Communication to the Aarhus Convention Compliance Committee

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II. Party concerned

The Federal Republic of Germany.

III. General information

1. Introductory remarks

This communication concerns the construction of new infrastructure for the transport and distribution of liquified natural gas (LNG) in Germany. It claims non-compliance of several provisions of the LNG Acceleration Act (Gesetz zur Beschleunigung des Einsatzes verflüssigten Erdgases; LNG-Beschleunigungsgesetz; LNGG) with the Aarhus Convention (AC).

There is an exemption of certain LNG projects of the obligation to conduct an environmental impact assessment (EIA) (Section 4 LNGG). For these projects, the LNGG shortens public participation periods from six or eight weeks to merely two weeks (Sections 5, 7, 8 LNGG). This is not in compliance with Art. 6.2 and 6.3 AC (IV. 1.)

By not making sufficient efforts to allow the public to effectively participate in the drafting of the LNGG, the German government violated Art. 8 AC (IV. 2.).

To achieve acceleration, the LNGG contains a provision that determines energy industry necessity and the need of the LNG infrastructure to guarantee the supply of gas to the general public (Section 3 sentence 2 LNGG). No public participation was provided for that decision. As this decision also renders later public participation ineffective, there is a violation of 6.4 AC. Furthermore, judicial review of the determination of need is insufficient and therefore the LNGG violates Art. 9.3 AC. (IV. 3.)

In consequence of the exemption of the obligation to conduct an environmental impact assessment (EIA) (Section 4 para. 1 LNGG), judicial review of LNG projects is restricted to contraventions against provisions of national law relating to the environment. Thereby the LNGG is violating Art. 9.2 AC. (IV. 4.)

The LNGG enables the approval of an early start without prior public participation (Section 5, 7 LNGG), which is not in compliance with Art. 6.1 and 6.4 AC. (IV. 5.)

2. The LNGG

The LNGG was passed by the German Parliament (Bundestag) on 19 May 2022 against the background of Russia's war of aggression against Ukraine with the aim of securing the national energy supply through the rapid integration of liquefied natural gas into the existing transmission network (Section 1 para. 1 LNGG). The law entered into force on 1 June 2022. The LNGG has been amended twice, by law of 8 October 2022[1] and by law of 12 July 2023.[2] There was no public participation in the process of adopting the law.

The LNGG is intended to provide an accelerated approval and award process for **up to eleven projects in up to five locations**: eight Floating Storage and Regasification Units (FSRU) and three onshore LNG terminals as well as several LNG connection pipelines and other connected infrastructure. These projects are listed in the Annex to Section 2 LNGG.

3. Permitting regime for LNG terminals without the LNGG

The following is a description of the normal permitting and licensing processes for LNG facilities without the modifications of the LNGG.

The approval and permitting processes for these facilities are complex, and given the complexity of the installations, technically and legally challenging to navigate. The specific approvals and permits required depend on the individual technical conditions. Each component of the facility is subject to a separate permitting process based on its characteristics and environmental impact. As a result, the LNG terminal developer must apply for several different permits and approvals. Within the permitting regimes for different parts of the facility, the permits can be broadly categorized into emission control, water law, and energy regulatory permits.

FSRUs require the operation of a plant of a cryogenic LNG storage facility and steam boiler firing for regasification. The construction and operation of gas storage facilities, regasification boilers, and combustion engine systems within the FSRU require an immission control permit in accordance with Section 4 of the German Federal Immission Control Act (Bundes-Immissionsschutzgesetz; BImSchG).[3] This includes compliance with noise and air emission limits, potential water contamination, and safety distances in case of accidents. The requirements for the immission control permit depend on the calorific output (Section 4 BImSchG in conjunction with Appendices 1 to the Fourth Ordinance for the Implementation of the Federal Immission Control Act (Vierte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes; 4. BImSchV).

Depending on the specific location, the FSRU may require the construction and operation of a jetty head, handling and loading platforms, mooring and fender dolphins, walkways and access walkways and bridges. It may also be necessary to deepen the access area to the jetty and the mooring basin. For the construction of the FSRU jetty with mooring basin and access area and/or if the waterways around the FSRU or the jetty must be deepened or otherwise enlarged a planning approval procedure under Section 68 of the Water Resources Act (Wasserhaushaltsgesetz; WHG) is required. In addition, the withdrawal of water and the discharge of sewage may require a permit according to Sections 8, 12 WHG.

[1] BGBl. I p. 1726
[2] BGBl. 2023 I no. 184
[3] See No. 9.1.1.1 and 9.2.3.1 of the 4. BImSchV.

Similar considerations apply to the onshore facility, which during its construction represents a significant intervention in the environment and emits air and noise pollutants. The connection of the onshore facility by means of a pipeline must be approved in accordance with Section 43 of the Energy Industry Act (Energiewirtschaftsgesetz; EnWG) within a planning approval procedure if the diameter of the pipeline exceeds 300 mm.

The question whether the facilities require an EIA in accordance with the Environmental Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung; UVPG), depends on the specific design of the facilities. In the case of the storage of liquefied natural gas, it depends on capacity (No. 9.1.1.1 or No. 9.1.1.2 of Annex 1 to the UVPG), in the case of steam boiler plants for regasification, the rated calorific output (No. 1.1.1 or 1.1.2 of Annex 1 to the UVPG). Either a general preliminary assessment of the individual case, or - in the case of larger capacities - there is an EIA obligation without a preliminary assessment. The construction of the LNG jetties requires an EIA in accordance with No. 13.10 of Annex 1 to the UVPG or in accordance with no. 13.11.1, as this is the construction of a port for maritime shipping or a jetty for loading or unloading ships for loading or unloading ships that can accommodate ships of more than 1,350 tons.

Almost all the permitting requirements described above also require public participation. The public participation within the framework of the BImSchG permit is regulated in Section 10 para. 3 BImSchG. The timeframe for public participation is six weeks, for installations according to the Industrial Emissions Directive (Directive 2010/75/EU; IED) eight weeks (Section 10 para. 3 sentence 4 BImSchG). For water and energy planning approvals, Section 70 para. 1 sentence 1 WHG and Section 43a EnWG refer for their public participation procedures to Section 73 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz; VwVfG). Section 73 para. 3 and 4 VwVfG regulate a timeframe for public participation of six weeks, for plan amendments it is two weeks.

IV. Facts and non-compliance of each provision

1. Timeframes for public participation (Sections 5, 7, 8 LNGG)

a) Facts

The LNGG shortens public participation periods **from six/eight weeks to two weeks** for permitting processes of all infrastructure within the scope of the LNGG, with the exception of onshore terminals pursuant to Section 2 para. 1 no. 2 LNGG and gas pipelines pursuant to Section 2 para. 1 no. 6 LNGG. For plan amendments it is shortened from two weeks to one week.

i. Usual public participation for immission control approvals pursuant to the BImSchG

Section 5 para. 1 sentence 1 no. 1 – 2 LNGG amends the existing timeframe for public participation in the approval of projects under the BImSchG pursuant to Section 2 para. 1 no.1 and 5 LNGG for which no EIA is required, from six/eight weeks to two weeks. The authority is obliged to render the relevant documents available only for one week after the publication (Section 5 para. 1 sentence 1 no. 1 LNGG). The public may then submit written or electronic objections to the competent authority up to one week after the end of the public display period; resulting in only two weeks in total. This period also applies to installations pursuant to the IED (Section 5 para. 1 sentence 1 no. 2 LNGG). Pursuant to Section 5 para. 1 sentence 1 no. 3 LNGG, the organization of a public hearing is not mandatory, but at the discretion of the authority.

