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# Statement by the Federal Republic of Germany regarding the communication by Brigitte Artmann to the Aarhus Convention Compliance Committee of 27 January 2020, Case ref. ACCC/C/2020/178

On 10 February 2020, the Secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) forwarded a communication to the Federal Republic of Germany from Brigitte Artmann (communicant), which was received by the Aarhus Convention Compliance Committee on 27 January 2020.

The communication alleges non-compliance by the Federal Republic of Germany with its international obligations under articles 9 para. 2, para. 3 and para. 4, as well as article 3 para. 1, of the Aarhus Convention by failing to ensure sufficient legal protection opportunities for the German public regarding the multi-tiered planning and decision procedures relating to grid expansion.

At its 66th meeting on 13 March 2020, the Compliance Committee determined, on a preliminary basis, the communication to be admissible in accordance with paragraph 20 of the annex to decision I/7 of 2 April 2004 (ECE/MP.PP/2/Add.8).

The Secretariat of the Convention invited the Federal Republic of Germany to submit any written explanations or statements by 23 August 2020 at the latest. With this present letter, the request has been fulfilled within the stipulated period.

In the following, the Federal Republic of Germany presents comments on the facts of the matter and the legal foundations (in I), on the admissibility of the communication (in II), and on the individual allegations of the communicant (in III).

**In the final analysis, the Federal Republic of Germany believes that the individual allegations are unfounded, and that it has not violated any of its obligations under the Aarhus Convention.**

## Structure of the comments



## I. On the facts of the matter and the legal foundations

The communicant complains with regard to the legal protection available in multi-tiered planning and approval procedures in the Federal Republic of Germany, and in specific terms bases the allegations of insufficient legal protection on the planning procedures for grid lines in accordance with the Grid Expansion Acceleration Act – Transmission Grid (*Netzausbaubeschleunigungsgesetz Übertragungsnetz* – NABEG). She considers the "requirement plan" (*Bedarfsplanung*) not to constitute effective legal protection for members of the public.

## 1. On grid planning and on grid expansion in Germany

The legal basis for the planning and approval of grid lines in Germany is to be found in the following statutes above all: Act on the Supply of Electricity and Gas (Energy Industry Act) (*Gesetz über die Elektrizitäts- und Gasversorgung – Energiewirtschaftsgesetz* – EnWG), Act on the Federal Requirement Plan (*Gesetz über den Bundesbedarfsplan – Bundesbedarfsplangesetz* – BBPlG), Act on the Expansion of Power Grids (*Gesetz zum Ausbau von Energieleitungen – Energieleitungsausbaugesetz* – EnLAG), Grid Expansion Acceleration Act (NABEG), and the Administrative Procedure Acts, including those of the *Länder*. It is possible to make a fundamental distinction between two procedures – depending on the nature of the grid line planned: the "customary" planning and approval procedure in accordance with the Energy Industry Act (upstream spatial planning procedure and plan approval procedure), and the "expedited" planning and approval procedure in accordance with the Grid Expansion Acceleration Act (upstream Federal specialist planning and plan approval procedure). The grid expansion in accordance with the Grid Expansion Acceleration Act is applied above all to the construction or alteration of cross-*Länder* or cross-border ultra-high voltage lines which are indicated as such in the Federal Requirement Plan Act in accordance with section 12e subsection (4), first sentence, of the Energy Industry Act, in the "Federal Requirement Plan" (section 2 subsection (1) of the Grid Expansion Acceleration Act).

The provisions in question here largely stem from the legislative packages of 2011 and 2012 on the transformation of the energy system. The transformation of the energy system adopted by the then Federal Government predicates the expedited expansion of the German grid in order to ensure that renewable energy sources are successfully integrated as needed, whilst at the same time ensuring security of supply. The legislative packages were therefore intended, firstly, to facilitate the necessary acceleration of grid expansion, whilst secondly the acceptance of this expansion among the population was to be ensured by providing more opportunities for participation, and through greater transparency. This is shown in the fact that early, comprehensive public participation was characteristic of virtually every stage of the procedure: There is participation on the part of both the authorities and the public, both as part of the upstream requirement assessment (scenario framework and network development plan), and in the Federal specialist planning (where appropriate early public participation, section 25 subsection (3) of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVfG); application

conference, section 7 of the Grid Expansion Acceleration Act; participation by the authorities and the public, sections 9 and 10 of the Grid Expansion Acceleration Act), and in the plan approval (application conference, section 20 subsections (1) and (2) of the Grid Expansion Acceleration Act; consultation procedure, section 22 of the Grid Expansion Acceleration Act).

The procedure for grid planning, and for the concomitant grid expansion in Germany, in accordance with the Grid Expansion Acceleration Act, will be explained below. Whilst the Grid Expansion Acceleration Act itself provides for two-tier planning with the **Federal specialist planning** and **plan approval procedures**, the general **requirement plan** is upstream.

**On the requirement plan, sections 12a – 12e of the Energy Industry Act**

The requirement plan for the grid expansion comes first. The main planning steps here comprise three stages, and include establishing a **scenario framework**, followed by a **network development plan**, and finally involve the Federal legislature entrenching the **Federal Requirement Plan** in law.

The German network development plan for electricity identifies the requirement for grid expansion in the transmission grid. The network development plan results from a process which is regulated in section 12a - c of the Energy Industry Act. The provisions define the process steps and establish the competences of the transmission system operators, as well as of the Federal Network Agency as the competent supervisory authority. The process is broken down into the establishment of the scenario framework and of the network development plan by the transmission system operators, as well as its approval and confirmation by the Federal Network Agency.

