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Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany (PRE/ACCC/C/2020/178)

Consideration of the preliminary admissibility

Berlin, 5 March 2020

Dear Ms. Marshall,

We thank for the information on a communication concerning compliance by Germany submitted by Ms. Brigitte Artmann, representing the "Aarhus Konvention Initiative", on 27 January 2020. The Federal Government would like to participate via audio-conference during the consideration of the preliminary admissibility by the Compliance Committee in its 66th session.

Furthermore, we would like to take the opportunity for some preliminary, non-exhaustive comments on the communication that might be of relevance for the consideration of the preliminary admissibility of communication PRE/ACCC/C/2020/178.

The Federal Republic of Germany has doubts concerning the admissibility of the communication, as the communicant has not exhausted domestic remedies yet. The admissibility of the communication is to be determined by the Compliance Committee of the Aarhus Convention *inter alia* in accordance with paragraph 21 of the annex to decision I/7 (Review of Compliance) adopted at the first meeting of the Parties. According to paragraph 21, the Committee

> *"should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress".*

1. The communication deals with a complex topic and is partly vague concerning the specific allegations made. Nevertheless, the basic allegation of the communication is not new, but was already discussed in the process of implementing decision V/9h before MOP 6. It concerns the question of access to justice in relation to a multi-tiered-planning procedure under domestic law of a Party. The relevant German legislation in this regard hasn't changed since 2017.

2. In Germany power grid development is organized in such a multi-tiered-planning procedure: Several steps of needs assessment are followed by a tiered-planning procedure, which then finally results in downstream decisions, i.e. planning approval decisions that permit specific projects.

3. By adopting the Federal Requirements Plan Act, the federal legislator, der Deutsche Bundestag, takes the final decision of the needs assessment procedure. In this Act, the legislator decides on the necessities for reliable energy supplies and the urgent need of specific projects as mentioned in the Federal Requirements Plan Act. Moreover, the Act contains a list of these necessary projects – including the start and end points for each new construction project only.

4. The decision on the existence of a need is primarily a question of political will and political consideration, as the Federal Administrative Court put it[1].

5. Yet, the Act neither constitutes nor implies a final or binding decision that any specific project will be built later and becomes reality. Nevertheless the findings of the Federal Requirements Plan Act are binding for the transmission system operators and as well in principle for later stages in the multi-tiered-planning procedure. However, the Act does not constitute a final decision, if and if yes how and by which concrete route the specific project might be realized later. During the planning procedure as well as the planning approval procedure, inter alia provisions relating to the environment obviously form part of the legal assessment of the authorities, and may also lead to the final decision that a project will not be permitted. The Federal Requirements Plan Act itself does not create irreversible facts.

6. With regard to judicial review in the context of power grid development, the German legislator has opted for a system of concentrated legal review against the final downstream decision. The final planning approval decisions are decisions under Article 6 and Article 9 paragraph 2 of the Aarhus

[1] Federal Administrative Court (*BVerwG*), judgement of 08.06.1995 – 4 C 4/94, see para. 20

Convention and are subject to judicial review according to the relevant provisions of the German Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*). If a member of the public concerned challenges the legality of the downstream decision, the courts do not only review the legality of the final planning approval decision as such, but there is also incidental review possible with respect to previous planning stages, including the plan justification as envisaged by the Federal Requirements Plan Act.

7. The Federal Government underlines that concepts of concentrated review against the downstream decision are in line with the Convention, as this Committee noted that "*article 9, paragraph 3 does not set specific requirements as to the stage at which an act should be challengeable.*"[2] This concept and the need of an incidental review in accordance with the Aarhus Convention have lately been confirmed by the Federal Administrative Court.[3]

8. In assessing the preliminary admissibility, the Committee may take into account that the communicant has not indicated that she has ever taken any legal action against any final planning approval decision permitting a power grid project. In particular, she has not demonstrated at all that during a procedure against the downstream decision, a court did not hear her argument that the decision on the need assessment was in contradiction to provisions relating to the environment. The German Federal Authorities do not have information on any such ongoing court proceedings.

[2] Report of the Compliance Committee, Compliance by Germany with its obligations under the Convention, 2. August 2017, ECE/MP.PP/2017/40, para. 39.
[3] Federal Administrative Court, judgement of 11.7.2019 - 9 A 13.18, see para. 56.

9. It must be noted that the legal proceedings mentioned by the communicant concerning the planning stages before the law on the Federal requirement plan are no domestic remedies concerning the decision-making in the frame of the Convention. The system of a civil law court case according to Article 75 of the Energy Industry Act takes place before the Federal Requirements Plan Act and has the purpose to give access to justice to the transmission system operators that might be infringed in their economic interests.

10. Furthermore: The communicant is a natural person. The organization that she represents is not a recognized non-governmental organization in Germany, nor has it ever applied for recognition, as far as is known by the Federal Government. Standing for access to justice by private persons in Germany requires the possibility of an infringement of an individual right by the decision in question. The communication seems to be unclear, what possible rights of the communicant could be infringed by the Federal Requirement Plan Act or the decisions later-on in the multi-tiered planning procedure.

11. Nevertheless, if there would be an ongoing case: The case law of the Federal Administrative Court shows that plaintiffs are free to raise objections before national courts concerning the planning approval decision, which would lead inter alia to a rejection of the plan justification, including the need for a respective project. The Federal Administrative Court examines these objections as part of the evidence control, both in fact and in legal terms.[4] That shows that a review of the downstream decision is possible.

[4] Federal Administrative Court, judgement of 18 July 2013 – 7 A 4.12, see paras 32 ff.; Federal Administrative Court, judgement of 04 April 2019 – 4 A 6/18, see paras. 18 ff.

12. Consequently, it may be concluded that according to the communication itself, the communicant has not exhausted domestic remedies that are available to her at all.

13. In decision V/9, the 5th Meeting of the Parties to the Aarhus-Convention had noted that „*the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies, in accordance with paragraph 21 of the annex to decision I/7"*.[5] At the 6th Meeting of the Parties to the Aarhus Convention, the European Union and its Member States had welcomed in a statement "*that the ACCC is taking [the exhaustion of remedies] into account in their proceedings in accordance with paragraph 21 of decision I/7 and decision V/9*"[6].

14. In the view of the Federal Government, the Committee should take a similar approach in its assessment of the preliminary admissibility of this communicant in accordance with paragraph 21 of the annex to decision I/7 and decision V/9. Thus, it should take into account that the communicant has not exhausted domestic remedies at all.

Yours sincerely,

For the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety

[5] Report of the fifth session of the Meeting of the Parties, Addendum, Decisions adopted by the Meeting of the Parties, ECE/MP.PP/2014/2/Add.1, Decision V/9, para. 6 (b).
[6] Statement by the EU and its Member States, http://www.unece.org/env/pp/aarhus/mop6_docs.html, Statements and Comments, 7 (b): Compliance mechanism, Statement by the European Union concerning general issues of compliance, p.1.

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