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Distinguished Members of the Compliance Committee,
Dear Madam and Sir,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany regarding access to justice in the context of tiered decisions and plans (ACCC/C/2020/178)

we thank you for the opportunity to comment on the communication the Party Concerned made regarding the admissibility of the above communication, in particular in pages 11–12 of its response of 13 August 2020.

1. **State of the proceedings**

The communication was initially received by the Committee on 27th January 2020.

The communication concerns compliance by Germany with articles 9(2), (3) (4), and 3(1) of the Convention with respect to access to justice in the context of tiered decisions and plans. The practice is found in many areas of the law, but the communicant has chosen the law on the electricity grid extension.

Preliminary determination of admissibility was determined on 13 March 2020. Germany submitted observations 13 August 2020, and the communicant was asked by the Secretariat on 1st October 2020 to not react to this submission at this point.

2. Non-Compliance persist
The communication is still pertinent, the non-compliance persists.

As a result of the exclusion of **direct review** per se and restriction of scrutiny of the demand assessment during an **incidental review**, neither the general public like the communicant nor an environmental association can review the assumptions and declarations made leading to the Federal Requirement Plan. The assumptions determine the need for each project and thus the "environmental.part of the decision".[1]

The latter non-compliance is currently exacerbated by the adoption of new subject matter law such as the Federal LNG (Liquid Natural Gas) Statute incorporating the model of a federal requirement plan. This issue shall be brought to the attention of the Committee separately.

3. Changes in Law since January 2020
Given the fact that the communication is more that three years old, there have been various amendments to the legal basis.

As far as the communicant was able to follow, significant changes have been made to the Energy Industry Act (EnWG) including additions to § 12c) Law of 25.2.2021, BGBl. 2021, p 298) but § 12c para. 4 EnWG remains unchanged.

Since the submission of the complaint in 2020, there has been no relevant changes in the matter of access to justice in environmental matters under German law. § 15 NABEG and (indirectly) Section 12c EnWG still exclude the tiered planning decisions from judicial scrutiny.

The issues mentioned in Section III No 1 a) and 1 b) of the complaint persist: despite widespread criticism by environmental organizations and legal scholars, the Environmental Appeals Act has yet to be amended in such a way as to fully implement the provisions of Art. 9.2, 9.3 and 9.4 of the Convention.

A reform of the Environmental Appeals Act (EEA) is currently being prepared by the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection. This reform is required to address the recommendations of decision VII/8g regarding removal of the requirement in section 3 (1), second sentence, No. 5 of the EEA (membership requirement).

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[1] Hungary - ACCC/C/2004/4; ECE/MP.PP/C. 1/2005/2/Add.4, 14 March 2005.

The scope of the reform proposal is as of yet uncertain.

Yet, there have been no relevant legislative developments in terms of access to justice for individuals or associations in general or with regard to access to justice or to ease the examination of the need determination in tiered decision making.

4. Submission of 13th August 2020

It its submission on 13th August 2020 the Party concerned essentially argues that the communicant, a private person, has sufficient access to justice generally and in particular also with regard to tiered decisions and plans.

On p 7 et seq the Party concerned admits that several decision in the multi-tiered planning process of grid extension projects are not directly challengeable in a court of law. This applies to the approval of the scenario framework and the confirmation of the network development plan by the Federal Network Agency, as well as the Federal Requirement Plan. On p. 9 it alleges with regard to incidental judicial relief:

> „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… 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."

The communicant alleges this to be a mere theoretical possibility, and has explained this with examples in the communication.

On p. 11 the Party concerned repeats its view that "the communicant has effective domestic legal remedies at her disposal which are also suited to provide effective, sufficient redress".

Specifically the argument is as follows:

i. 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."

ii. The communicant (or other entities) can argue environmemtal law violations as the Federal Administrative court hast „once more emphasised the absolute necessity of judicial review, particularly against the background of the Aarhus Convention (BVerwG, Judgment of 11 July 2019, ref. 9 A 13.18, para. 56 – juris)

iii. The communicant has not exhausted domestic remedies with regard to a specific project: „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 pro-tection against this. There can hence be no question of the legal remedies having been ex-hausted in the Member State.“

5. No individual standing

Firstly, the Party Concerned fails to show entirely how the communicant, a private person, and not an approved environmental association could initiate any kind of legal scrutiny against the multi-tiered planning decision making process. The Party Concerned neglects that the EEA focuses only on approved environmental associations and it fails to take this into account on p. 10-12.

Section III.1 of the initial communication correctly summarises the law in Germany and the Party Concerned has not in any way disputed this.