Section 4 LNGG exempts LNG projects from the obligation to conduct an EIA. It regulates that the authority responsible for the approval decision shall not apply the UVPG and thus the EIA for projects pursuant to Section 2 para. 1 n° 1, 3, 4 and 5 LNGG if accelerated approval of the specific project is likely to make a relevant contribution to overcoming or averting a gas supply crisis. Whether or not these terminals have a significant environmental impact does not play a role in the decision.

The explanatory memorandum to the law specifies: "*A relevant contribution is regularly to be assumed if more than just a small amount of LNG can and is to be fed in via the specific facility and the gas shortage situation continues to exist or threatens to continue, for which a gas warning level according to the Gas Emergency Plan (...) is an indication, and it has not been permanently eliminated in the meantime by other newly added secure sources of supply. A quantitatively relevant contribution can regularly be assumed if the project reaches or exceeds an annual regasification capacity of at least 5 billion m³. Connection pipelines (...) make a relevant contribution to averting a gas supply crisis if they are needed to connect a facility to the transmission system for which the authority assumes such a contribution according to its assessment. The same applies to watercourse developments (...) if these are necessary for the construction and operation of the installation.*"

In consequence of the exemption of the EIA, regulations on public participation laid down in Sections 18 – 22 UVPG are inapplicable. Section 4 para. 4 sentence 2 LNGG states instead, that the draft approval, including the reasoning as well as the essential documents concerning the application, in particular the documentation concerning the environmental impact of the project in question and the reasons for inapplicability of the UVPG are to be made available to the public for a timeframe of four days. This replaces public participation pursuant to the UVPG, it is merely informative, there is no possibility to comment.

ii. Public participation for planning approvals pursuant to WHG and EnWG

a. WHG

Section 7 sentence 1 no. 1 – 2, no. 6 LNGG amends the existing timeframes for public participation in the approval of projects under the WHG pursuant to Section 2 para. 1 no.1, 3, 4 and 5 LNGG for which no EIA is required, from six weeks to two weeks. The plan shall be made available for inspection for a period of <u>at least one week.</u> Anyone whose interests are affected by the project may raise objections to the plan <u>up to one week</u> after the end of the display period (Section 7 sentence 1 no. 2 LNGG). The competent authority then may hold a hearing if it considers this to be necessary (Section 7 sentence 1 no. 3 LNGG).

If a plan on display is to be amended, anyone whose interests are affected by the project for the first time or to a greater extent than before may submit comments and raise objections to the plan <u>up to one week</u> after notification of the amendment (Section 7 sentence 1 no. 6 LNGG). A plan amendment covers modifications to the planning, as long as these are not so far-reaching that they result in a new project.[4]

b. EnWG

Section 8 para. 1 sentence 1 no. 1 lit. a -b, d LNGG amends the existing timeframe for public participation in the approval of projects under the EnWG pursuant to Section 2 para. 1 no. 3 LNGG, for which no EIA is required, from six weeks to two weeks. The plan for pipelines connecting LNG plants to the transmission network is to be displayed for a period <u>of one week</u> (Section 8 para. 1 sentence 1 no. 1 lit. a LNGG). Objections can only be raised <u>up to one week</u>

[4] Schoch/Schneider/Weiß, 3. EL August 2022, VwVfG § 73 marginal no. 359.

after the expiry of the display period (Section 8 para. 1 sentence 1 Nr. 1 lit. b LNGG). The competent authority may hold a hearing if it considers this to be necessary (Section 8 para. 1 no. 1 lit. c LNGG). If a plan on display is to be amended anyone whose interests are affected by the project for the first time or to a greater extent than before may submit comments and raise objections to the plan up to one week after notification of the amendment (Section 8 para. 1 sentence 1 no. 1 lit. d LNGG).

These changes do not apply to connecting pipelines with a length of more than 40 kilometers and a diameter of more than 800 millimeters (Section 8 Abs. 1 Nr. 1 in connection with Section 8 para. 1 no. 1a LNGG) and not to gas pipelines pursuant to Section 2 para. 1 no. 6 LNGG (Section 8 para. 1 sentence 2 LNGG).

b) Provisions of the Convention with which non-compliance is alleged

As regards public participation in permitting procedures under the scope of the LNGG, the communication alleges non-compliance with Art. 6.2 and 6.3 AC.

i. Scope of Art. 6.1 AC – LNG connection pipelines

Other than most LNG projects listed in Section 2 para. 1 and 2 LNGG, LNG connection pipelines under the scope of Section 8 para. 1 no. 1 LNGG do not fall under the scope of Art. 6.1 lit. a AC. No. 14 of Annex I only applies to pipelines for the transport of gas with a diameter of more than 800 mm and a length of more than 40 km. Section 8 para. 1 sentence 1 no. 1 LNGG does only apply to planning approval decisions for LNG connection pipelines that do have a diameter of more than 300 millimeters (Section 43 para. 1 sentence 1 no. 6 EnWG) but are also below the threshold of a length of more than 40 kilometers and a diameter of more than 800 millimeters.

However, these pipelines fall under Art. 6.1 lit. b AC, since they may have a significant effect on the environment. This results from the fact that under national law construction and operation of LNG connection pipelines from a length of less than 5 km and a diameter of more than 300 mm require a site-specific screening of the individual case. Pipelines from a length of 5 km to 40 km and a diameter of more than 300 mm require a general screening of the individual case (no. 19.12 of the Annex 1 to the UVPG). Such obligations indicate a significant effect of these pipelines on the environment. Since national law does provide for such screening decisions, Germany has determined that these activities may have a significant effect on the environment according to Art. 6.1 lit. b AC.

ii. Art. 6.2, 6.3 AC

The LNGG shortens timeframes for public participation from six /eight weeks to two weeks. This constitutes a violation of Art. 6.3 and 6.2 AC.

Art. 6.3 AC requires that the public participation procedures shall include reasonable timeframes for the different phases, allowing sufficient time for the public to prepare and participate effectively during the environmental decision-making. This includes time for the public to digest the information provided in the notification according to paragraph 2, time to seek additional information from the public authorities identified in the notification, time to examine information available to the public, time to prepare for participation in a hearing or commenting opportunity and time to participate effectively in those proceedings.[5]

[5] AC Implementation Guide, p. 142.