The scenario framework identifies the bandwidth of the likely development in the energy sector in the medium term. The transmission system operators submit a draft scenario framework to the Federal Network Agency. The Agency subjects the framework to a public consultation process, after which it examines and approves it. The transmission system operators draw up the draft network development plan on the basis of the confirmed scenario framework. The transmission system operators then subject the plan to a public consultation, after which they revise it and present it to the Federal Network Agency. The Agency consults the revised network development plan. It analyses and then confirms it, taking the outcome of the

consultation into account (section 12c subsection (4), first sentence, of the Energy Industry Act). The requirement confirmation identifies the necessary expansion measures in the transmission grid, taking into account as a matter of priority all economic options on the optimised capacity utilisation or boosting of the existing grid. The requirement confirmation contains all measures of optimisation, boosting or expansion needed in the observation period in order to operate the grid safely and reliably. This includes both work on lines within Germany, and interconnectors with neighbouring countries, as well as local horizontal measures (such as switching systems, transformers or reactive power compensation systems), offshore pipelines as well as innovations such as the grid booster. The requirement confirmation is carried out for each of these categories using specific modi operandi, criteria and thresholds. For instance, when analysing work on lines within Germany, firstly the reducing influence of the measure on grid overloads (overload index and effectiveness) is calculated, and secondly the resulting capacity utilisation (necessity) of the new measure is determined. New measures are added in this process, iteratively to the existing grid, in order to be able to verify whether sufficient grid overloads were resolved, or whether further measures are called for. Precise line routes are not yet defined at this stage. In line with the statutory stipulations, the process is implemented on a continual basis, and results in a final requirement confirmation every two years.

The Federal Network Agency draws up an environmental report at an early stage, during the process of drafting the network development plan, section 12c subsection (2) of the Energy Industry Act. In this procedure, the likely considerable environmental impact of the implementation of the plan, as well as of sensible alternatives, is ascertained, described and assessed, section 12c subsection (2), first sentence, of the Energy Industry Act in conjunction with section 40 subsection (1), second sentence, of the Environmental Impact Assessment Act (UVPG).

The Federal Network Agency is legally obliged to transmit the current network development plan, which at present is drawn up at two-year intervals, to the Federal Government at least every four years as a draft **Federal Requirement Plan** (section 12e subsection (1) of the Energy Industry Act). In practice, it has been the Federal Network Agency so far which has transmitted each network development plan to the Federal Government. The Federal Government then submits this draft Federal Requirement Plan to the Federal legislature (section 12e

subsection (1) of the Energy Industry Act). The German Bundestag then adopts any **amendments to the Federal Requirement Plan Act** on the basis of the draft Federal Requirement Plan. The Federal Requirement Plan Act has been in existence since 2013, and the start and end dates of future line projects are annexed to it. It does not however contain any specific routes. The Federal Requirement Plan Act also and in particular stipulates the fundamental technical implementation types of the lines to be constructed, as well as regulating on the lines to which the scope of the Grid Expansion Acceleration Act extends, and hence where expedited grid expansion is to take place.

**On Federal specialist planning, sections 4 et seqq. of the Grid Expansion Acceleration Act**

On the basis of the Federal Requirement Plan Act, the transmission system operators now propose corridors for the respective line project in an "Application for Federal specialist planning" (section 6 of the Grid Expansion Acceleration Act), i.e. bands up to 1,000 m wide through which the lines contained in the Federal Requirement Plan Act are to pass, with their start and end points, which in turn are specified in the Act. The Federal Network Agency examines as part of Federal specialist planning whether the route of the corridors is precluded by outweighing public or private interests. Additionally, a Strategic Environmental Impact Assessment is to be carried out for Federal specialist planning in accordance with the provisions of the Environmental Impact Assessment Act (section 5 subsection (7) of the Grid Expansion Acceleration Act). Once an "application conference" has been carried out, and subsequent to comprehensive participation by authorities and the public, the Federal Network Agency takes a decision on Federal specialist planning in accordance with section 12 of the Grid Expansion Acceleration Act. The decision then determines the route to be taken by the line. In accordance with section 15 subsection (1), first sentence, of the Grid Expansion Acceleration Act, this decision is binding for the plan approval procedure.

**On the plan approval procedure, sections 18 et seqq. of the Grid Expansion Acceleration Act**

The decision on the Federal specialist planning is followed by the concrete plan approval procedure. This is where the route of the grid expansion project is finally determined. This is based on the routes set out as part of the decision on Federal specialist planning, section 4, second sentence, of the Grid Expansion Acceleration Act. In accordance with section 15 subsection (1),

first sentence, of the Grid Expansion Acceleration Act, the decision on Federal specialist planning is binding for the plan approval procedure.
As has already been illustrated, the line route is defined as part of the plan approval procedure. This procedure bases the assessment of all relevant points of view on the outcome of the Federal specialist planning procedure, and continues it at a higher level of detail. The plan approval procedure aims to strike up a proper balance between all relevant aspects – where they are amenable to a weighing up. When reviewing the characteristic "plan justification", the determination of the requirement by the Federal Requirement Plan Act is comprehensively reviewed. Accordingly, the plan approval order is the most comprehensive decision, as well as constituting the final approval decision for implementing the management projects within the scope of the Grid Expansion Acceleration Act.

## 2. Options for legal protection in grid expansion in Germany

The German legislature deliberately opted for a model in legal protection against decisions in accordance with the Grid Expansion Acceleration Act which focuses on legal remedies against the final plan approval order, and in which the lawfulness of the authorities' actions in the upstream planning stages is incidentally reviewed. Direct legal protection is therefore only isolatedly provided for in this respect, for instance with regard to individual measures that are relevant to fundamental rights (e.g. development freezes in accordance with section 16 of the Grid Expansion Acceleration Act).

The planning stage which the communicant alleges not to be adequately amenable to review relates to the upstream requirement plan. Decisions taken in this context are **the approval of the scenario framework** and the **confirmation of the network development plan** by the Federal Network Agency, as well as the enactment of the **Federal Requirement Plan** by the Federal legislature. The first two steps constitute official decisions, whilst the original enactment and amendment of the Federal Requirement Plan Act by the Federal legislature is not an official decision, but a legislative one.
In accordance with section 75 subsection (2) of the Energy Industry Act, both decisions of the Federal Network Agency can only be directly challenged, in specific civil proceedings, by those who are concerned by the procedure before the regulatory authority, that is primarily by the transmission system operators. Third parties do not as a rule have standing to lodge complaints with regard to the scenario framework, as the content of the latter is still not

sufficiently concrete to render such parties concerned with regard to separate legal positions. This also applies to third-party challenges to the confirmation of the network development plan which builds on this framework, and which is more concrete in this regard; it is furthermore explicitly ruled out (section 12 c subsection (4), second sentence, of the Energy Industry Act):