The communicant as a private person not affected in her property rights cannot seek any form of judicial relief against the planning approval with respect to its core elements as determined in the requirement plan and with respect to environmental law generally. In fact, even property owners are restricted in their ability to argue environmental law, as was recently summarised by the Federal Administrative Court:

> „The plaintiffs can assert a violation of their property rights. As landowners affected by expropriation, they are entitled to a judicial review of the planning approval decision for its objective legality (so-called full review claim), insofar as the asserted error is causal for the utilisation of their land (BVerwG, judgments of 12 August 2009 - 9 A 64 07 - BVerwGE 134, 308 para. 24 - 26 June 2019 - 4 A 5 18 - Buchholz 455 - Buchholz 455 - Buchholz 455 - BVerwG). August 2009 - 9 A 64.07 - BVerwGE 134, 308 para. 24, of 26 June 2019 - 4 A 5.18 - Buchholz 451.17 Section 43 EnWG No. 10 para. 12 and of 3 November 2020 - 9 A 12.19 - BVerwGE 170, 33 para. 25 et seq, 34 et seq.).“[2]

This alone leads to the conclusion that the communication is admissible. The Aarhus Convention is an instrument which affords rights to people and the general public, and, if they so choose, their associations. It is not sufficient to implement a whole pillar (Access to Justice) only with regard to associations which have an official stamp of approval.

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[2] Judgment of 31.03.2023 - BVerwG 4 A 11.21 - ECLI:DE:BVerwG:2023:310323U4A11.21.0
https://www.bverwg.de/de/310323U4A11.21.0

In contrast, the Party Concerned seems to read ACCC/C/2008/31 (Decision V/9h of 2 July 2014 in an absolute manner: „there was no need to amend the national legal remedy system for private individuals“ (p. 14).

5. Exhaustion of existing remedies - direct
The communication is also about the legality of the network development plan (NDP) listing the requirements for new grid infrastructure which is later adopted as the Federal Demand Plan (FDPA).

Section III.2c) and VI of the communication has explained how the communicant has gone to great length to try and challenge what she can and has thus tried to launch an "energy related appeal" ("Energiewirtschaftliche Beschwerde) against the network development plan. The Party Concerned does not rebut in any way that she has even tried the direct way. It is simply not true that the communicant has “by no means exhausted the domestic options for legal protection“.

Given the fact that the communication also pertains to Art 9.4 it is relevant that the Party Concerned does not rebut that direct appeal is not available against any of the tiered decision making.

This in itself also renders the communication admissible as under the admissibility criteria set out in the annex to decision I/7, admissibilty may also pertain to only one legal argument of non-compliance.

6. Exhaustion of existing remedies – indirect or incidental
This pertains to the allegations i) and iii above:

The Party Concerned complains that the communicant has not exhausted domestic remedies with respect to the project pertinent to the region she lives in (SuedOstLink).

Firstly, this argument is obviously flawed as the communication is not about a specific project. The non-compliance is that – regardless of any legal steps against the last step in the planning approval process – there would be no substantive review of the assumptions made in the various planning stages devoid of judicial scrutiny before the last planning consent. This includes incidental scrutiny.

Also, despite the pertinent planning steps having have been completed since 2017 / 2019, there is of yet no decision to challenge. In the district of Wunsiedel, there are two planning sections of the Wolmirstedt Isar (SuedOstLink) project in the planning approval procedure.

*C1,
https://www.netzausbau.de/Vorhaben/ansicht/abschnitt.html?cms_abschnitt=Abschnitt+C1&cms_gruppe=bbplg&cms_nummer=5&cms_status=pfv
Münchenreuth - Marktredwitz (Abschnitt C1)
Appr. 55 km | Bayern, Sachsen, Thüringen | TenneT

*C2
https://www.netzausbau.de/Vorhaben/ansicht/abschnitt.html?cms_abschnitt=Abschnitt+C2&cms_gruppe=bbplg&cms_nummer=5&cms_status=pfv
Marktredwitz - Pfreimd (Abschnitt C2)
Appr. 90 km | Bayern | TenneT

Both C1* and C2* are currently at different stages of the planning approval process. In both C1 and C2 there are now two planned lines, numbered 5 and 5a, which run in parallel. No planning approval decision has been issued for either C1 or C2.

The communicant – not being affected with her own property – has simply no legal standing under German law for either of them.

The statement on p. 11: “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“ is therefore simply misleading. See above 4.

With respect to the „fencing“ of the determination of need in any indirect case agains the final consent, the Party Concerned cannot quote a single case in which the assumptions and details of such need determination has been examined.

It states in its submission of 5 March 2020, page 5:

> „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. That shows that a review of the downstream decision is possible.“

but does not (and cannot) rebut the argument set out on p. 8 of the communication that in fact, the need determination can only be scrutinised if the FDPA violates constitutional principles.

7. Recent judicial activity
Proceeding on the assumption that the Committee may not find admissibility with respect to individual standing already, the question is whether a land owner or environmental association could in theory and practice challenge the assumptions and declarations of the grid planning contained in the NDP and FDPA.

This point pertains to the argument raised by the Party Concerned in iii) above.