In previous findings, the Committee has never considered two weeks to be a reasonable timeframe, they rather indicate that a minimum of 20 to 30 days is needed for public participation, depending on the project:

A period of only 10 working days to become acquainted with the documentation, including the EIA report, and to prepare to participate in the decision-making process concerning a major landfill fell short of the requirement under Art. 6.3 AC.[6]

In another finding the Committee concluded that a period of 20 days could not be considered reasonable, in particular if such period includes days of general celebration in the country.[7] Concerning a National Renewable Energy Action Plan, the Compliance Committee found that two weeks was a very short and unreasonable period of time for the public to prepare and participate effectively.[8]

In contrast, a period of approximately six weeks for the public to review the documents and prepare for the review, and then a further consecutive 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed opinion was long enough for the public concerned to participate effectively.[9] For a nuclear power plant, the Committee found that 60 days for the public to comment on the EIA documentation and 43 days to comment on the EIA expert report were sufficient to meet the requirements of Art. 6.3 AC.[10] In another case, 19-25 working days to prepare and provide comments on the EIA report for a 400 kV, 1000 MW overhead power line over 50 km length were considered reasonable.[11]

Art. 6.2 AC requires the State Parties to inform the public concerned early in an adequate, timely and effective manner i.e. in a way that "ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate".[12] Moreover, the information must also be given timely in the sense that it allows for the effective and early public participation set down in Art. 6.4 AC.[13]

The Committee has decided that a timeframe of at least 30 days between the public notice and a hearing in the decision-making procedure guaranteed an information in a timely manner,[14] while a period of "one week to examine the EIA documentation relating to a mining project is not early notice in the meaning of Art. 6.2 AC, because it does not allow enough time to the public concerned to get acquainted with voluminous documentation of a technical nature and to participate in an effective manner."[15]

These findings can merely be general guidelines. Since the Compliance Committee noted that the requirement to provide "reasonable timeframes" in Art. 6.3 AC, implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. Thus, a

[6] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 70.
[7] ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 92.
[8] ACCC/C/2010/54 (European Union), ECE/MP.PP/C.1/2012/12, para. 83.
[9] ACCC/C/2007/22 (France), ECE/MP.PP/C.1/2009/4/Add.1, para. 44.
[10] ACCC/C/2012/71 (Czechia), ECE/MP.PP/C.1/2017/3, para. 86.
[11] ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 106.
[12] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 67.
[13] AC Implementation Guide, p. 136; ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 65 ff.
[14] ACCC/C/2009/37 (Belarus), ECE/MP.PP/2011/11/Add.2, para. 89.
[15] ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 67.

timeframe which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project.[16]

LNG terminals and connected infrastructure are major complex projects. The complexity stems from the highly technical documentation and from the complex environmental impacts. The combustion of imported LNG and the upstream GHG emissions from LNG will contribute significantly to global climate change. The LNGG allows the import and combustion of LNG for a long period of time (until 2044). LNG terminals will lead to increased natural gas production and the construction of LNG export terminals. LNG terminals in Germany are therefore also responsible for various environmental and specifically climate impacts in the upstream supply chain (See Annex 2 for more details).

During the two-week timeframe, the public would have to review all the information, but may also have to seek additional information, prepare objections, and write and submit the objections. Since the public authority is not required to hold a public hearing and since the approval of an early start should be carried out without public participation (Section 5 para. 1 sentence 4, Section 7 sentence 4 of the LNGG) it may be the only opportunity for the public to comment and raise objections.

The exemption from the obligation to carry out an EIA leads to a further complication with regard to effective public participation. This is because the documents must be specially prepared for the public as part of an EIA. If an EIA is required, there will be additional information like the EIA report as well as reports and recommendations relevant to the decision (Section 19 para. 1 UVPG). Those can be, for example, comments already received from authorities or recognized associations at the time of interpretation or expert opinions commissioned by the competent authority on the project.[17] It can include traffic forecasts and expert reports, e.g. expert reports on the effects of a project on surface waters or groundwater bodies.[18] Without an EIA, expert reports are still provided for in the permitting processes, but no EIA report has to be submitted. This makes it more difficult to read and understand the information, as the EIA report contains a description of all the environmental impacts of a project, including the interplay between protected assets and a generally understandable, non-technical summary of the EIA report is not provided for. This non-technical summary is very important for the accessibility of the information for the general public.

According to Section 4 para. 4 LNGG, the public will instead only receive for a period of four days: the draft of the authorization decision including the justification, the essential application documents including the documents presenting the essential effects of the project on the environment and the reasons for granting the exemption pursuant to Section 4 para. 1 LNGG from the requirements of the UVPG. Neither this information, nor the information provided for in the remaining participation processes according to the BImSchG, WHG and EnWG can compensate the lack of information due to the exemption of an EIA. Furthermore, the timeframe of four days to get access to these documents is extremely short. It is important to acknowledge that the obligation to conduct an EIA is not waived due to the lack of significant environmental impact but despite it.

Therefore, it is indispensable that the public has enough opportunity to consider and understand the existing significant environmental impact of these projects. This makes it necessary for the public to have even more time to seek additional information.

[16] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 69.
[17] Schink/Reidt/Mitschang/Dippel, 2. Aufl. 2023, UVPG § 19 marginal no. 23.
[18] BeckOK VwVfG/Kämper, 61st ed. 1.10.2023, VwVfG Section 73 marginal no. 34.

Planning documents and additional information for these projects are voluminous and complex. For all LNG terminals approved under the LNGG to date, the documents have consisted of several hundred and in some cases even of thousands of pages. For example, the application for the immission control approval for the FSRU in Lubmin had 1132 pages, the one for the FSRU in Mukran had 2193 pages, the one for the FSRU in Stade 1560, the one for the FSRU in Wilhelmshaven (Voslapper Groden Nord 2) had 4286 pages. Furthermore, the highly technical and complex documents are difficult to understand.

It should also be noted that the German public did not have much experience with LNG terminals. Prior to 2022, only in one case there were considerations in Germany to establish its own LNG infrastructure. The only informal and voluntary participation process, two evenings to explain and discuss the project at an early stage, was taking place in February 2019. Apart from this, there have been no public consultations.

Two weeks are not sufficient to get acquainted with the voluminous documentation of the respective terminals and pipelines, so that the public information during two weeks is neither “timely” nor “effective” in the sense of Art. 6.2 AC. Moreover, two weeks do not constitute a reasonable timeframe in the meaning of Art.6.3 AC.

The same applies to the short timeframes for plan amendments pursuant to Section 7 sentence 1 no. 6 LNGG and Section 8 para. 1 sentence 1 no. 1 lit. d LNGG, which are also a violation of Art. 6.1 AC in conjunction with no. 22 of Annex I. Because of the same reasons explained above, one week instead of two weeks is not enough time for the public to comment on plan amendments.

c) Nature of alleged non-compliance

The communicant alleges a failure of specific legislation. Section 5 para. 1 sentence 1 no. 1 – 2 LNGG, Section 7 sentence 1 no. 1, no. 2 and no. 6 LNGG, Section 8 para. 1 sentence 1 no. 1 lit. a -b, d LNGG do shorten timeframes of public participation.

2. No public participation in the preparation of the LNGG

a) Facts

The Federal Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Klimaschutz, BMWK) drafted the LNGG as a response to the Russian invasion of Ukraine on 24 February 2022. It dates back to 9 May 2022 and was only leaked to environmental organizations in an informal manner on the same day. The German Bundestag passed the law ten days later, on 19 May 2022. Hence, the law was directly submitted to the Bundestag without prior public participation.

Section 47 para. 3 of the Joint Rules of Procedure of the Federal Ministries (Gemeinsame Geschäftsordnung der Bundesministerien; GGO) determines that draft legislation is to be submitted to relevant central and general associations as well as expert groups as early as possible. For further information on the legal regime and practice by the ministries, the Communicant refers to Communication ACCC/C/2023/203.

b) Provisions of the Convention with which non-compliance is alleged

As regards public participation in the first drafting of the LNGG, the communication alleges non-compliance with Art. 8 AC. Neither was the draft LNGG made publicly available nor was the public given the opportunity to comment on the draft.

Art. 8 AC states that each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

Before the LNGG was adopted by the German Bundestag, this legislation was prepared by an executive body, specifically the BMWK. In drafting the act, the BMWK acted in its executive capacity with regard to a "generally applicable legally binding normative instrument." The public participation in question therefore falls within the scope of Art. 8.

