Committee with regard to the concluded non-compliance with Article 3, paragraph 2. This response shall demonstrate that in our view Germany is in compliance with the provisions of the Aarhus Convention also concerning this remaining issue.

We do not reply to the considerations and evaluations of the Compliance Committee regarding the other specific allegations made by the Communicant. However, we reserve the right to make further comments on the other considerations should the Committee reconsider these in light of a possible submission by the communicant on the draft findings and recommendations.

II. Response to the draft findings and recommendations of the Compliance Committee

1. <u>Preliminary remarks on the procedure</u>

At its 46th meeting on 23 September 2014, the Compliance Committee held a joint hearing on communications ACCC/C/2013/92 – concerning Germany and ACCC/C/2013/91 – concerning the UK.

[1] Articles without any special reference are those of the Aarhus Convention.

In Germany's of view this was not a constructive approach. The deliberations focussed on case 91. Quite a number of relevant aspects concerning case 92 were only touched upon marginally and were therefore, as we feel, not sufficiently taken into account. Much to our regret this led to complex written questions from the Committee and may have been, at least in part, of relevance for the draft findings and recommendations.

2. Summary of the position of the Federal Republic of Germany on the Committee's draft findings and recommendations

Germany believes that

(1) in this particular case in view of the actual course of events
- the communicant firstly submitted comments to the UK concerning project Hinkley Point C and,
- secondly, even if the German authorities had contacted the UK as asked for by the Committee, no better participation could have been achieved on behalf of the communicant before the decision on 19 March 2013 due to the advanced stage of the procedure;

(2) in this case, the Federal Environment Ministry complied, as far as reasonably possible, fully with the explicitly expressed requests of the communicant:
- ➔ the Federal Environment Ministry explained the reasons to the communicant why Germany had not requested that the UK initiate a transboundary EIA pursuant to the Espoo Convention;
- ➔ the Federal Environment Ministry was not obligated to revise its previous decision of not requesting that the UK initiate an EIA pursuant to the Espoo Convention, as the letter by the communicant did not contain any pertinent new aspects; the communicant's demand to request a transboundary EIA could therefore not be complied with;
- ➔ contrary to the conclusions of the Committee, the communicant, who is well-versed in the law on transboundary EIAs, made only two very specific demands. She did not, however, ask for "facilitating participation in decision-making"; we do not understand why the Committee's review goes beyond the specific request without explanation;

(3) the Compliance Committee has no mandate to determine whether or not parties must consider the interest of the public in participating in a transboundary EIA or the demand to initiate a transboundary EIA as an independent EIA-criterion. The Espoo Convention does not contain any provisions on such an obligation. According to the Espoo

Convention, it is at the sole discretion of government authorities to decide whether the project planned is likely to cause a significant adverse transboundary impact on the environment. The interest of the public is adequately taken into account in the EIA-screening or -assessment - as was done in the present case. However, this cannot go so far as to mean that individual members of the public may prescribe to the Federal Government how to interpret the phrase "likely to cause a significant adverse transboundary impact on the environment" in a specific case;

(4) Article 3 (2) of the Aarhus Convention does not obligate parties to actively generate (environmental) information by requesting it from another country; notwithstanding the legal stipulations of the Espoo Convention, an authority of a party potentially affected by an activity can only pass on to the public, in accordance with Article 3 (2) of the Aarhus Convention, information which it actually holds.

=> Germany therefore contests having failed to comply with Article 3 (2) of the Convention.

3. On II B. "Facts"

On paragraph 20:

This paragraph leaves out why on 21 February 2013, following its request, Germany received the letters from the UK to Austria of October and November 2012 from Austria. This was not due to a request from the German public. Rather, during question time on 20 and 27 February 2013, a member of the German Bundestag asked for an overview of various nuclear projects in other European countries and specifically asked about the Hinkley Point C project. The UK's response to Austria, pointed out the strict schedule of the British approval procedure, according to which a license had to be granted by 19 March 2013.