*Section 12c Examination and confirmation of the Network Development Plan by the Regulatory Authority*
(…)
(*4) The regulatory authority is to confirm the network development plan, in consideration of the result of the participation of authorities and of the public, with effect for the transmission system operators, by 31 December of each odd calendar year, starting with 2017. The confirmation shall not be independently contestable by third parties.*
*(...)*

The Federal Requirement Plan Act is a formal Federal statute; as a matter of principle, individuals can therefore obtain legal protection as part of efforts to lodge a constitutional complaint before the Federal Constitutional Court in accordance with article 93 para. 1 no. 4 a of the Basic Law (*Grundgesetz*). (Recognised) environmental associations may not have the requirement plan directly reviewed in court. True, the requirement plan constitutes a plan or a programme within the meaning of section 1 subsection (1), first sentence, no. 4 of the Environmental Appeal Act (UmwRG) against the approval ruling on which a legal remedy can hence as a matter of principle be asserted. Having said that, in accordance with section 1 subsection (1), first sentence, no. 4 sub-clause 2, the provision does not apply if it is a plan or a programme the adoption of which is decided by formal law, as is the case here. Section 1 subsection (1), first sentence, no. 4 of the Environmental Appeal Act reads as follows:

*Section 1 Scope*
*(1) The present Act shall apply to appeals against the following decisions:*
*(...)*
*4. decisions on the adoption of plans and programmes within the meaning of section 2 subsection (7) of the Environmental Impact Assessment Act, and within the meaning of the relevant legislation of the* Länder*, for which in accordance with*

*a) annex 5 of the Environmental Impact Assessment Act, or*
*b) legislation of the* Länder
*an obligation may exist to carry out a strategic environmental assessment, with the exception of plans and programmes the adoption of which is decided by formal law;*
*(...).*

It is explicitly regulated for the decision on **Federal specialist planning** that legal protection is only possible on an incidental basis as part of a court action against the plan approval order, section 15 subsection (3), second sentence, of the Grid Expansion Acceleration Act:

*Section 15 Binding effect of Federal specialist planning*
*(...)*
*(3) The decision in accordance with section 12 shall not have any direct external effect, and shall not replace the decision on the permissibility of the expansion measure. It may only be examined as part of the legal remedy procedure against the approval decision for the respective expansion measure. Section 75 subsection (1a) of the Administrative Procedure Act shall apply mutatis mutandis.*
It is therefore consistently explicitly regulated within the scope of the Environmental Appeal Act that the legal provision contained in section 15 subsection (3), second sentence, of the Grid Expansion Acceleration Act remains unaffected, section 1 subsection (1), third sentence, no. 3 of the Environmental Appeal Act.

Both individual plaintiffs as well as recognised environmental associations may take action against the final **plan approval order** by means of a rescisory action before the Federal Administrative Court, in which the previous planning stages are revised incidentally, as already mentioned. In particular, the justification of the plan, and hence the requirement assessment for the individual measure, is also subject to judicial review via the Federal Requirement Plan Act. This possibility is explained in greater detail as part of the communicant's comments on the individual allegations (in III. 2. a)). Because of the legally-ordered immediate enforceability of the plan approval order (section 43e subsection (1), first sentence, of the Energy Industry Act), if the plan approval order is challenged, the individual plaintiff may furthermore apply in the expedited procedure in accordance with section 80 subsection (5) of the Code of

Administrative Court Procedure (*Verwaltungsgerichtsordnung* – VwGO) for the suspensive effect of the rescisory action to be ordered by a court.

### 3. Regarding the communicant

The communicant is a natural person. The "Aarhus Konvention Initiative", which she claims to represent, is not a recognised environmental association in Germany. The Initiative is made up of civil society movements, as well as of individuals, engaging in legal- and political-level activities to ensure compliance with the Aarhus Convention in Germany on a project-related basis. The communicant is at the same time a member of the district council of Wunsiedel rural district, the territory of which is affected by the planning of the "SuedOstLink" line project (line project no. 5 in accordance with the annex re section 1 subsection (1) of the Federal Requirement Plan Act). The communicant has repeatedly submitted statements and objections as part of public participations at the previous stages of the procedure of the still pending planning procedure on the "SuedOstLink" in which she particularly questioned the requirement for the line project and rejected the implementation of the project. Press reports show that there is a specific link between the present complaint and the communicant's attempts to prevent the above link project[1].

[1] Cf. for instance https://www.br.de/nachrichten/bayern/kreisraetin-artmann-geht-in-genf-gegen-netzentwicklungsplan-vor,Rp4WyzG

## II. On the admissibility of the communication

The Federal Republic of Germany continues to have doubts as to the admissibility of the communication.

As the Compliance Committee found in paras. 1 to 5 of its preliminary determination of admissibility of 13 March 2020, the admissibility of a communication is to be assessed in accordance with the admissibility criteria set out in paragraphs 20 and 21 of the annex to decision I/7. Whilst paragraph 20 of the annex to decision I/7 relates to the content of the communication, in accordance with paragraph 21, furthermore, any available domestic remedy is to be taken into account unless such remedy is unreasonably prolonged or does not provide an effective and sufficient means of redress for the applicant. Even if failure to exhaust effective domestic remedies does not automatically make a communication inadmissible, this question is at least also to be taken into account when assessing the admissibility of a communication.

In its statement on preliminary admissibility of 5 March 2020, the Federal Republic of Germany stated on pages 4 to 6 that the communicant has effective domestic legal remedies at her disposal which are also suited to provide effective, sufficient redress.

The Compliance Committee has nonetheless not at all discussed the matter of the exhaustion of the legal remedies in the instant case in its preliminary determination of admissibility of 13 March 2020.

The Federal Republic of Germany would like to stress that the communicant still has yet to lodge any legal remedy against a concrete plan approval order within the area of responsibility of the Federal Network Agency that has approved a grid project. In particular, she has also not substantiated that a court has failed to take account of her argument that the decision on the requirement assessment allegedly contradicted environmental provisions during proceedings against the downstream decision. The German Federal authorities also have no information regarding such pending court proceedings. In fact, it is hardly likely that the communicant could make a successful case against the background of our observations in the statement of 5 March 2020 on the case-law of the Federal Administrative Court. We herewith refer once again in this context to the decision that was handed down only last year by the Federal

Administrative Court, in which the Court once more emphasised the absolute necessity of judicial review, particularly against the background of the Aarhus Convention (cf. Federal Administrative Court (BVerwG), judgment of 11 July 2019, ref. 9 A 13.18, para. 56 – juris.).