The Committee found that "preparation of legislation by executive bodies to be adopted by national parliaments" are included in the provision of Art. 8 AC.[19] According to the Committee, "nothing in the title or text of article 8 of the Convention [suggests] that it does not include the preparation of legislation by executive bodies to be adopted by national parliaments.[20] Art. 8 relates "to any normative acts."[21] Public authorities, including governments, "do not act in a legislative capacity when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation.[22]

Art. 8 obliges the Parties to "strive to promote effective public participation at an appropriate stage". This expresses an obligation of a somewhat "softer" nature than the obligations set out in Art. 6 and 7, meaning that the Parties must show that they make efforts to provide for public participation in the preparation of legislation and other generally applicable legally binding normative instruments.[23] In comparison with Art. 6 and 7, Art. 8 gives the parties greater leeway in deciding how to fulfil this obligation."[24] The phrase "as far as possible" acknowledges that there is an element of politics in law-making that Parties will need to take into consideration.[25]

While the specific modalities of public participation in the preparation of rules are not prescribed by the Convention, it is mandatory for the Parties to ensure that the outcome of public participation is taken into account as far as possible.[26] This provision establishes a relatively high burden of proof for public authorities to demonstrate that they have taken into account public comments in processes under Art. 8.[27] The Convention sets forth minimum requirements on public participation enshrined by Art. 8 AC, parties are then left with some discretion as to the specificities of how public participation should be organized.[28] Even if the Committee did not state it explicitly so far, it becomes clear from its previous findings that the party cannot exclude public participation altogether.

Even if an emergency may lower the standard of effort required of a party, the party would still have to make best efforts measured against that lower standard. The explanatory memorandum of the LNGG does not explicitly mention any reasons for not carrying out a public participation in the drafting of the LNGG. It does neither mention the participation process nor an exemption from such a process. It is not apparent that any attempt was made to involve the public. Russia's invasion of Ukraine on 24 February 2022 might have justified the acceleration of timeframes for public participation, i.e. through shortening the comment period. Not consulting the public at all is however neither in line with the purpose of Art. 8 AC nor can it be

[19] ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 95 ff.
[20] ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 95.
[21] ACCC/C/2009/44 (Belarus), ECE/MP.PP/C.1/2011/6/Add.1, para. 61.
[22] ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 101.
[23] AC Implementation Guide, p. 181.
[24] ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 103.
[25] AC Implementation Guide, p. 181.
[26] AC Implementation Guide, p. 185.
[27] AC Implementation Guide, p. 185.
[28] ACCC/C/2010/53 (United Kingdom), ECE/MP.PP/C.1/2013/3, para. 84.

justified by the specific political situation. A short public participation period would not have jeopardized the national energy security. Especially, when scientific studies already pointed out that these terminals were not necessary for energy security.[29]

c) Nature of alleged non-compliance

The communicant alleges a general failure as to the non-compliance of the Federal Republic of Germany in its involvement of associations regarding the draft of the LNGG. The German government did not make sufficient efforts to allow the public to participate in the process. It thereby violated Art. 8 AC.

3. Statutory determination of need (Section 3 LNGG)

a) The Facts

In order to expedite the planning and approval process, the legislator has created a provision in Section 3 of the LNGG which establishes energy industry necessity and the need/demand of the LNG infrastructure to ensure the supply of gas to the general public for all of the projects pursuant to Section 2 para. 2 LNGG in connection with the Annex to Section 2 LNGG.

In national law, an infrastructure project is only permitted if there is a public need for it, which is normally assessed by an authority for the individual project as part of the permitting process (i.). In exceptional cases, this need is determined by the legislator (ii.).

i. Determination of need in administrative procedures

In the usual administrative planning approval procedure, the authorities generally check whether the plan is justified. This means that the authority examines whether the respective project is objectively necessary and reasonably required for reasons of public welfare measured against the objectives of the respective law and whether the respective project meets the statutory planning objectives and whether there is a need for its implementation.[30] The plan justification relates to the project as such (the "whether at all").[31] The exact location of the project in the area, and thus, for example, the choice between possible routes, is only decided by weighing up all the interests involved.[32]

The planning authority must forecast the demand. To do so, it must select a suitable specialized method, correctly determine the facts on which its forecast is to be based and provide plausible reasons for its findings.[33] In the judicial review of the planning approval decision., the plaintiff can ask the court to examine the plan justification. The court will then examine whether the planning authority has properly developed the forecast with the information available to it at the time, taking into account the circumstances relevant to it.[34]

ii. Statutory determination of need

Section 3 sentence 2 LNGG is a statutory determination of need and replaces the authorities' examination of the planning justification for the projects listed in the Annex (to Section 2 LNGG).[35] This does not include the size or capacity of the respective LNG terminals but

[29] DIW, Energieversorgung in Deutschland auch ohne Erdgas aus Russland gesichert, in: DIW aktuell, no. 8, 08.04.2022; [Artelys: Briefing. Does phasing-out Russian gas require new gas infrastructure?]
[30] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 33, 36.
[31] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 38.
[32] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 38.
[33] BVerwG, Urteil vom 04.04.2012 – 4 C 8.09 u.a., Rn. 59 with further references.
[34] BVerwG, Urteil vom 19.3.2003 - 9 A 33/02, NVwZ 2003, 1121.
[35] BVerwG, Beschluss vom 22.06.2023 - 7 VR 3.23 -, Rn. 24.

determines the question of "whether at all" these terminals are necessary, and in which locations.

Statutory determinations of need are provided for several times in German sectoral planning law. For example, communication ACCC/C/2020/178 deals with the German national grid extension on the federal level. In that process with three phases, there will be an assessment and determination of the demand for grid capacity with the help of demand and supply scenarios. A similar extensive procedure applies to the Federal Transport Infrastructure Plan. These processes also include drawing up a plan pursuant to Art. 7 AC, they do include public participation.

Unlike for the national grid extension or federal transport infrastructure, there is no legal obligation in national law to draw up a plan or program to determine the demand for LNG terminals with the help of scenarios. Therefore, there was no process for assessing and determining the demand for these terminals and connected infrastructure. There was also no public participation as regards the demand of the LNG terminals.

b) Provisions of the Convention with which non-compliance is alleged

As regards the determination of needs, the communication alleges non-compliance of the Federal Republic of Germany with Art. 7/Art. 6 AC, Art. 6.4 AC and 9.3 and 9.4 AC.

i. Art. 7 AC

By not participating the public during the drafting of the determination of need, the party concerned violated Art. 7 AC/Art. 6 AC.

The determination of need in Section 3 sentence 2 LNGG is either a decision pursuant to Art. 6 or 7 AC. In the communicant's opinion, the provision has the legal effects of a plan or programme in the sense of Art. 7 AC and as such did require public participation. Art. 7 AC states that each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, Art. 6, para. 3, 4 and 8, shall be applied.