On paragraph 22:

The account is not precise. The letter of complaint by the communicant, addressed, according to its text, to the NNB Generation Company Limited, the European Commission and then Federal Environment Minister Peter Altmaier, was, according to our files, not sent to the then Federal Environment Minister on the same day, 25 February 2013. The letter was merely attached to an e-mail to the Federal Environment Ministry dated 28 February 2013, which was registered on 1 March 2013, the next working day, as it arrived after the core working hours of the ministry. Following the usual course of business, the competent division received the letter to then Federal Environment Minister Peter Altmaier with the request to

process the matter in the week following that weekend, which was the first week of March and therefore after the deadline for the Austrian public of 3 March 2013 had elapsed. In the letter of 28 February 2013 the communicant

- asked Germany, with reference to Article 3 (7) of the Espoo Convention, to request that the UK initiate such a transboundary EIA so that a transboundary EIA would take place and the German public could participate, and
- requested an explanation why the then Federal Environment Minister had not, to date, requested a transboundary EIA pursuant to the Espoo Convention.

On paragraph 42:

Germany's comments were summarised and therefore not presented correctly. In its comments dated 15 April 2014 Germany pointed out, inter alia, that, pursuant to Article 3 (2) and pursuant to the eighth recital, the support by officials and authorities is to assist

"*citizens in exercising their rights under the Aarhus Convention. At issue for the complainant however is mainly that Germany should have requested a transboundary EIA under Article 3 (7) of the Espoo Convention, which is thus at best indirectly a question of the right to participation in the sense of the Aarhus Convention. Moreover Article 3 (2) of the Aarhus Convention could only apply if the competent authorities in the Federal Republic of Germany had failed to provide any support or guidance at all to the public, in particular to the complainant, in the current case. The Federal Republic of Germany did however respond to the complainant's letter of 28 February 2013 and provide guidance. The complainant's request for participation was not fulfilled, but she did receive information about the assessments of the United Kingdom and the European Commission with which the Federal Republic of Germany concurred. That means that the complainant did receive a response to her request for participation. The Federal Republic of Germany's response was also clear and comprehensible, providing adequate support and guidance. More could not be required of the responsible authorities in the Federal Republic of Germany. After the legally incontestable decision not to submit a request under Article 3 (7) of the Espoo Convention had been made, it was not possible for the Federal Republic of Germany to give more support than that provided in its letter of 27 March 2013. Thus the Federal Republic of Germany's obligation under Article 3 (2) of the Aarhus Convention to "endeavour to ensure" support and guidance was not violated (cf. The Aarhus Convention: An Implementation Guide, Second Edition, 2013, United Nations, p. 54)."*

4. On Non-compliance with article 3 (2) of the Aarhus Convention

The Compliance Committee finds that Germany *by not undertaking any efforts to facilitate the participation of the German public in the decision-making procedure regarding Hinkley in the face of a clear request from its public to do so* fails to comply with article 3, paragraph 2 of the Aarhus Convention.[2]

[2] Para. 86 of the draft findings and recommendations.

Germany does not share the current draft evaluation and consideration of the Compliance Committee in the draft findings and recommendations concerning this allegation. We reiterate our previous response in this regard and our statements at the 46. meeting of the Compliance Committee.

Article 3 paragraph 2 does not require that a Party has to execute a request from a representative of the public (i.e. if a representative of the public asks the authorities of her native country for a transboundary EIA procedure under the Espoo Convention to be carried out, the competent authorities of this native country do not have an obligation to contact the Party of Origin) but only to deal with such a request in a thorough, dedicated and appropriate manner. The communicant has received such a reply with the letter of 28 March 2013. Therefore, Germany is in compliance with Article 3, paragraph 2.

a) Course of events in this specific case and conclusions

The Compliance Committee criticises Germany for not having contacted the UK in this case after having received the letter of the communicant.

In this specific case, however, neither the facts nor the circumstances give grounds to charge the Federal Republic of Germany with a failure to comply. This conclusion is drawn from these facts beyond dispute:

- In autumn 2012/January 2013, the UK granted Austria the possibility to submit comments of the public by 3 March 2013. The UK and Austria coordinated the schedules in this way so that the date planned for a final decision concerning Hinkley Point C, which was 19 March 2013, would not be affected.
- The Federal Environment Ministry received this information for the first time in mid-February 2013 when it requested information from Austria because of parliamentary questions regarding various nuclear projects planned in Europe (see page 3 above). This information showed that Austria, i.e. the Austrian public, was given time until 3 March 2013 at the latest, as this participation could not be permitted to jeopardise the schedule.
- In her e-mail of 28 February 2013, the communicant demanded that the Federal Environment Ministry request that the UK initiate a transboundary EIA.