The proceedings mentioned by the communicant can also not substantiate that she has exhausted the domestic remedies. As was already stated in the observations of 5 March 2020, these proceedings are not remedy measures within the meaning of the Aarhus Convention. In fact, the communicant is calling on the Compliance Committee in this instance although she has by no means exhausted the domestic options for legal protection. True, the decisions on the Federal specialist planning in the planning sections are now available with regard to the concrete "SuedOstLink" line project that the communicant has criticised in the past (line project no. 5 in accordance with the annex to section 1 subsection (1) of the Federal Requirement Plan Act). As has been stated, there is provision for a concentration of legal protection against these decisions in the review of the plan approval order with incidental review of the previous planning stages. As soon as plan approval orders have been handed down with regard to the "SuedOstLink" line project, the communicant can and must first of all seek judicial legal protection against this. There can hence be no question of the legal remedies having been exhausted in the Member State.

The Federal Republic of Germany considers that the Compliance Committee should take these aspects into account when reviewing admissibility.

## III. Comments on the individual allegations of the communicant in accordance with the communication of 27 January 2020

The communication of 27 January 2020 alleges that the Federal Republic of Germany has violated provisions of the Aarhus Convention. The communicant relies here on article 9 para. 2, article 9 para. 3, article 9 para. 4 and article 3 para. 1 of the Aarhus Convention. Summing up, the communicant submits the following grounds which she considers to constitute a breach of international law:

- Multi-tiered planning and approval procedures are said **not** to provide a **direct legal protection option** to appeal against decisions on upstream planning levels; in concrete terms, this is said to relate to the possibility to review upstream decisions that are taken as part of the **requirement plan** in grid expansion.
- The **incidental review** of the requirement plan as part of a court action against the plan approval order concluding the planning procedure is said to be **insufficient** to guarantee effective legal protection since the specialist judicial review was only carried out to a limited degree, as this question had been ruled on bindingly for the courts with the determination of the requirement in the Federal Requirement Planning Act.
- **Specific legal protection options** against the decisions of regulatory authorities (section 75 of the Energy Industry Act, such as against the confirmation of the network development plan), which are only available to specific groups, are said to preclude a clear, transparent, uniform legal protection system.

### 1. Preliminary remark

The inadequate implementation of the arrangement on access to justice of article 9 para. 2 and para. 3 of the Aarhus Convention in German law already formed the subject-matter of compliance proceedings ACCC/C/2008/31 (decision V/9h of 2 July 2014). In order to completely implement article 9 para. 2 of the Aarhus Convention in German law, the legislature within its scope rescinded the limitation of the power of complaint to “provisions serving environmental protection” in accordance with the stipulations of the 5th session of the Meeting of the Parties to the Aarhus Convention. In order to completely implement article 9 para. 3 of the Aarhus Convention, the substantive scope of the Environmental Appeal Act was expanded in accordance with the stipulations of the 5th session of the Meeting of the Parties to the Aarhus

Convention to include further acts or omissions amenable to complaint (specifically, amongst others section 1 subsection (1) of the Environmental Appeal Act was supplemented to include the new numbers 4 to 6) in order to make the application of environmental provisions amenable to comprehensive review by private individuals and public authorities. The possibility of a representative action under environmental law was hence expanded to include amongst other things decisions on the approval of plans and programmes where there may be an obligation to implement a strategic environmental impact assessment (section 1 subsection (1), first sentence, no. 4 of the Environmental Appeal Act). By contrast, there was no need to amend the national legal remedy system for private individuals.
At the 6th session of the Meeting of the Parties of 2017, the compliance procedure was concluded subsequent to the previous reform of the German Environmental Appeal Act in 2017 by the session of the Meeting of the Parties to the Aarhus Convention (decision VI/8).

**2. No violation of the Aarhus Convention**

The Federal Republic of Germany is of the view that it has not acted in violation of its obligations under the Aarhus Convention.

**a. No violation of article 9 para. 2, article 9 para. 3 and article 9 para. 4 of the Aarhus Convention**

In contradistinction to the view taken by the communicant, there has been no violation of article 9 para. 2, article 9 para. 3 and article 9 para. 4 of the Aarhus Convention.

Article 9 of the Aarhus Convention establishes the obligations incumbent on the Parties with regard to access to justice. In accordance with article 9 para. 2 of the Aarhus Convention, the Parties must ensure that “members of the public concerned”, under preconditions detailed therein, have access to a review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 of the Aarhus Convention.

A plan approval order to construct and operate an ultra-high voltage line constitutes a decision within the meaning of article 6 of the Aarhus Convention for which public participation is provided in accordance with annex I to the Aarhus Convention. Legal protection against such a plan approval order is therefore granted within the framework of article 9 para. 2. The

communicant is however complaining in the instant case of insufficient legal protection only with regard to the requirement plan, but not to the plan approval order. The decisions at the upstream level of the requirement plan are however not subject to article 6 of the Aarhus Convention. The Federal Republic of Germany deliberately refrained from making use of the possibility to also subject other provisions of the Aarhus Convention to the regime of article 9 para. 2, so that legal protection as to the decisions on the requirement plan in grid expansion within the framework of article 9 para. 3 of the Aarhus Convention is granted. This result is also in line with the view taken by the communicant.

In accordance with article 9 para. 3 of the Aarhus Convention, the Parties must ensure that, where they meet the criteria, if any, laid down in their national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of their national law relating to the environment.