Art. 7 of the Convention does not define a "plan", "programme" or "policy" relating to the environment. When determining how to categorize a document under the Convention, the document's substance, legal functions and effects must be evaluated, rather than its label in domestic law.[36] A typical plan or programme: (a) is often regulated by legislative, regulatory or administrative provisions; (b) has the legal nature of a general act (often adopted finally by a legislative branch); (c) is initiated by a public authority, which (d) provides an organized and coordinated system that sets, often in a binding way, the framework for certain categories of specific activities (development projects), and which (e) usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.[37] These characteristics of a plan or programme are those that are "typical". They are neither exhaustive nor elements that must each be satisfied in order to come within the scope of Art. 7.[38]

A decision having the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project will rather constitute

[36] ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para. 29; ACCC/C/2014/105 (Hungary), ECE/MP.PP/C.1/2021/16, para. 126.
[37] ACCC/C/2014/105 (Hungary), ECE/MP.PP/C.1/2021/16, para. 127; AC Implementation Guide, p. 124.
[38] ACCC/C/2014/105 (Hungary), ECE/MP.PP/C.1/2021/16, para. 130.

a permit decision under Art. 6,[39] whereas a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not) would link it more closely with Art. 7.[40] Art. 8 rules differ from decision-making under Art. 6 in that they result in directions that apply equally to all similarly situated persons, not only to those involved in the particular matter before the authority. They differ from planning and policymaking under Art. 7 in that they create binding legal obligations.[41]

The statutory determination of need anticipates part of the authorization procedure. Normally, under national law, determinations of need would be carried out either by the competent authority as part of the permitting process (and as such be part of an Art. 6 AC decision), or through a demand assessment procedure, which would involve the preparation of a plan and then culminate in a legislative act by the federal parliament (being part of an Art. 7 AC decision). If the legislator takes this decision upon itself, it does not act in a legislative capacity. In the opinion of the communicant, Section 3 sentence 2 LNGG sets a binding framework for very specific activities and constitutes an organized and regulated system which does have a lot of influence on the individual permitting decision. It determines the existence of demand of a list of specific LNG projects in designated locations. Therefore, there are good arguments in favor of this being a decision under the scope of Art. 7 AC. However, as the determination of need is anticipating part of the authorization procedure and regularly is a decision being taken by the public authority as part of the decision to permit, it is left to the Committee to decide whether the determination of need in Section 3 sentence 2 LNGG is as an Art. 6 AC or Art. 7 AC decision.

Either way, public participation is required in the decision-making process. As it was not provided in drafting Section 3 sentence 2 LNGG, the party concerned violated Art. 6/Art. 7 AC.

ii. Art. 6.4 AC

Because of Section 3 sentence 2 LNGG, public participation in the permitting process will not deal with the question of whether a need for the LNG terminal exists. By the time the public is informed and able to participate in the permitting process pursuant to the LNGG, all options, specifically the "zero option", won't be open anymore. Since later public participation will be ineffective, the LNGG violates Art. 6.4 AC.

Art. 6.4 AC states that "Each party shall provide for early public participation, when all options are open and effective public participation can take place." It is not enough for the public to be able to comment at a later stage on how the environmental impact of the installation could be mitigated, when precluding the public from having any input on the decision on whether the installation should be there in the first place. [42] In a tiered decision-making procedure, the requirement for "early public participation, when all options are open" (…) does imply that members of the public should be able in their comments to challenge the options put forward in the draft plan and to propose other options, including the zero option.[43] The Committee considers the term "options" used in Art. 6.4 AC to be wider than the term "alternatives studied" found in Art. 6.6 lit. e AC. "Options" refers to all the possible courses of action that the decision-maker may choose or the public may propose, including the "zero option". The "alternatives studied" are those options that were elaborated and studied by the applicant.[44]

[39] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 58.
[40] ACCC/C/2005/12, (Albania), ECE/MP.PP/C.1/2007/4/Add.1, para. 68.
[41] AC Implementation Guide, p. 182.
[42] ACCC/C/2005/12 (Albania), ECE/MP.PP/C.1/2007/4/Add.1, para. 79.
[43] ACCC/C/2014/100 (United Kingdom), ECE/MP.PP/C.1/2019/6, para. 84.
[44] ACCC/C/2014/100, United Kingdom, ECE/MP.PP/C.1/2019/6, para. 101.

Section 3 sentence 2 LNGG means that the planning approval authorities are no longer allowed to examine whether there is a demand for the realization of the respective terminal.[45] With regard to LNG connection pipelines, the authority would also no longer be allowed to examine whether the energy industry necessity exists, i.e. whether the connection pipelines close an existing supply gap or serve the security of supply.[46] The plan justification relates to the project as such (the "whether at all").[47] The decision that the LNG terminals are objectively necessary and reasonably required for reasons of public welfare or whether the respective project meets the statutory planning objectives and whether there is a need for its implementation,[48] was already taken. Furthermore, the effect of the statutory determination of need is even greater than the plan justification in the context of a typical administrative decision. The planning approval authority must still carry out a planning assessment between all affected public and private interests which includes the assessment of the different alternatives.[49] However, the public authority must include the statutory determination of need in its assessment as an important public interest.[50] The statutory determination of need – other than the plan justification – has an "alternative-limiting" effect at the approval level.[51]

The authority would still have to decide against the implementation of the project if concerns that cannot be overcome in the assessment were to stand in the way of a project.[52] However, this is rather a formal possibility. In the practice of decision-making this never or hardly ever happens. The Committee already decided that it is not sufficient that there is a formal possibility, de jure, for the authority to turn down the application. If the practice is such that, despite the possibility of the permit authority to reject an application, this never or hardly ever happens, then de facto all options would not be open at the stage in question.[53]

In another case, the Committee found that "if a particular tier of the decision-making process has no public participation, then the next stage that does have public participation should provide the opportunity for the public to also participate on the options decided at that earlier tier. [...] A multi-stage decision-making procedure in which certain options are considered at a stage without public participation and where no subsequent stage provides an "opportunity for the public to also participate on the options decided at that earlier tier" would be incompatible with the Convention."[54] In the present case, there is no compensation for the lack of public participation at the later tier as regards demand and location. Public participation in the permitting process will not cover these questions since the statutory determination of need is legally binding. The public authority would not be able to take due account of comments and objections regarding the demand and location and therefore, of the outcome of the public participation in the decision-making according to Art. 6.8 AC.

The Committee found in another case that, by limiting the options in practice for the location of a border crossing point for an overhead power line by setting that location through inter-State consultations before the public participation procedures had been concluded, the Party concerned precluded the possibility for the public to participate when all options on the crossing

[45] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 33, 36.
[46] BeckOK EnWG/Riege, 5. Aufl. 1.12.2022, EnWG § 43 marginal no. 88.
[47] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 38
[48] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 33, 36.
[49] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 45.
[50] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 44.
[51] BVerwG, Urteil vom 09.02.2017 - 7 A 2/15 -, Rn. 411.
[52] Stelkens/Bonk/Sachs/Neumann/Külpmann, 10. Aufl. 2022, VwVfG § 74 marginal no. 45; BVerwG, Urteil vom 04.05.2022 - 9 A 7/21 -, Rn. 51.
[53] ACCC/C/2007/22 (France), ECE/MP.PP/C.1/2009/4/Add.1, paras. 38-9.
[54] ACCC/C/2012/71 (Czechia), ECE/MP.PP/C.1/2017/3, paras. 91-92.

point were open and thus failed to comply with Art. 6.4 of the Convention.[55] The statutory determination of need in Section 3 sentence 2 LNGG is similar to those inter-State consultations, setting the location and the requirement of the terminals without the possibility for the public to participate.

Furthermore, the possibility of the public to participate at an early stage of decision-making, when all options are open, on whether the proposed activity should go ahead at all, has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact.[56] The opportunity for the public to provide input into the decision-making on whether to commence use of such a technology should not be provided only at a stage when there is no realistic possibility not to proceed.[57] As explained above, LNG terminals are a technology that was not previously applied in Germany. Also, LNG terminals are of high risk since there is a risk of the gas igniting during liquefaction in the LNG terminal and when the cryogenic leakage of the cryogenic liquid from its transport or storage container. A large escape of LNG via water leads to vaporization, resulting in the formation of a flammable cloud. This results in the formation of a flammable cloud. The gas after regasification of the LNG is also explosive.