➔ At the time when the competent division of the Federal Environment Ministry received the communicant's e-mail of 28 February 2013 through the official channels, the deadline for participation granted to Austria by the UK had already elapsed. At this point, the Federal Environment Ministry had only recently been informed of the British schedule

concerning both the decision and the UK's condition for Austrian participation, namely that the participation should not be permitted to jeopardise the British schedule.

➔ The Federal Environment Ministry had already decided prior to this not to ask the UK to initiate a transboundary EIA. The communicant's e-mail of 28 February 2013 did not change that. Furthermore, the communicant herself stated that, at the same time that she sent the letter to the Federal Environment Ministry, she also exercised her participation rights and submitted comments to the UK. The Federal Environment Ministry could not have achieved anything more by contacting the UK.

➔ In addition, contacting the UK to find out, how German public participation could still have been possible would, have been futile, since the request would have been much too late and the Federal Environment Ministry knew (informally) through the information provided by Austria that the UK insisted on following its schedule. In Germany's opinion, the hearing on 23 September 2014 for cases 91 and 92 proved once more that this assessment was correct.

Also:

- The communicant is known to the Federal Environment Ministry from various transboundary EIA and SEA procedures as a representative of civil society who has great knowledge about the applicable law and the rights to participate under national, EU and international law. Therefore her need for assistance and guidance is considerably lower than that of other members of the public. Her knowledge of the subject matter is underlined by the fact that, in parallel to her letter of 28 February 2013 to the Federal Environment Ministry, **she also submitted comments on Hinkley Point C directly to the UK in early March 2013.** The communicant therefore exercised her rights, which she was familiar with from previous procedures, without waiting for a reply from the Federal Environment Ministry to her letter of 28 February 2013. The communicant expressly confirmed this when asked by the Committee's curator at the hearing on 23 September 2014. This was possible for her because the UK had published all documents concerning the consultation and information on project Hinkley Point C on the internet.[3] Moreover, the UK confirmed that all comments from members of the public from all countries had been taken into account in the decision.[4]
- The aim of the communicant was not - as the Committee seems to assume - to receive abstract assistance or guidance. In her letter of 28 February 2013, which she had writ-

[3] Also see Opening Comments on behalf of the UK at the hearing on 23 September 2014, paragraph 21.
[4] Also see Opening Comments on behalf of the UK at the hearing on 23 September 2014, paragraph 21.

ten in German and English and which was submitted to the Committee, she specified her aims as follows: She "demanded" public participation on an EIA on Hinkley Point C expressly referring to and citing Article 3 (7) of the Espoo Convention. In her reasoning she criticised that Germany had not requested that the UK initiate a transboundary EIA. The Federal Environment Ministry rejected the first demand by letter of 27 March 2013; however, the Ministry's letter did include the explanation requested by the communicant as to why Germany had not asked that the UK initiate a transboundary EIA. As the Federal Environment Ministry explained its reasons for not complying with the further demands of the communicant, no further action had to be taken based on the communicant's letter of 28 February 2013. This was even more true since the letter of the communicant did not contain any new arguments which could have formed the basis for revising the decision not to request that the UK initiate a transboundary EIA, which had already been taken.

- Regarding the assessment of EIA-law of whether this specific project is likely to cause a significant adverse transboundary impact on the environment, the Federal Environment Ministry concurred with the reviews carried out by the UK and the European Commission. It can be concluded from previous findings and recommendations delivered by the Committee on other EIA-screenings that no objections can be made to the Federal Environment Ministry's decision on the basis of the Aarhus Convention.[5] In Germany's view this means that, contrary to the statement of the Committee, the Federal Republic of Germany cannot be obligated to take further action under Article 3 (2) of the Convention in this case. Germany believes that this fulfils the requirement of the provision "shall endeavour to ensure", which means, also in the opinion of the Committee, that it may be asked to make an effort, but not to achieve results.[6] Germany therefore emphatically refutes the unfounded reproach by the Committee that it had not undertaken any efforts. As already explained, the Federal Environment Ministry answered the question of the communicant, thereby supporting her. No additional action was necessary.
- There was no reason for the German authorities to contact the competent authorities of the UK. As we emphasised before, the Federal Environment Ministry requested (informally) information from its Austrian counterparts because of a parliamentary question. The Federal Environment Ministry had decided not to request transboundary participation from the UK. The communicant's letter did not change that.

