10 May 2024

Comments of the Federal Republic of Germany on the communication from Deutsche Umwelthilfe e.V. to the Aarhus Convention Compliance Committee dated 10 July 2023

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Reference: ACCC/C/2023/203

On 22 August 2023, the Secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention - AC) forwarded a communication to the Federal Republic of Germany from Deutsche Umwelthilfe e.V. (communicant), which was received by the Compliance Committee of the Aarhus Convention on 10 July 2023.

The communication alleges non-compliance by the Federal Republic of Germany with its international obligations under Article 8 of the Convention in connection with public participation with respect to the draft amendment to the Climate Protection Act (Klimaschutzgesetz – KSG).

At its 80th meeting on 22 September 2023, the Compliance Committee determined, on a preliminary basis, the communication to be admissible in accordance with paragraph 20 of the annex to decision I/7 of 2 April 2004 (ECE/MP.PP/2/Add.8).

The Secretariat of the Compliance Committee invited the Federal Republic of Germany to submit any written explanations or statements by 12 May 2024 at the latest. With this present document the request has been fulfilled within the stipulated period.

In the following, the Federal Republic of Germany presents comments on the admissibility of the communication (in section I.) and on the individual allegations of the communicant (in section II.).

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

I. Comments on the admissibility of the communication

The Federal Republic of Germany has doubts concerning the admissibility of the communication.

As the Compliance Committee found in No. 1 to 5 of its preliminary determination of admissibility of 22 September 2023, the admissibility of a communication is to be judged in accordance with para. 20 and 21 of the annex to decision I/7. In addition, however, the other provisions of decision I/7 may not be disregarded, such as para. 19 of the annex to decision I/7.

In the opinion of the Federal Republic of Germany, the complaint must be deemed inadmissible with regard to both para. 20(b) and (d) as well as with regard to para. 19 in conjunction with 20 (d) of the annex to decision I/7.

Firstly, the communicant makes clear that it is not satisfied with the content of the draft amendment of the Climate Protection Act KSG as it repeatedly refers to a "functioning KSG" being currently in force with no need for an amendment (para. 4, 5, 24). This gives reason to believe that the communicant tried to use the communication – at the time of its submission, when the parliamentary legislative procedure was still pending – as a lever to challenge the intended amendment of the KSG. In view of this, the admissibility of the communication may be questioned with regard to para. 20 (b) of the annex to decision I/7.

Secondly, also after the preliminary determination of admissibility by the Compliance Committee, the Federal Republic of Germany is convinced that the communication refers to an individual incident and not to a systemic compliance deficit; this leads to its inadmissibility in accordance with para. 20 (d) of the annex to decision I/7 (Review of Compliance). As made clear by the Committee in case ACCC/C/2004/7[1], the compliance procedure of the Aarhus Convention is neither an institution to review individual cases of unsuccessful environmental litigation on the national stage, nor an individual redress mechanism. Insofar, after it firstly stated explicitly that its communication concerns the specific case of non-compliance of the Federal Government in its involvement of associations regarding the draft of the KSG amendment[2], the communicant tries to deny in its additional statement on the preliminary admissibility from 20 September 2023 that individual redress was the intention of the complaint and states that the individual case would allow the systematic conclusions for a systemic deficit.

[1] ACCC/C/2004/07 (Poland), Preliminary Determination on Admissibility, 24 September 2004, http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2004-07/C07admissibility.pdf, para. 4.
[2] Cf. para. 45 of the communication.

This is not convincing. With regard to § 47 of the Joint Rules of Procedure of the Federal Ministries (Gemeinsame Geschäftsordnung der Bundesministerien - GGO) the answer of the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (Bundesministerium für Umwelt, Naturschutz, nukleare Sicherheit und Verbraucherschutz – BMUV) on a request for environmental information in 2022 made clear, that these procedures are respected. The short response deadline set by the Federal Ministry of Economic Affairs and Climate Protection (Bundesministerium für Wirtschaft und Klimaschutz – BMWK) in the case of the KSG draft amendment is an incident that does not provide for the conclusion for a systemic compliance deficit in the German law and practice.

Thirdly, as stated by the Federal Republic of Germany in its comments of 19 September 2023 on the preliminary admissibility it is also a prerequisite for a communication that it is accompanied by corroborating information. The communication lacks such information about the alleged fact that the current case of the KSG draft amendment is more than an isolated incident and therefore it does not meet the requirements of para. 19 and 20 (d) of the annex to decision I/7.

Therefore, the Compliance Committee is kindly asked to reconsider its evaluation of the preliminary determination of admissibility and take into account the above-mentioned aspects more closely.

II. Comments on the individual allegations of the communicant

The Federal Republic of Germany has the following doubts regarding the merits.

1. Applicability of Article 8 to the preparation of legislation

In the understanding of the Federal Republic of Germany, Art. 8 AC does not apply to the drafting of legislation by the federal ministries to be adopted by parliament - thus also not to the individual case of the draft amendment to the KSG criticized by the communication.