Section 3 sentence 2 LNGG prevents early public participation, when all options are open and effective public participation can take place. Therefore, Germany violated Art. 6.4 AC.

iii. Art. 9.3 AC and 9.4 AC

The statutory determination of need pursuant to Section 3 sentence 2 AC must allow access to judicial review pursuant to Art. 9.2 or Art. 9.3 AC. The remedies must also be adequate and effective pursuant to Art. 9.4 AC. As the determination of need is a legislative act, (effective) judicial review is not possible. This constitutes a violation of Art. 9.2/9.3 AC and Art. 9.4 AC.

According to Art. 9.3 AC, each Party shall ensure that, where they meet the criteria, if any, laid down in its 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 its national law relating to the environment.

The determination of need in the LNGG is an act by a public authority. The legal nature of a decision must be determined on a contextual basis, taking into account the legal effects of the act, while its label under the domestic law of the Party concerned is not decisive.[58] A parliament may act as a public authority under the Convention when it is not acting in its legislative capacity, for example when authorizing an activity or project.[59] As shown above, Section 3 sentence 2 LNGG has the legal nature of a "plan or programme" in the sense of Art. 7 AC and as such is to be classified as an act by a public authority. As such, it must be possible for the public to submit this decision to a judicial review under Art. 9.3 AC. Otherwise, the mere choice of the form of the act would decide on the access to judicial review and remove it from the scope of application of Art. 9 AC. This would not be in line with the purpose of the Convention to ensure wide access to justice.

55 ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, paras. 112-115.
56 UNECE, Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention, ISBN 978-92-1-117089-4, November 2015, para. 17.
57 ACCC/C/2006/16 (Lithuania),ECE/MP.PP/2008/5/Add.6, para. 74.
58 ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para. 29; ACCC/C/2006/17 (European Community), ECE/MP.PP/C.1/2008/5/Add.10, para. 42; ACCC/C/2011/61 (United Kingdom), ECE/MP.PP/C.1/2013/13, para. 52.
59 ACCC/C/2011/61 (United Kingdom), ECE/MP.PP/C.1/2013/13, para. 54.

Furthermore, Section 3 sentence 2 LNGG might contravene provisions of national law relating to the environment, specifically national law relating to climate change. Section 13 para. 1 of the Federal Climate Change Act (Bundes-Klimaschutzgesetz = KSG) is a national law relating to the environment. Section 13 para. 1 KSG regulates that bodies discharging public duties shall give due consideration to the purpose of the KSG and to the targets set for its implementation. This means that public authorities and all other public bodies must also take into account the national climate targets in Section 3 KSG in their decision-making. It does not apply to legislation, but to plans and permitting decisions, when there is a decision-making scope. If Section 3 sentence 2 LNGG would be a plan or part of the permitting decision, Section 13 para. 1 KSG would apply.

There is no indication that the party concerned took the climate protection targets into account when drawing up Section 3 para. 2 LNGG. Since there are calculations that cast significant doubt on the achievement of the climate targets with LNG terminals, it is likely that there is a violation of Section 13 para. 1 KSG. If Germany were to use 100% of the capacity of eleven LNG terminals in the LNGG, CO_2 emissions from the combustion of the imported gas would account for 140 $MtCO_2$ per year.[60] This would be a third of the greenhouse gas emissions permissible under the target path in 2030 under the KSG (Annex 2 to Section 4 KSG). This does not even include CO_2 and fugitive methane emissions from production and transport.[61]

This shows that it has to be possible to subject the determination of need in the LNGG to judicial review under Art. 9.3 AC. However, there is no or at least not an effective judicial review available in the sense of Art. 9.4 AC. The Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) would only review compliance with formal constitutional law and not the compliance with environmental law.[62] Furthermore, an incidental review does also not provide for a full review of all environmental rules. According to the Federal Administrative Court (Bundesverwaltungsgericht; BVerwG), objections to the existence of a demand in court and official proceedings are generally excluded if there is a binding statutory determination of need.[63] The courts can only refuse the determination of need or justification if Section 3 sentence 2 LNGG violates constitutional principles.

The BVerwG only assumes that the limits of legislative discretion have been exceeded "if the determination of need is manifestly unobjective, i.e. if there is clearly no need for the project that could justify the legislator's assumption".[64] According to the BVerwG, this is only the case if there is no need whatsoever with regard to the existing or expected future need or if the circumstances have changed so fundamentally since the legislator's decision on need that the intended planning objective could not even be remotely achieved under any circumstances.[65] To this date, the BVerwG has never found this condition to be met. As regards LNG projects, there are only few court decisions yet. The Court's reasoning in the only decision so far to mention the determination of need is very brief and merely refers to the explanatory memorandum. This summarizes quite well the Court's general approach to statutory determinations of need:

"The legislator considers the projects covered by the needs assessment pursuant to Section 3 sentence 2 LNGG to be particularly necessary from an energy industry perspective in order to

[60] New Climate Institute, German LNG terminal construction plans are massively oversized, December 2022, S. 5f: The maximum total capacity of 73 bcm per year will be reached at the end of 2026, emitting 140 $MtCO_2$, the targeted emissions pathway in 2030 being 435 $MtCO_2$
[61] New Climate Institute, German LNG terminal construction plans are massively oversized, December 2022.
[62] ACCC/C/2016/137 (Germany) and ACCC/C/2020/178 (Germany)
[63] BVerwG, Urteil vom 28.04.2016 - 9 A 9.15 -, Rn. 53; BVerwG, Urteil vom 03.11.2020 - 9 A 7.19 -, Rn. 107; BVerwG, Urteil vom 04.05.2022 - 9 A 7/21-, Rn. 17.
[64] BVerwG, Beschluss vom 22.06.2023 - 7 VR 3.23, Rn. 25 with further references.
[65] BVerwG, Urteil vom 12.03.2008 – 9 A 3/06, Rn. 43.

guarantee security of supply and to create a diversified gas supply that is open to the future and that their realization is urgent (BT-Drs. 20/1742 p. 17). There are no indications that this assessment could be manifestly incorrect for the LNG pipeline in question here."[66]

This shows: the Court will not objectively scrutinize if the project is individually and objectively needed. While a court may review the approval decision's assumptions with regard to the demand for the project in question, it will not scrutinize the assumptions and weighing that leads to the demand assessment. The latter would also not even be possible for Section 3 sentence 2 LNGG, since there has been no preceding demand assessment procedure. Either there were no assumptions and weighing before drafting Section 3 sentence 2 LNGG or this information is not publicly available.

For more details, the communicant refers to Communication ACCC/C/2020/178 Germany, presenting the scope of judicial review, that also applies in the present case. However, there is a difference between these two communications: Other than in the present case, the determination of need in the Communication ACCC/C/2020/178 is preceded by a demand assessment procedure, which involves the preparation of a plan and a strategic environmental assessment according to the SEA directive. The BVerwG has recently decided that it reviews incidentally the compatibility of a plan adopted by formal law with the SEA Directive.[67] In the present case, however, there was no strategic environmental assessment, since the SEA directive does not apply. Hence, incidental review of the statutory determination of need is even more limited than in Communication ACCC/C/2020/178.