[5] This would apply even if the decision had proven to be wrong. See Comments of the Federal Republic of Germany dated 15 April 2014, page 10 f with reference to ACCC/C/2008/24 and the Implementation Guide.
[6] Also see Implementation Guide, Second Edition, 2014, page 62.

- If the Federal Environment Ministry had contacted the respective authorities in the UK formally or informally, as asked for by the Committee, it would already have exercised rights pursuant to Article 3 (7) of the Espoo Convention. The Espoo Convention, however, does not obligate Germany to do so. For this reason, the negative decision taken by the Federal Environment Ministry in this case was legally sound. Nor can an obligation to initiate procedures pursuant to another convention, in this case the Espoo Convention, be based on Article 3 (2) of the Aarhus Convention. The Committee has not commented on this fact - not even in paragraph 73 of the draft findings and recommendations. If the Committee were to see that differently it would, in Germany's opinion, overstep its competences, since the Committee's mandate does not include the interpretation of the Espoo Convention.
- The Committee may consider the Austrian approach in this case as an example of best practice. However, there was no legal obligation on Austria to take this approach arising from the Aarhus Convention. As the UK laid out in paragraph 29[7] of its response dated 16 May 2014 in compliance procedure ACCC/C/2013/91, this did not give the Austrian public any advantage over the German public.

b) On the considerations and evaluations of the Committee in detail:

On paragraph 62:

The Committee does not give any consideration to Germany's position that the present case is mainly to be assessed under the rules of the Espoo Convention. Germany complied with the provisions of the Espoo Convention. This was expressly confirmed by the Committee during the hearing of 23 September 2014, even though the mandate of the Committee does not cover this subject matter. If Germany cannot be criticised for its actions under the Espoo Convention, on which the communicant based her letter, this cannot at the same time be turned into a failure to comply with the Aarhus Convention.

[7] "29. The information provided to the Austrian Government was already freely available to the public, including the German public. The Austrian Government chose to carry out a consultation with its public and to act as a central co-ordination point, forwarding the individual responses of its citizens as well as providing its own representation. It was, in effect, exercising a facilitating function for its public. This did not give the Austrian public any special status in the HPC application process, as members of the Austrian public, like the German public, were already able to participate in that process, for instance, by making representations on the application during the examination phase."

On paragraph 70:

The Committee's presentation is not convincing and even contradictory. We agree with the Committee that both the eighth recital and Article 3 (2) of the Convention are not limited to decisions pursuant to Articles 6, 7 or 8 of the Convention. Germany never claimed that that was the case. It merely pointed out that the assistance provided by officials and authorities prescribed by the Convention should help citizens exercise the rights granted to them by the Convention. This includes Articles 4, 5 and 9 of the Convention, which also stipulate rights of citizens. Beyond the rights granted by the three pillars of the Convention, however, Article 3 (2) can have no additional function. The Committee determined that Germany has not failed to comply with either Article 4 or 6 in the present case. In Germany's view this leads to the conclusion that in the present case Article 3 (2) of the Convention does not prescribe any additional obligation to assist beyond the rights granted by the three pillars of the Convention.[8] This is because the Aarhus Convention itself does not regulate transboundary cross-national procedures of any kind which have the aim of asserting the public's rights pursuant to the Convention in other states. Rights and guarantees for procedures under the Aarhus Convention can therefore only be linked to decision procedures of the competent authorities in the country of origin or to the knowledge of the authorities in the potentially affected country.

On paragraph 71 / 72:

Germany agrees with the first statement in paragraph 71.[9] Regarding the second statement of paragraph 71, Germany would like to point out that the fifth session of the Meeting of the Parties to the Aarhus Convention did not formally adopt the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, but merely took note of them.[10] Therefore, that document is of no legal relevance. Irrespective of this fact, the passages of the Maastricht Recommendations[11] quoted by the Committee exclusively deal with the issue of how a country of origin can achieve participation of the public in other countries in line with the Aarhus Convention regarding a decision on an environmentally relevant activity. Consequently, the heading of that section makes an explicit reference to the Espoo Convention and the Protocol on Strategic Environmental Assessment.