**aa. Implementation of article 9 para. 3 of the Aarhus Convention in German law**

In accordance with a constant line of rulings of the Compliance Committee, the Parties have a broad margin of appreciation when it comes to implementing article 9 para. 3 of the Aarhus Convention. In particular the lodging of a popular action is not necessary for implementation. It is necessary – as a minimum prerequisite –, but also sufficient, for it to be possible for the application of environmental provisions to be subject to a judicial review in a Party by private individuals or public authorities. Related to individual plaintiffs, section 42 subsection (2) of the Code of Administrative Court Procedure, which requires for the admissibility of an action that the plaintiff must claim that his or her rights have been violated, complies with the criteria within the meaning of article 9 para. 3 of the Aarhus Convention in a manner that is in compliance with international law. Furthermore, Germany has implemented the outlined requirements by introducing the representative action under environmental law and the prerequisites for recognition in accordance with section 3 of the Environmental Appeal Act. The 5th session of the Meeting of the Parties, logically, also only required in the abovereferenced proceedings against Germany (decision V/9h of 2 July 2014) that the national provisions on the representative action under environmental law be amended. No legal amendment was necessary for individual plaintiffs, including the communicant – the “association” for which she acts as a spokesperson is not a recognised environmental association. The prerequisite of

section 42 subsection (2) of the Code of Administrative Court Procedure applies to her, i.e. she must assert a subjective rights violation in order to have standing to lodge an action. This conception harmonises with article 9 para. 3 of the Aarhus Convention. As was already mentioned above, the Federal Republic of Germany has now fully implemented article 9 para. 3 of the Aarhus Convention with the additions that were made to the Environmental Appeal Act in 2017.

**bb. Effective legal protection with a view to grid planning is guaranteed**

Effective legal protection is guaranteed in the Federal Republic of Germany with a view to grid planning. It is not disputed that there is no direct legal protection for third parties against the upstream planning levels. This would also not be appropriate for individual plaintiffs – such as the communicant – as they are not concerned on an individual basis. With regard to the recognised environmental associations, the Federal Republic of Germany has established via section 1 subsection (1), first sentence, no. 4 of the Environmental Appeal Act that the decision on the approval of specific plans and programmes with regard to which there is provision for an environmental assessment is eligible as subject-matter for a court action. The concentration of legal protection by means of an incidental review of the upstream planning stages in the judicial review of the final ruling on admissibility in line with section 1 subsection (1), first sentence, no. 4 sub-clause 2 of the Environmental Appeal Act does not per se give rise to a violation of the Aarhus Convention (cf. (1) on this). Such a violation would only exist were there to be no opportunity for a review at all. That having been said, sufficient legal protection is guaranteed as part of the possibility of an incidental review of the requirement (cf. (2) on this).

It should be pointed out on a preliminary basis that the provision contained in section 1 subsection (1), third sentence, no. 3 of the Environmental Appeal Act, which the communicant has also cited, is not relevant to the instant complaint, as this provision is based on section 15 subsection (3), second sentence, of the Grid Expansion Acceleration Act, and – with regard to the decision on Federal specialist planning – it in fact explicitly standardises a concentration of legal protection in the judicial review of the final ruling on admissibility. The communicant is however not complaining of a lack of legal remedies as to the ruling on Federal specialist planning, but only with regard to the requirement assessment. It therefore remains unclear why the communicant nonetheless cites section 1 subsection (1), third sentence, no. 3 of the

Environmental Appeal Act in the communication. No further comments are therefore submitted.

**(1) No violation by virtue of exclusion of a direct opportunity for a review**

In contradistinction to the view taken by the communicant, the exclusion of a direct opportunity for a review and the reference to the opportunity for a review only as part of a court action against the ruling on admission concluding the multi-tiered procedure does not per se give rise to a violation of article 9 para. 3 of the Aarhus Convention.

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."* (Report of the Compliance Committee, Compliance by Germany with its obligations under the Convention, 2 August 2017, ECE/MP.PP/2017/40, para 39).
In the final report of the Compliance Committee on Case V/9h, the Committee fundamentally approved a possibility for an incidental review in multi-tiered planning and decision procedures:
*"The Committee accepts that there may be certain plans and programmes for which the possibility to incidentally review all relevant aspects of a plan or programme in subsequent downstream decision may be sufficient."* (Report of the Compliance Committee, Compliance by Germany with its obligations under the Convention, 2 August 2017, ECE/MP.PP/2017/40, para 43).
This is ultimately also favoured by the passage from the report of the Compliance Committee also mentioned by the communicant on p. 2 of the communication: *"At the same time, the Committee notes the submission by the communicant and observers that, pursuant to section 1, subsection (1), sentence 3, number 3, of the Environmental Appeals Act, the review of national grid expansion and construction plans is excluded. The communicant and observers did not, however, provide specific information that would demonstrate that the possibilities for incidental review of these plans are insufficient."* (Report of the Compliance Committee, Compliance by Germany with its obligations under the Convention, 2 August 2017, ECE/MP.PP/2017/40, para 43).
This indicates that the Committee presumably considers an incidental review of the plans to be sufficient, at least for the case of grid expansion forming the subject-matter at hand.

For the same reasons, the view of the communicant is also not tenable that section 1 subsection (1), first sentence, no. 4 sub-clause 2 of the Environmental Appeal Act, which rules out the possibility to review the approval decision of plans and programmes in the event that they are issued on a statutory basis, constitutes a violation of the Aarhus Convention. The legal possibility to provide for this exception emerges from the interplay between article 9 para. 3 and article 2 no. 2 of the Aarhus Convention: Article 9 para. 3 of the Aarhus Convention relates inter alia to authorities of the Parties. These national authorities are defined by article 2 no. 2 of the Aarhus Convention. In accordance with the second sentence of this definition, this excludes amongst others bodies and institutions acting in a legislative capacity (cf. on this also the parallel implementation of the term in section 2 subsection (1) no. 1 (a) of the Environmental Information Act (*Umweltinformationsgesetz* – UIG) of the Federation, as well as the Opinion of Advocate General Jääskinen of 8 May 2014, Cases C-404/12 P and C-405/12 before the Court of Justice of the European Union (CJEU)).