As a result, direct judicial review of the determination of need in relation to environmental law is not possible for individuals and environmental organizations and therefore the LNGG violates Art. 9.3 AC; indirect judicial review is ineffective and therefore Section 3 sentence 2 LNGG constitutes a violation of Art. 9.2 and 9.4 AC.

c) Nature of alleged non-compliance

This communicant alleges a failure of specific legislation and a general failure. The choice to pass the determination of need in the form of a law in Section 3 sentence 2 LNGG without providing for public participation and alternative ways for judicial review excludes the public from the possibilities to participate and to access a review procedure.

4. Limited judicial review because of exemption from EIA

a) Facts

Section 4 para. 1 LNGG stipulates that the authority responsible for the approval decision does not have to apply the UVPG to projects pursuant to Section 2 (1) numbers 1, 3, 4 and 5 LNGG if accelerated approval of the specific project is likely to make a relevant contribution to overcoming or averting a gas supply crisis. Section 4 (1) LNGG exempts the projects pursuant to Section 2 (1) numbers 1, 3, 4 and 5 LNGG of the obligation to carry out an EIA.

As is well known to the Committee, the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz; UmwRG) was amended in 2017. There, the legislator wanted to differentiate between the judicial review pursuant to Art. 9.2 and 9.3 AC, as is shown in the explanatory memorandum to the UmwRG 2017.[68] The distinction between acts and omissions that fall under Art. 9.2 AC or Art. 9.3 AC is made between Section 1 para. 1 sentence 1 no. 1 and 2 on the one hand (Art. 9. 2 AC) and Section 1 para. 1 sentence 1 no. 2a to 6 (Art. 9.3 AC) on the

[66] BVerwG, Beschluss vom 22.06.2023 – 7 VR 3.23, Rn. 25; BVerwG, Beschluss vom 12.09.2023, 7 VR 4.23, Rn. 26.
[67] BVerwG, Urteil vom 11.07.2019 – 9 A 13.18, Rn. 56.
[68] BT.-Drs. 18/9526, p. 23.

other hand. For admissibility of legal remedies against a decision pursuant to Section 1 para. 1 sentence 1 numbers 2a to 6 or against its omission, the association must assert the violation of environmental legislation (Section 2 para. 1 sentence 2 UmwRG). For the merits of the legal remedy the decision pursuant to Section 1 paragraph 1 sentence 1 numbers 1 and 2 or its omission must violate legal provisions that are relevant to this decision, the decision pursuant to Section 1 para. 1 sentence 1 numbers 2a to 6 or its omission must violate environmental legislation that is relevant to this decision (Section 2 para. 4 UmwRG).

Section 1 sentence 1 no. 1 UmwRG includes authorization decisions for which, there may be an obligation to carry out an EIA. Without the LNGG, the projects pursuant to Section 2 para. 1 no. 1, 3, 4 and 5 LNGG would fall under the scope of Section 1 sentence 1 no. 1 UmwRG and therefore would be open to a judicial review pursuant to Art. 9.2 AC. However, since Section 4 para. 1 LNGG stipulates that the authority responsible for the approval decision does not have to apply the UVPG to projects pursuant to Section 2 para. 1 no. 1, 3, 4 and 5 LNGG if accelerated approval of the specific project is likely to make a relevant contribution to overcoming or averting a gas supply crisis, these projects do not fall under the scope of Section 1 sentence 1 no. 1 UmwRG but under the scope of Section 1 sentence 1 no. 5 LNGG.

As is illustrated by the BVerwG:

"(...) Projects of the type at issue here are also generally subject to a general preliminary assessment to determine whether an EIA is required (...) so that an EIA obligation within the meaning of Section 1 (1) sentence 1 no. 1 UmwRG may exist. (...). Subsequently, however, the LNG Acceleration Act came into force on June 1, 2022 (...). According to Section 4 para. 1 LNGG, the UVPG does not apply here, so that neither an EIA nor a preliminary EIA assessment had to be carried out (...) and has the consequence that the scope of application of the [UmwRG] pursuant to Section 1 para. 1 sentence 1 no. 5 UmwRG is opened (...)."[69]

b) Provisions of the Convention with which non-compliance is alleged

As regards the exemption of the EIA, the communication alleges non-compliance with Art. 9.2 and 9.4 AC

Section 4 para. 1 LNGG exempts projects pursuant to Section 2 para. 1 no.1, 3, 4 and 5 LNGG in a generalized manner of the judicial review under Art. 9.2 AC. Due to the exemption, decisions pursuant to Art. 6.1 AC are subject to the judicial review regime of Art. 9.3 AC. This constitutes a violation of Art. 9.2 AC.

Art. 9.2 AC states that "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned [...] have access to a review procedure before a court of law [...] to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 [...]".

The Committee already stated that review procedures according to Art. 9.2 AC should not be restricted to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection of the environment", as there is no legal basis for such limitation in the Convention.[70]

This is however exactly what is happening as regards Section 4 para. 1 LNGG as it is interpreted by the BVerwG in conjunction with Section 1 sentence 1 no. 1 UmwRG. Decisions on projects pursuant to Section 2 para. 1 no. 1, 3, 4 and 5 LNGG will fall – in most cases – under the scope

[69] BVerwG, Urteil vom 22.06.2023 – 7 A 9.22, Rn. 17 f.
[70] ACCC/C/2008/31, Germany, ECE/MP.PP/C.1/2014/8, para. 78.

of Art. 6.1 lit. a AC. With Section 4 para. 1 LNGG, projects pursuant to Section 2 para. 1 no. 1, 3, 4 and 5 LNGG do not fall under the scope of Section 1 sentence 1 no. 1 UmwRG but no. 5. Decisions pursuant to Section 1 para. 1 sentence 1 no. 5 UmwRG must violate environmental legislation that is relevant to this decision (Section 2 para. 4 UmwRG). Therefore, decisions in the scope of Art. 9.2 AC must violate environmental legislation that is relevant to this decision.

c) Nature of alleged non-compliance

The communicant alleges a failure of specific legislation. The combination of Section 4 para. 1 LNGG, Section 1 sentence 1 no. 1 UmwRG, Section 2 para. 1 sentence 2 and para. 4 UmwRG directly restricts access to a judicial review.

5. No public participation in preliminary decisions

a) Facts

Before the licensing authority issues the permit in question, it is possible for the developer to apply for the approval of an early start (approval). This is a provisional permit that allows the commencement of certain activities even before the application has been decided in the main proceedings. This is possible in a procedure for the granting of an Immission control approval for construction or measures required to test the operational capability of the installation (Section 8a BImSchG), in the procedure for an approval under water law for water uses or watercourse development (Sections 17 and 68 WHG).

Pursuant to the LNGG, the competent authority may authorize the approval for projects pursuant to Section 2 para. 1 no. 1 LNGG under the BImSchG even before the complete application documents are available if no EIA has to be carried out for these projects, it has not yet been possible to prepare the missing documents in view of the urgency of the project, and a decision in favor of the applicant can be expected even without taking the missing documents into account (Section 5 para. 1 sentence 1 no. 5 LNGG). If these conditions are met, the licensing authority shall permit the early start **before public participation** (Section 5 para. 1 sentence 4 LNGG). The same applies to decisions under the WHG on projects pursuant to Section 2 para. 1 no. 1, 3, 4 and 5 (Section 7 sentence 1 no. 5, sentence 4 LNGG).

b) Provisions of the Convention with which non-compliance is alleged

Since Section 5 para. 1 sentence 4 LNGG and Section 7 sentence 1 no. 5, sentence 4 LNGG are exempting approvals of an early start from the public participation requirement, the LNGG violates Art. 6.1 AC and Art. 6.4 AC.