[8] Also see Implementation Guide, Second Edition, 2014, page 30.
[9] See Comments dated 15 April 2014, page 13 f..
[10] Cf. Decision V/2, paragraph 2.
[11] Cf. paragraphs 23 - 26.

But this is not the case in the present situation where the UK was the country of origin and Germany at most a potentially affected country.

Therefore, the Committee's general conclusion in paragraph 72 cannot be drawn from the previous paragraphs. It is rather the decisive logical fault in the Committee's arguments and is thus rejected by Germany in its current form. Contrary to the Committee's opinion, any obligation of a party arising from Article 3 (2) of the Convention is always limited to activities to which a party can be obligated pursuant to the other provisions of the Convention (see above, on paragraph 70). This means that as the Federal Environment Ministry was not a competent authority within the meaning of Article 6 of the Convention, it can only be concerned with the case within the meaning of Article 4 of the Convention. According to that Article, authorities have to provide all information that they hold or that is available to them. They are not obligated to request information from other authorities or to compile it.[12] It follows that the Convention does not obligate Germany to contact the UK of its own accord.

On paragraph 73:

The Committee's statement is not understandable given the facts of this case.

Article 3 (2) of the Convention only provides for an effort to be made or an obligation to assist in the sense that the public is given the opportunity to participate in an ongoing public participation procedure for a specific decision. It does not contain the obligation to initiate such a procedure. Initiating such a procedure within the scope of the Aarhus Convention can only be based on Article 6 and only with regard to the country of origin. The issue of whether or not a transboundary EIA including a public participation procedure is carried out falls exclusively under the Espoo Convention. Germany maintains its opinion as laid out in the Comments dated 15 April 2014.

Pursuant to the Espoo Convention, the right to public participation is granted only if a transboundary EIA is carried out. This decision is primarily the responsibility of the competent authority in the country of origin and secondly, where applicable, of the competent authority in a potentially affected country. The legal issue at hand, whether a member of the public can demand a transboundary EIA procedure to be carried out or for such a request to be made, falls exclusively within the scope of the Espoo Convention, since the Aarhus Convention does not regulate any such intergovernmental procedures. The Aarhus Convention itself does not contain obligations regarding either national or transboundary EIA procedures.[13] When the Aarhus Convention was adopted, the Parties expressly recognised the existing

[12] Cf. Implementation Guide, Second Edition, 2014, page 83.
[13] Cf. Implementation Guide, Second Edition, 2014, page 122.

standards of the Espoo Convention as specified in the 23rd recital. The right of public participation granted under the Aarhus Convention only relates to the country of origin of the project, in this case the UK, but not Germany. The communicant exercised her rights vis à vis the competent authority in the UK at the same time that the Federal Environment Ministry was preparing a response to her letter. Therefore, the only remaining obligation of the German authorities was to satisfy the right of access to all available environmental information regarding such a procedure in another country. The Federal Environment Ministry complied with these obligations in full.

On paragraph 74:

We do not share the strict interpretation of the Committee. The Federal Environment Ministry has endeavoured, within the meaning of the provision, to provide access to all knowledge and information to the communicant. The communicant asked for the reasons why no transboundary EIA procedure had been requested. The only other explicit demand was for the federal government to request that the UK initiate such a procedure. Exercising its rights pursuant to Article 3 (7) of the Espoo Convention would have been the only option for the federal government to do so. Such a request cannot be based directly on the Aarhus Convention. With reference to the European Commission's Opinion of 3 February 2012, the Federal Government decided against initiating proceedings under the Espoo Convention. Both the UK and the European Commission had reviewed whether the project in question would cause significant adverse transboundary impacts on the environment within the meaning of the Espoo Convention and came to the conclusion that this would not be the case. As laid out in its Comments dated 15 April 2014, the Federal Environment Ministry concurred with this decision. The Federal Environment Ministry's review of the communicant's request showed that she had produced no new information that would have given cause for a new, different assessment of the situation. The Federal Environment Ministry responded to the communicant accordingly and explained its reasons for the assessment. In doing so the Federal Environment Ministry did, as explained before, comply with its obligations pursuant to Article 3 (2). The response was in line with the request of the communicant, who has, as detailed above, extensive knowledge of the legal and technical framework. The degree of assistance to be provided must be evaluated for every member of the public individually with regard to the circumstances of the specific case. Furthermore is of importance in this context

as well: Parties cannot be asked to go beyond their obligations arising from the three pillars of the Convention.[14]

The Committee stresses that Article 3 (2) obligates the parties to make an effort rather than achieve results and that the efforts have to withstand scrutiny. It is clear that the Convention requires making an "effort". However, the Committee goes too far in its interpretation when it demands that Germany make an effort for effort's sake, even though it is clear that this effort would not have achieved anything. As pointed out above, any further activity was superfluous as the communicant had submitted her comments to the UK directly and as any activity by the Federal Environment Ministry would not have had any influence on the national procedure in the UK because of the UK's schedule.