The communicant has raised the following point in the communication:

> "While a court may review the approval decision's assumptions with regard to the demand for the specific measure in question (a project of grid extension covered by the NDP) it will not scrutinize the assumptions and weighing that leads to the demand assessment also in conjunction with the environmental report issued in conjunction with the NDP. It will not objectively scrutinize if the project is individually and objectively needed in the sense of § 12b) EnWG (a norm of environmental law)."

The Party Concerned has not shown or explained that a court would do this. It has only repeatedly relied on a judgement from the Federal Administrative Court (BVerwG, Judgment of 11 July 2019, Ref. 9 A 13.18, para. 56 – juris). It has, however failed to actually reveil the content and repercussions (or rather non-repercussions) of this judgement.

What does the court state and how does this impact the current procedure?

The judgement of 11 July 2019 (Ref.: 9 A 13.18) is based on the planning approval decision for the expansion of the BAB 39 motorway in Lower Saxony.

There were several complaints against this, including from Friends of the Earth Germany (BUND e.V., approved association under the EEA). The complaint was partially successful. The only important point is the passage on the justification of the plan.

In its judgement, the court initially affirms the planning justification of the road expansion project because it is included in the requirements plan for federal roads, which is attached to the Roads Expansion Act as an annex, as a project of urgent need (Federal Transport Infrastructure Plan).

However, the court then examines - and this is in fact new - whether the binding effect of the Requirements Act no longer applies because the requirements plan could violate the EU Directive on Strategic Environmental Assessment (SEA) and would therefore be inapplicable with regard to the primacy of Union law. The court states that an incidental review of the compatibility of a plan adopted by formal law with the SEA Directive is not excluded (para. 56). In the following,

the court reviews the compatibility with the SEA Directive and affirms this, i.e. does not assume an infringement.

Consequences for the current non-compliance procedure are slim to none, contrary to what the Party Concerned alleges.

The decision has many parallels to the Network Development Plan (NDP). Thus, the Federal Republic of Germany has argued that an independent review of the justification of a NDP project in a legal action is possible after all and that the complaint should therefore be rejected as inadmissible.

However, there are some important differences between the NEP and the Federal Transport Infrastructure Plan and the judgement of the Federal Administrative Court that need to be explained:

- The NDP is prepared annually by private companies (transmission system operators) and then explicitly adopted by the BNetzA (the Federal Transport Infrastructure Plan is precisely not).

- It is an official decision with an external effect. For this reason, the legislator has expressly excluded third-party challenges to the NDP (Section 12c IV sentence 2 EnWG).

- The NDP itself is not the subject of the SEA, but rather the requirements plan, which is adopted by the legislator (every four years). The legislator assumes that the NDP is only an dependent part of the procedure. Nevertheless, the NEP is adopted annually and an SEA is carried out.

- According to the ACCC decision canon, however, judicial review must be independent of any requirement to carry out an SEA.

Most importantly however: Even if the Strategic Environmental Assessment can be reviewed incidentally, the necessity of the individual measure (380 kV line) cannot be reviewed as a result. This is because the necessity is not determined according to the SEA Directive, but according to Section 12b I EnWG (environmental law). This is also not a question of the primacy of Union law, but of the national concept for determining requirements.

Overall therefore, the jurisprudence on the fencing of need determinations stands. Even if an SEA could be examined, this would not mean that the “need determination” would be examined by the court. After all, the SEA is only a procedural requirement with no substantive say on what is deemed necessary with respect to grid planning.

Another decision by the Federal Administrative Court underpins this finding.

In its decision of 24.3.2021, Ref. 4 VR 2/20[3] pertaining to § 15 NABEG the court regards the possibility of an examination of the SEA as sufficient with respect to the Convention and disregards the fact that the substantive needs determination cannot in fact be challenged. This should come as no surprise as the various stipulations in law cited by the communication point to the fact that the German legislator intends to keep the need determination out of any court examination on purpose.

8. Conclusion

The communication is admissible.
On substance, the Committee should find in favour of the communicant, on both accounts: Individual standing and the lack of access to court with respect to the core element of any infrastructure project: The need determination.

The Federal Republic of Germany fails to establish sufficient and effective possibilities for appeal as per Art 9.2, 9.3 and 9.4 of the Convention regarding the application of environmental law in the need assessment procedure.

This violates the Committee's established ruling that in tiered decision making or planning procedures, it must be assured that the compliance with environmental provisions of each stage of the procedure can be fully reviewed

Under current German law, neither registered environmental associations nor individuals like the communicant have sufficient access to a review procedure that fully reviews the application of environmental law.

We remain at your disposal.

Respectfully

Dr. Roda Verheyen
Attorney at Law - Rechtsanwältin

[3] ECLI:DE:BVerwG:2021:240321B4VR2.20.0 - https://www.bverwg.de/de/240321B4VR2.20.0