Art. 6.1 AC only applies to decisions on whether to permit proposed activities listed in annex I or which may have a significant effect on the environment. Decisions pursuant to Art. 6 AC are "in other words, decisions which permit a particular proposed project, activity or action to go forward".[71] It is clear from past findings that the question of whether or not a particular decision can be considered a 'decision to permit' must depend on the legal effects of the decision.[72]

The question is: Does the decision confer any right to construct, operate or use the site?[73] Does the decision have the function of authorizing a project to be located in a particular site and setting the basic parameters of the project?[74] The ACCC has already stated that it would not meet the requirements of the Convention if there are other environment related permitting decisions with regard to the activity in question for which no full-fledged public participation

[71] AC Implementation Guide, p. 126.
[72] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 57.
[73] ACCC/C/2007/22 (France), ECE/MP.PP/C.1/2009/4/Add.1, para. 33.
[74] ACCC/C/2016/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 57.

process is foreseen but which are capable of significantly changing the basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process.[75]

An Art. 6 decision is typically (a) an individual decision issued by a public authority, (b) usually upon an individual application by an applicant for a permitting decision (c) permitting a particular activity to be undertaken by the applicant, (d) in a specific place and under specific conditions, and (e) usually following the general requirements set by the plans or programmes setting the framework for such activities.[76]

The early start is an independent administrative act that precedes the approval procedure. In national law, the approval of an early start has no legally binding effect with regard to the granting of the (final) permit.[77] Nevertheless, depending on the specific approval, the public authority authorizes the developer to "go forward" and confers a (temporary) right to use the site and start construction, carry out measures for testing the operational capability or the use of water bodies or watercourse development. This means that individual construction steps, such as foundation work, but also the entire construction can be authorized.[78] Hence, there will be already a decision on the location of the project in a particular site, the approval sets the basic parameters of the project.

The Committee already found that the start of construction before public participation is not in conformity with the requirement of "early participation, when all options are open".[79] "For an activity likely to have a significant effect on the environment (…) it can never meet the requirement of Art. 6.4 AC for the decision to permit the activity to be taken after the activity has already commenced or the construction has taken place".[80] Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure.[81]

In national law, for the approval the measures taken must be reversible[82] and the risk of reversal must not unreasonably burden the further decision-making process.[83] It must be technically possible to reverse the measures; the extent to which investments made are devalued must also be taken into account.[84] It is sufficient for reversibility that the previous condition can be permanently and essentially restored.[85]

For public participation to be effective in those tiered decisions, it is important that the public has the opportunity to comment on the reversibility of the project. The public will often have special knowledge of local conditions and of the practical implications of proposed activities.[86] In the scope of application of the LNGG, far-reaching decisions are made in a very short period of time, which is the specific purpose of the law. In such cases, it is not possible to make a reliable forecast as to whether complex environmental impacts of a project can be reversed.

[75] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5, Add.6, para. 57.
[76] AC Implementation Guide, p. 124.
[77] BeckOK UmweltR/Enders, 68. Ed. 1.10.2023, BImSchG § 8a marginal no. 3.
[78] BeckOK UmweltR/Enders, 68. Ed. 1.10.2023, BImSchG § 8a marginal no. 8.
[79] ACCC/C/2004/2 (Kazakhstan), ECE/MP.PP/C.1/2005/2/Add.2, para. 25.
[80] ACCC/C/2013/90 (United Kingdom), ECE/MP.PP/C.1/2021/14, para. 94.
[81] ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 74.
[82] BVerwG, Urteil vom 30.04.1991 - 7 C 35/90.
[83] BVerwG, Beschluss vom 30.04.1991 – 7 C 35/90, NVwZ 1991, 994 (996).
[84] BVerwG, Beschluss vom 30.04.1991 – 7 C 35/90, NVwZ 1991, 994 (995).
[85] Jarass BImSchG, 14. Aufl. 2022, BImSchG § 8a marginal no. 6.
[86] AC Implementation Guide, p. 31.

There is a risk of de facto prejudging as measures could not be reversible in the end. Then, public participation in the permitting process would be too late, the public could no longer check that the authority has taken all precautions to ensure reversibility.

Exempting these decisions in the LNGG from public participation is a violation Art. 6.1 AC and Art. 6.4.

c) Nature of alleged non-compliance

The communicant alleges a failure of specific legislation. Section 5 para. 1 sentence 4 LNGG and Section 7 sentence 1 no. 5, sentence 4 LNGG exclude public participation at an early stage when all options are open and render later public participation ineffective.

V. Use of domestic remedies

According to paragraph 21 of the annex to decision 1/7, the Committee should also at all relevant stages take into account any available domestic remedy unless the application of the remedy does not provide for an effective and sufficient means of redress.

This Communication is directed at several legislative provisions. It does not aim to show violations of the AC in the specific planning and approval procedures which are subject to the legal regime of the LNGG. The information contained in this Communication on specific approval procedures is included only to highlight the consequences of the LNGG in practice. The problems concerning public participation do stem from the LNGG itself and not from the wrong application of the law by the public authorities.

Against the LNGG, there are no domestic remedies available. The only domestic remedy would be the abolishment or change of the wording of the provisions in question. Apart from a constitutional complaint to the BVerfG, there is no possibility to challenge a law in Germany.[87] In a constitutional complaint, the BVerfG only reviews the compatibility of a law with constitutional law.

Other environmental organizations have filed lawsuits and applications for interim injunctive relief against various LNG projects. There are only a few court decisions resulting from these lawsuits yet, all except two concern interim injunctive relief. In the communicant's view, a more detailed overview of those proceedings is superfluous since incidental judicial review concerning the specific planning and approval procedures does not provide a sufficient domestic remedy. Even if the Court did consider the LNGG regulations to be incompatible with the AC, the BVerwG could not decide to set aside or not apply the LNGG. Under national law, international law has the status of simple federal law and would therefore not have a higher priority,[88] furthermore the LNGG would have to be considered lex posterior.

Also, a reference to the Court of Justice of the European Union for a preliminary ruling on the compatibility of the provisions of the LNGG with the European Union Directives transposing the Convention does not constitute a domestic remedy since the claimant cannot require but only recommend the domestic court to request the ruling.[89]

[87] ACCC/C/2016/137 (Germany),ECE/MP.PP/C.1/2021/25, paras. 80 - 81.
[88] BVerfG, Beschluss vom 15.12.2015 – 2 BvL 1/12, BVerfGE 141, 1 Rn. 33.
[89] ACCC/C/2016/137 (Germany), ECE/MP.PP/C.1/2021/25, para. 82.

VI. Other international procedures

On 29th June 2023, the German environmental NGO Deutsche Umwelthilfe e.V. (DUH) submitted a communication to the Secretariat of the Espoo Convention Implementation Committee regarding a specific proposed LNG project in the Bay of Western Pomerania due to the lack of information and participation of the Baltic Sea littoral states, namely Poland, Denmark and Sweden, as well as the public in these countries despite the transboundary impacts.

VII. Confidentiality

The information of the communicant can be made transparent.

VIII. Supporting documentation

The following documents are attached to the Communication:

Annex 1 – Specific national laws (LNGG, BImSchG, WHG, EnWG, UVPG, VwVfG, GGO, KSG)
Annex 2 –Environmental, specifically climate impacts in the supply chain

Berlin, Germany, 25th April 2024

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[redacted]

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