Rather, an overall view of the opportunities for access to justice is decisive for an assessment of whether the provisions of a Party are compliant with article 9, with regard to the principles established by the Committee for multi-tiered planning and approval procedures:

*"When evaluating the compliance of the Party concerned with article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that "effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced"* (Convention, preambular para. 18; cf. also findings on communication ACCC/C/2006/18 concerning Denmark (ECE/MP.PP/2008/5/Add.4), para. 30). *Therefore, in assessing whether the Convention's requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organisations, in different stages of the decision-making* ("multi-tiered" decision-making).
*In addition, in examining access to justice with respect to the different types of acts before it (SEA statements, spatial plans or construction and exploitation permits), the Committee bears in mind that whether a decision should be challengeable under article 9 is determined by the*

*legal functions and effects of a decision, not by its label under national law* (c.f. findings on communication ACCC/C/2005/11 concerning Belgium (ECE/MP.PP/C.1/2006/4/Add.2), para. 29 and findings on communication ACCC/C/2006/16 concerning Lithuania (ECE/MP.PP/2008/5/Add.6), para. 57)."

The Federal Republic of Germany is of the view that the German legal protection system does justice to these requirements with regard to grid planning and to the expansion of the grid, in particular in accordance with the Grid Expansion Acceleration Act. Effective legal protection is guaranteed by an incidental review of the upstream planning decision (Federal specialist planning decision) in legal protection concentration on the approval decision (plan approval order). The requirement plan – even though it is entrenched in law – is reviewed incidentally as part of a court action against the plan approval order, and is not for instance ruled out because of its *"label under national law"*.

**(2) Incidental review guarantees effective legal protection**

Unlike as submitted by the communicant, the incidental review which is exercised by the courts is sufficient. The communicant was unable to make a case that the possibilities of incidental review of the plans are insufficient.

When it comes to multi-tiered planning and decision-making procedures, as part of an action against the plan approval order concluding the proceedings, the court reviews not only the lawfulness of the last stage of the proceedings, namely the plan approval order itself, but also – and incidentally – the lawfulness of the upstream stages of the proceedings. The court comprehensively reviews whether the plan approval order is in violation of legal provisions which are significant to the decision on its issuance. This includes both procedural and substantive legal provisions. The "plan justification" is also part of substantive law, and hence part of the review programme. The plan justification was developed by the case-law as a separate prerequisite for admission for the plan approval order. The Federal Administrative Court stated as follows in this regard:

*"The plan justification is an unwritten requirement of any specialist planning, and an expression of the principle of the proportionality of any state activity that entails encroachments on private rights. The requirement is met if a requirement exists for the intended project,*

*measured against the goals of the respective specialist planning statute, so that the planned measure is required from this point of view. This is not only the case where the project is indispensable, but if it is required in terms of reason."* (Federal Administrative Court judgment of 16 March 2006 – 4 A 1075.04, para. 182).

The plan justification is a legally-bound decision which is upstream of the exercise of the planning discretion, and hence opens up design flexibility in planning in the first place, so that it is subject to full judicial review as a matter of principle.
The particularity applies to the multi-tiered planning and decision-making procedure in accordance with the Grid Expansion Acceleration Act, as well as in parts to planning under Federal law on traffic routes, that the plan justification is established in advance via the legislative requirement assessment. In accordance with section 1 of the Federal Requirement Plan Act, the line construction projects listed in the annex to this Act serve to both feed in electricity from renewable energy sources, as well as to ensure the interoperability of the electricity grids within the European Union, the connection of new power plants, or the avoidance of structural bottlenecks in the transmission grid. In accordance with section 1 subsection (1), first sentence, of the Federal Requirement Plan Act, the necessity in terms of the energy industry, and the priority requirement of all projects contained in the annex to the Federal Requirement Plan Act, are established as a Federal Requirement Plan in accordance with section 12e subsection (4) of the Energy Industry Act. Section 12e subsection (4) of the Energy Industry Act reads as follows:

*Section 12e Federal Requirement Plan*
*(...)*
*(4) The adoption of the Federal Requirement Plan by the Federal legislature shall confirm the necessity for reliable energy supplies and the urgent need with regard to the projects contained therein. The findings shall be binding on the transmission system operators, as well as on planning approval and planning permission in accordance with sections 43 to 43d and sections 18 to 24 of the Grid Expansion Acceleration Act for the Transmission System.*
*(...)*

This means in concrete terms that, for the projects listed in the annex to the Federal Requirement Plan Act, the plan justification, i.e. the establishment of the requirement, has been

anchored in law for the further planning process, and hence bindingly adopted as a matter of principle. This does not however mean that the statutory requirement assessment cannot be subject to a judicial review. In contradistinction to the view taken by the communicant, judicial review also guarantees effective legal protection, even if the Federal Administrative Court carries out a "review of evident violation" (*Evidenzkontrolle*). This is for instance shown by a ruling handed down by the Federal Administrative Court from last year. The ruling was triggered by an action on the part of a recognised environmental association against a plan approval order for the construction of a new motorway. The Federal Administrative Court carried out a review of the requirement plan as part of the substantive review of the plan approval order. It first stated as follows:

*"The project has been included as an urgently-required project in the requirement plan for Federal trunk roads which is annexed to the Federal Trunk Road Upgrading Act* (Fernstraßenausbaugesetz) *in the version of the Sixth Act Amending the Federal Trunk Road Upgrading Act* (Sechstes Gesetz zur Änderung des Fernstraßenausbaugesetzes) *of 23 December 2016 (Federal Law Gazette [BGBl.] Part I p. 3354) - FStrAbG (section 1 subsection (1), second sentence, of the Sixth Act Amending the Federal Trunk Road Upgrading Act) (no. 701). The statutory requirement assessment is binding on the plan approval and on the judicial proceedings, and as a matter of principle rules out a subsequent review of whether there is a traffic requirement for the planned motorway (case-law, cf. most recently Federal Administrative Court, judgment of 12 June 2019 - 9 A 2.18 - juris para. 22 with further references.)."*

The court went on to review whether this binding effect of the statutory requirement plan ceases to apply due to the requirement plan violating against Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. This makes it clear that, in contradistinction to the view of the communicant, the courts do not limit their review to a "review of evident violation" pure and simple, but that the requirement plan is subject to a judicial review with a view to environmental provisions. The Federal Administrative Court states as follows in advance with regard to the amenability to judicial review of compliance of the requirement plan with the directive:

*"The judicial review of the requirement plan is not ruled out by section 1 subsection (1), first sentence, no. 4 sub-clause 2 of the Environmental Appeal Act. Such exclusion is limited in terms of its wording only to legal remedies which are directed against the decision on acceptance of the plan by formal statute and have such as their subject-matter. By contrast, the incidental review of compliance with the SEA Directive by a plan accepted by a formal statute is not ruled out. This also complies with the purpose of section 1 subsection (1), first sentence, no. 4 of the Environmental Appeal Act as emerges from the legislative materials. The provision is to implement art. 9 para. 3 of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (BGBl. 2006 II p. 1251; hereinafter: Aarhus Convention) (Bundestag printed paper [BT-Drs.] 18/9526 p. 31). Accordingly, the Parties are to ensure access to judicial procedures to challenge acts on the part of public authorities which contravene provisions of their domestic law relating to the environment. Acts by public authorities here do not however include, in accordance with art. 2 no. 2, second sentence, of the Aarhus Convention, the acts of bodies or institutions acting in a legislative capacity. This is taken into account by section 1 subsection (1), first sentence, no. 4 of the Environmental Appeal Act (Bundestag printed paper 18/9526 p. 35). Plan approval orders under road traffic law constitute acts by public authorities within the meaning of art. 9 para. 3 of the Aarhus Convention against which a judicial remedy must be available. This understanding is, finally, also favoured by the principle of effectiveness under EU law. Without the possibility of their incidental review, plans and programmes the acceptance of which is decided on by statute, as in the case of the requirement plan for the Federal trunk roads, would be completely removed from review by the national courts."*
*(Federal Administrative Court, judgment of 11 July 2019 – 9 A 13.18 – juris para. 56).*

It can be presumed that the Court will rule in a similar manner on actions against plan approval orders for projects lying in the responsibility of the Federal Network Agency. Were this not to be the case, as the Federal Administrative Court has explicitly found, the Federal Requirement Plan, on which a ruling was made by statute, would be completely removed from review by the national courts.

This judgment makes it clear that effective legal protection is guaranteed in Germany, including in multi-tiered planning procedures. The evidence-based case-law cited by the

communicant does not lead to legal protection being limited. True, the case-law acknowledges that the legislature has as a matter of principle broad scope for shaping and making prognoses in the requirement assessment. The boundaries on this legislative discretion are overstepped here if the requirement assessment is manifestly subjective, in other words if there is no need for the project that could justify acceptance by the legislature (Federal Administrative Court judgment of 3 May 2013, 9 A 16/12 para. 21). This is however also necessary since the establishment of the expansion requirement is above all a transport policy decision based on cost-benefit considerations. The Federal Administrative Court put it as follows: *"The decision on the existence of a need is primarily a question of political will and political consideration."* (Federal Administrative Court, judgment of 8 June 1995, file ref. 4/94, para. 20).

The plaintiff may nonetheless submit objections in the legal protection proceedings against the plan approval order according to which the plan justification, that is the requirement for the respective project, does not apply. The Federal Administrative Court reviews these objections as part of the evidentiary review, both in factual and in legal terms (Federal Administrative Court, judgment of 18 July 2013 − 7 A 4.12, paras. 32 et seqq.; Federal Administrative Court, judgment of 4 April 2019 – 4 A 6/18, paras. 18 et seqq.). As the cited judgment of 11 July 2019 has shown, it is ensured here that the requirement plan is subjected to a comprehensive review as to compatibility with environmental provisions. The result of the amenability of the requirement plan to review only within incidental legal protection hence does justice to the meaning and purpose of the requirement assessment.

Insofar as the communicant is complaining of the lack of a possibility of legal protection with regard to the network development plan, it needs to be borne in mind that the act that is primarily relevant for the requirement assessment constitutes the enactment of the Federal Requirement Plan by the Federal legislature. It is only when the line project has been included in the Federal Requirement Plan Act that, in this regard, the necessity in terms of the energy industry and the urgent requirement in accordance with section 12e subsection (4) of the Energy Industry Act is established in a legally-binding manner. True, the two upstream decisions taken by the Federal Network Agency do exert an influence on the structure of the Federal Requirement Plan, but in more precise terms these are two separate processes. The establishment of the scenario framework and of the network development plans is not necessarily

synchronised with the statutory requirement assessment. As has been described, the Federal Network Agency does submit a network development plan to the Federal Government at least every four years in the shape of a draft Federal Requirement Plan. That said, it is up to the legislature alone to decide at what time and with what content an amendment of the Federal Requirement Plan Act is resolved on. What is more, the confirmation of the scenario framework and of the network development plan merely constitutes a review in terms of the energy industry. In this respect, the environmental report in accordance with section 12c subsection (2), first sentence, of the Energy Industry Act in conjunction with section 40 subsection (1), second sentence, of the Environmental Impact Assessment Act is not a part of the network development plan, but serves to prepare the Federal Requirement Plan Act (cf. section 12c subsection (2), first sentence, of the Energy Industry Act). It is therefore not necessary in the view of the Federal Republic of Germany to open up direct legal protection options in order to guarantee effective legal protection in accordance with article 9 para. 3 of the Aarhus Convention.

It can hence be stated that effective legal protection is guaranteed via the incidental review of the requirement plan as part of an action against the final plan approval order. This statement is not precluded by the fact that there has never previously been a positive case of rescission or non-application of a requirement plan.

**cc. No violation of article 9 para. 4 of the Aarhus Convention**

Since, as stated, an effective legal protection system is in place, there is also no violation of article 9 para. 4 of the Aarhus Convention. In accordance with article 9 para. 4, the procedures of the Parties must provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.

In the case of incidental review, the review of upstream planning cannot always take place in a timely manner. This by itself does not however preclude effective legal protection nonetheless being guaranteed. It should also be noted that transferring legal protection to upstream planning levels does not de facto of necessity improve the position of the potential parties to any court action. For reasons of effective legal protection, the opportunity to file an action at an earlier stage might entail preclusion of objections and a restricted opportunity to assess the second action against the final approval decision. A complete judicial review would hence

always require the implementation of at least two sets of action proceedings. The risks and burdens entailed with going to court could hence increase considerably for the environmental associations in question, and this could be highly problematical both in constitutional terms, and in terms of the goals of the Aarhus Convention. The most effective remedy in this case is judicial review at the end of the "planning cascade".