On paragraph 75:

In its decision on the nuclear phase-out on 6 December 2016, the Federal Constitutional Court confirmed that assessing the use of nuclear energy is assessing an ultra-hazardous technology.[15] Irrespective of this decision, the case 92 deals with an assessment in the area of EIA law. According to the Espoo Convention, the only relevant point is whether the project in question is likely to cause a significant adverse transboundary impact on the environment. This is only a question concerning EIA law. Whether an activity is categorised as extremely hazardous or not may play a role when applying and interpreting the EIA criteria; it does not, however, justify establishing a new, independent EIA criterion. With a view to EIA law, the same applies to the question of whether a participation procedure is of particular interest to the public. When a potentially affected party makes a decision with a view to EIA law on whether significant adverse environmental impacts are likely to affect the territory of another country, such demands must be adequately taken into account; but neither the Espoo nor the Aarhus Convention provide a basis for deriving a new, independent assessment criterion from this.

As we have reiterated, the Federal Environment Ministry did not see any reason to request that the UK initiate a transboundary EIA. An obligation to make such a request cannot be derived from the mere fact that the communicant demanded it.

The Federal Government takes seriously the interest of the German public to participate in a foreign licensing procedure for the construction of a new nuclear power plant by means of a

[14] Also see Implementation Guide, Second Edition, 2014, page 59 (table) and page 62.

[15] Judgment of the Federal Constitutional Court of 6 December 2016 (1 BvR 2821/11, 1 BvR 1456/12, 1 BvR 321/12), also see press release No. 88/2016 at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-088.html .

transboundary EIA procedure, and it takes this into account when deliberating whether or not to request participation. However, this cannot go so far as to mean that individual members of the public may prescribe to the federal government how to interpret the vague legal term "likely to cause a significant adverse transboundary impact on the environment" in a specific case.

If the Committee claims that particular weight must be given to undertaking efforts to facilitate the public's participation in decision-making, the assignation of responsibilities is flawed. The responsibility is that of the country of origin and not that of a potentially affected country (see above). The Committee also ignores that the communicant by no means requested the ministry to "facilitate the public's participation in decision-making" but exclusively demanded a transboundary EIA. It is not understandable why the Committee's review goes beyond the specific request without explanation.

The Committee's reference to its findings and recommendations on ACCC/C/2011/71 is also surprising because, as Germany sees it, these findings underline only that the main responsibility for a proper inclusion of the public of a potentially affected country regularly lies with the competent authority of the country of origin of the project.[16] The reference therefore does not support the Committee's reasoning but, to the contrary, Germany's arguments.

On paragraph 76:

In this case as well, the Committee incorrectly interlinks EIA related provisions of the Espoo Convention with the interpretation of Article 3 (2) of the Convention, which should be regarded separately. It is not clear where the alleged obligation of Germany to contact the UK is derived from. There is no such legal obligation under the Espoo Convention. No additional obligations to those under Articles 4 to 9 can be derived from the Aarhus Convention, which in itself does not regulate intergovernmental procedures. As shown, the Federal Environment Ministry complied in full with the request of the communicant insofar as the communicant received the expressly requested reasoning why the German authorities had not asked the UK to initiate a transboundary EIA. Based on this reasoning, taking any further action also had to be rejected. The communicant did not present any new arguments. Because of her expertise, the communicant, who is in frequent contact with the Federal Environment Ministry, did not need any further information or assistance, nor did she ask for it, either. Irrespective of this, as explained above, in this case any attempt to contact the UK would have been too late.

[16] See paragraph 73 of the findings.