#### dd. Transferability of the principles to other multi-tiered planning and decision procedures

The communicant indicates in her communication that her allegations relate not only to legal protection in grid expansion, but also to legal protection in further multi-tiered planning and decision-making procedures. She cites as examples the planning of railway lines and roads. Since the judgment via a court action against a plan approval order that was cited by way of example was issued for a motorway project, these objections can already be eliminated with reference to this judgment. It may be presumed that the court will reach a similar judgment, at least with regard to actions against plan approval orders for projects for which the Federal Network Agency is responsible.

### b. No violation of article 3 para. 1 of the Aarhus Convention

Finally, the opening up of a complaint under the law on energy in accordance with section 75 of the Energy Industry Act only for the parties to the proceedings before the regulatory authorities does not constitute a violation of article 3 para. 1 of the Aarhus Convention.

In accordance with article 3 para. 1 of the Aarhus Convention, each Party is to take the necessary measures to implement the provisions of the Convention implementing the information, public participation and access-to-justice provisions, as well as proper enforcement measures, to establish and maintain a clear, transparent, consistent framework in which to implement the provisions of this Convention.

Section 75 of the Energy Industry Act reads as follows:
*Section 75 Admissibility, jurisdiction*
*(1) A complaint shall be admissible against decisions of the regulatory authority. It may also*

*be based on new facts and items of evidence.*
*(2) The parties to the proceedings before the regulatory authority shall be entitled to lodge such complaint.*
*(3) (...)*
*(4) The Higher Regional Court with jurisdiction for the seat of the regulatory authority shall rule exclusively on the complaint; in cases falling under section 51, exclusively the Higher Regional Court with jurisdiction for the seat of the Federal Network Agency, including in cases in which the complaint is directed against an order of the Federal Ministry of Economic Affairs and Energy. Section 36 of the Code of Civil Procedure* (Zivilprozessordnung)*, shall apply mutatis mutandis.*

The transmission system operators are primarily parties to the proceedings on the scenario framework and the network development plan before the regulatory authority. Accordingly, they can directly challenge the decisions of the Federal Network Agency, including the confirmation of network development plans in special civil proceedings before the Cartel Senate of Düsseldorf Higher Regional Court. The network development plan, by contrast, may explicitly not be challenged by third parties (cf. section 12 c subsection (4), second sentence, of the Energy Industry Act). This is however also proper. The measures included in the network development plan merely describe connections between network nodes from which no line routes yet emerge. Third parties are hence not spatially affected by the confirmation of the network development plan. Rather, network development planning is primarily a regulatory tool. For the operators of transmission grids, the confirmation of the network development plan gives rise to planning and investment obligations which can be enforced by regulatory means (section 12c subsection (4), first sentence, and section 65 subsection (2a) of the Energy Industry Act), so that they – and only they – are to be granted legal protection at this early point in time. By contrast, the confirmation of the network development plan does not create any irreversible facts which, in the interest of effective legal protection, would necessitate an earlier remedy benefiting third parties. Limiting direct legal protection to the transmission system operators corresponds with the binding effect of the confirmation of the network development plan restricted to them. A violation of the rights of parties other than the transmission system operators is hence ruled out since the confirmation of the network development plan does not yet say anything about the approval of a specific project, and hence subjective third-party rights are not affected. As has already been stated, the requirement for the

individual line projects was only anchored in law by the Federal Requirement Plan Act. It is furthermore established with regard to environmental aspects only by the approval decision on the project in question. The requirement is to be taken into account as part of network planning by the transmission system operators, also in terms of investment, but the requirement assessment is not yet able to cause irreversible encroachments on interests that are relevant in terms of environmental protection at this stage. Solely the plan approval order is significant in this respect. There is also provision for direct legal protection against this – including via injunctive relief. This information is also transferable to the further upstream scenario framework and its review by the Federal Network Agency, even if there is no provision comparable to section 12c subsection (4), second sentence, of the Energy Industry Act. The degree of abstraction of the scenario framework is hence higher once again than with the network development plan, so that the individual effect on third parties is definitely ruled out in this respect. The specific legal remedy proceedings do not therefore constitute a remedy within the framework of the Aarhus Convention.

For this reason, the question posed by the communicant as to the amount of the costs for such court proceedings is also not relevant. In light of the communicant's comments in the communication, it should however be pointed out that the amount stated as to the values at dispute in proceedings on the scenario framework and the network development plan is much too large. It should be pointed out first and foremost in this regard that the decision referred to in the communication in the proceedings before Düsseldorf Higher Regional Court (cf. footnote 48, p. 13), in which a complaint value of 10,000,000 EUR was set, has no content connection with the complaint at hand. These proceedings related to the refusal of a network connection for an offshore wind farm. Düsseldorf Higher Regional Court set the value of the complaint in this individual case on the basis of the degree to which the communicant in that instance was effected in economic terms (albeit on a lump-sum basis) (cf. Düsseldorf Higher Regional Court, order of 26 November 2014, ref. VI-3 Kart 114/14 [V], para. 72 – juris). The communicant's statement based on this is hence completely immaterial. By contrast, in the proceedings in which the communicant herself lodged a complaint against the network development plan (and withdrew it once again before a ruling had been handed down on the merits, stating that no complaint had been intended at all), a value of complaint of only 10,000 EUR was ultimately set (Düsseldorf Higher Regional Court, Order of 6 February 2019, ref. VI-3 Kart 90/19 [V]).

## IV. Summary

The legal protection options with multi-tiered planning and approval procedures in the Federal Republic of Germany, and specifically legal protection with regard to the requirement plan in planning procedures for grid lines in accordance with the Grid Expansion Acceleration Act, is in compliance with the stipulations following from article 9 para. 2, article 9 para. 3, article 9 para. 4 and article 3 para. 1 of the Aarhus Convention. The system of incidental review of the upstream requirement plan in the framework of court action against the approval decision concluding the proceedings ensures effective legal protection.

To sum up, the Federal Republic of Germany also did not violate any obligations under the Aarhus Convention in the present case in other respects.

The Federal Republic of Germany reserves the right to make a further statement in the event of the communicant providing details or additions to the statements in her communication.