On paragraph 77:

The general issue addressed here by the Committee is not compatible with the Espoo Convention's assessment procedure for EIA matters, in which the interest of the public has to be taken adequately into account, but is not considered an independent criterion on its own. The Committee's position amounts to interfering with the interpretation of the Espoo Convention, which is not part of the Committee's mandate.

On paragraph 78:

This case scenario does not correspond to the present compliance procedure in any way. In pursuing this, the Committee interferes in the interpretation of the Espoo Convention without having the corresponding mandate.

The competent German authorities are aware of the strong interest of parts of the German public in nuclear projects, and nuclear power plants in particular, in other countries. And the closer the project is to Germany, the greater the interest. This can be compared with the Espoo Convention's criterion "likely to cause a significant adverse transboundary impact on the environment". However, the interest of the public itself, considered apart from the above-mentioned Espoo Convention criterion, cannot be the justification for a request for public participation from another state.

On paragraph 79:

The Committee's hypothetical considerations on the individual case cannot be executed and are not practicable considering the great number of licensing procedures in Europe that are relevant for EIAs. As explained above, the Federal Environment Ministry knew that in this case the procedure in the UK was about to be concluded. In fact, the communicant had sent comments concerning the project to the UK at the same time that she contacted the German authorities. The Federal Environment Ministry would not have been able to achieve anything beyond that. The communicant, who is well-versed in public participation procedures in transboundary EIAs, is well aware of that. The comments have to be sent directly by members of the public to the competent authority of the respective country. In this case as well, the Committee misinterprets the clear request of the communicant despite the clear phrasing.

Apart from that, the interpretation of Article 3 (2) of the Convention must be transferable to all conceivable case scenarios. Undertaking "some efforts" as called for by the Committee cannot be reconciled with the provision "shall endeavour to ensure that officials and authori-

ties assist and provide guidance". The Committee's interpretation of Article 3 (2) goes beyond what an authority is capable of doing when it has no competence regarding licensing procedures in another country and when it has no other information than that which is available to the public, i.e. information from publicly accessible media such as the internet. Due to limited staff, every government has to prioritise its tasks. With a view to nuclear projects in other countries, the Federal Environment Ministry therefore focuses firstly on cases for which notifications were received and secondly on cases in directly neighbouring countries. The latter is of special significance since Germany is one of the European countries with the most neighbouring states. Consequently, due to a lack of staff there is no possibility to actively follow up on licensing or planning procedures in other countries for which no or only little information is available. Using its limited capacities, the competent authority therefore has to decide which important tasks will be granted priority. Considering the great number of questions from the public and public participation procedures, it is simply impossible from the administrative point of view to meet the demands arising from the Committee's interpretation of Article 3 (2). This is especially true considering the multitude of other cases relevant for EIAs that would have to be dealt with if this interpretation was applied. Apart from that, as already underlined above, this interpretation of the Espoo Convention would exceed the Committee's mandate.

On paragraph 80:

The Committee criticises that Germany has not provided any evidence that it undertook efforts, whether formal or informal, to meet the communicant's demands. Yet it has never before asked Germany to provide such evidence or articulated comparable requirements in any other statement. In its draft findings and recommendations, the Committee formulates an entirely new interpretation of Article 3 (2) of the Convention. And the Committee overlooks again that the communicant exclusively and very specifically demanded a transboundary EIA procedure to be initiated and not just some form of participation in the UK procedure. As explained above, there was no legal reason for initiating a transboundary EIA procedure. Taking into account the above facts, the demand of the communicant also came too late. Based on the facts summarised above, Germany believes that the Committee's current interpretation is outside the scope of Article 3 (2) of the Convention.

On paragraph 81:

We do not understand at all what the Committee is trying to say with this paragraph nor how it relates to this case. The competent German authorities regularly publish information con-

cerning all procedures in which the German public can comment on nuclear projects abroad in the context of a transboundary EIA or SEA. The Federal Environment Ministry makes information on such projects available on its website together with the information of the competent authority for the purpose of disseminating information in a comprehensive manner.[17] The European Commission's opinion mentioned by the Committee was published in the EU's Official Journal and is thereby accessible on the internet for everybody. The Committee makes unacceptable generalisations and criticises the German practice in general and in an unjustified manner. It also ignores the information on notification procedures by other countries which were presented in this case. Germany explained in detail the legal and administrative processes in its Comments dated 15 April 2014 and in the national reports on the implementation of the Espoo Convention and the SEA Protocol, which are available at the UNECE website. In its responses to the questions of the Committee following the hearing, Germany also provided extensive information, including websites, in its Comments dated 8 January 2015 and 5 March 2015. In the hearing of 23 September 2014 present members of the public, including the communicant, expressly commended Germany's approach regarding nuclear projects abroad. Apart from the questions sent to us after the hearing, the Committee has not inquired more into these aspects so there was no need for Germany to submit further information. Germany categorically rejects this unjustified allegation of the Committee. It is contradictory, after all, that the Committee claims not to issue findings on these general considerations that do not affect the specific case, when actually the recommendations of paragraphs 87 (a) and (b) do exactly that.

On paragraph 82:

Germany does not share the Committee's position in this paragraph either. The assessment that the location of Hinkley Point is in proximity to Germany - especially compared to other nuclear power plants in Europe - is inaccurate in its substance and distorts geographical reality. We would like, by way of example, to refer to the communicant's response dated 14 February 2015 (Concerning question 5) and the Federal Environment Ministry's Comments of 8 January 2015 (concerning question 5) and 5 March 2015 (see section I).

Another false assertion is that the Federal Environment Ministry was aware of a particular interest of the communicant or other members of the public in this licensing procedure prior to the communicant's letter dated 28 February 2013.[18]

[17] Also see the Federal Environment Ministry's website on the topic of transboundary EIA and SEA procedures: http://www.bmub.bund.de/themen/atomenergie-strahlenschutz/nukleare-sicherheit/internationales/uvpsup/.

[18] See also presentation of facts in Comments of the Federal Republic of Germany dated 15 April 2014.

For the reasons given above, we reject the allegation of inactivity or failure to take any action; in particular, the letter of 28 February 2013 did not at all constitute a "request to facilitate the public's participation", as falsely claimed by the Committee. There was no failure to comply with Article 3 (2) of the Convention in this case.

On paragraph 86:

For the reasons given above, Germany objects to the statement that Germany had not undertaken any efforts to facilitate public participation, thereby failing to comply with Article 3 (2). Germany explained its reasons for not exercising its rights under Article 3 (7) of the Espoo Convention to the communicant, which was exactly what she had requested. Germany, acting in compliance with the Espoo Convention, was not obligated under Article 3 (2) of the Aarhus Convention to take any further action in this case.

On paragraph 87 (a):

We reject this recommendation. The Committee is mistaken about the German legal situation and good practice regarding transboundary participation procedures in projects in other countries (e.g. through national regulations on publishing notifications, EIA documents etc.).[19] Regardless of the assessment of the case at hand, the Committee has no reason to draw negative conclusions about the German practice in general. Germany has adopted or agreed a large number of agreements or understandings with its neighbouring countries on transboundary EIA or SEA procedures (also see national reporting on the Espoo Convention and the SEA Protocol). In some cases, concluding such bilateral agreements is a political issue as well. There are instances when neighbouring countries do not see the need for such an agreement despite Germany's interest in the matter. With a view to the UK, it should be pointed out that it is not a direct neighbour of Germany and therefore there is no cause for bilateral agreements. Besides the Espoo Convention, such bilateral agreements only exist with directly neighbouring countries; only this approach is in line with the practice under the Espoo Convention.

On paragraph 87 (b):

We reject this recommendation, too. This recommendation concerns a substantive EIA matter, for which the Committee is not competent. German authorities already take any known interest of the public into account for EIA related assessments.[20] The Committee's criticism is

[19] Also see paragraph 81.

[20] See above and Comments dated 15 April 2014, page 9f.

therefore either an unjustified generalisation or it aims to establish interest of the public as a new and independent assessment criterion alongside the assessment of whether a project is likely to cause significant adverse transboundary impacts on the environment. This, as laid out above, would be against the existing legislation on EIA on all levels.

Therefore the Compliance Committee is asked to re-consider its evaluation and conclusion on this allegation.

4. Written response to request concerning Paragraph 36 b of the Annex to Decision I/7

In its letter dated 18 November 2016, the Compliance Committee expressly asked Germany to inform the Committee whether it would agree to the Committee's proposed recommendations pursuant to paragraph 36 (b) of the annex to decision I/7.
Germany does **not** agree to the recommendations for the reasons laid out above.