However, the Federal Republic of Germany considers public participation of the public in general and associations in particular to be an important asset and is convinced that external input is a valuable and indispensable corrective in the preparation of draft legislation by the government that cannot be dispensed with. This applies in fact for all legislative drafts, not just those in the environmental field and thus irrespective of the applicability of Art. 8 AC.

a. Bodies acting in a legislative capacity

Art. 2 (2) AC expressly provides that the expression 'public authorities' as defined therein does not include bodies or institutions acting in a […] legislative capacity. However, contrary to the communicant's statement[3], this is precisely the case when a ministry drafts legislation to be adopted by the parliament. The preparation and tabeling of draft laws is part of the legislative procedure within the meaning of Art. 2 (2) sentence 2 AC. In the Federal Republic of Germany, this is in particular evident from the provision of Art. 76 para. 1 of the Basic Law (Grundgesetz) that states "Bills may be introduced in the Bundestag by the Federal Government, by the Bundesrat or from the floor of the Bundestag.". This means that the Federal Government does not only serve the parliament in providing a draft, but has its own right to initiate legislation. The line of argumentation in the findings to case ACCC/C/2014/120 cited by the communicant[4] is not convincing in this point; a restriction, as assumed therein, is not implied in Art. 2 (2) sentence 2 AC. The Federal Republic of Germany is by no means alone in this view. In the context of access to information in environmental matters, the European Court of Justice (ECJ)[5] has also held that the wording of Art. 2 (2) sentence 2 AC does not provide any indication that the legislative procedure is limited to the parliamentary procedure.[6] The ECJ also deemed it necessary with regard to Art. 2 (2) AC to apply a '*functional interpretation of the phrase 'bodies or institutions acting in a […] legislative capacity', according to which ministries which, pursuant to national law, are responsible for tabling draft laws, presenting them to Parliament and participating in the legislative process, in particular by formulating opinions, can be considered to fall within that definition*'[7], which means that the '*provision of not regarding 'bodies or institutions acting in a […] legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions*'[8].

The fact that a parliament is acting as a public authority when it is not acting in its legislative capacity but carries out other tasks such as the authorizing of activities or projects does not allow the reverse conclusion set out in the findings and recommendations to case

[3] Cf. para 35 of the communication.
[4] Cf. para. 34 of the communication, with reference to ACCC/C/2014/120 (Slovakia), Findings and recommendations, https://unece.org/sites/default/files/2021-10/ECE_MP.PP_C.1_2021_19_E.pdf, para. 98.
[5] Judgment of the ECJ of 14 February 2012,Case C–204/09 (Flachgas Torgau), no. 33 et seq.; Judgment of the ECJ of 18 July 2013, Case C-515/11, no. 19.
[6] Judgment of the ECJ of 14 February 2012, Case C–204/09 (Flachgas Torgau), no. 41.
[7] Judgment of the ECJ of 14 February 2012, Case C–204/09 (Flachgas Torgau), no. 49.
[8] Judgment of the ECJ of 14 February 2012,Case C–204/09 (Flachgas Torgau), no. 51.

ACCC/C/2014/120[9]. Clearly, such activities as the authorizing of projects do not fall under legislative activity. However, if the parliament prepares a draft law, there is no doubt that this preparatory process already falls under legislative capacity, not just the actual adoption in plenary. Judging this differently in the case that the preparation of the parliamentary legislative process is done by a ministry drafting the law would not be objectively justifiable.

Therefore, since the term 'public authority' according to Art. 2 (2) sentence 2 AC does not include ministries that prepare laws for adoption in parliament, Art. 8 AC is not applicable in the present case.

Finally, it has to be noted in this respect that in case ACCC/C/2014/120, the party concerned of that case, Slovakia, did not address the arguments against the applicability of Art. 8 and 2 AC, as it focused on the factual issues. In this respect, there is reason to revisit these issues, taking into account the aspects raised above. Additionally, from a formal point of view, it has to be noted that the findings of the Compliance Committee in case ACCC/C/2014/120 were only noted by the Meeting of the Parties in 2021, but not adopted, neither by Slovakia itself, nor by Germany, the European Union or other Parties of the Aarhus Convention. Therefore, with all due respect to the Compliance Committee, those findings cannot yet be assumed to be generally valid for the interpretation of Art. 8 AC.[10]

b. Executive regulations and other generally applicable legally binding rules

But even assuming that ministries are not already excluded with their preparation of laws to be adopted by parliament on the basis of Art. 2 (2) AC, Art. 8 AC still does not apply to the preparation of laws to be adopted by parliament. The wording contradicts this[11]. It does not seem plausible – also against the background of the argument that the term 'other generally applicable legally binding rules' was used because of the more general wording[12] – that something important such as a Parliament Act would not be explicitly mentioned alongside the 'executive regulations'. In contrast, it is obvious for the Federal Republic of Germany that the term 'other generally applicable legally binding rules' refers to other instruments that are comparable in rank to 'executive regulations', i.e. those that rank below a Parliament Act. Any other interpretation of the wording of Art. 8 AC would be contradictory to Art. 2 (2) AC – a

[9] Cf. ACCC/C/2014/120 (Slovakia), Findings and recommendations, para. 98.
[10] Cf. para. 10 of Decision VII/8 on general issues of compliance: https://unece.org/sites/default/files/2022-02/Decision_VII.8_general_eng.pdf.
[11] Cf. in this respect also the Judgment of the ECJ of 14 February 2012,Case C–204/09 (Flachgas Torgau), no. 36.
[12] Cf. ACCC/C/2014/120 (Slovakia), Findings and recommendations, para. 96.

circumstance that cannot be intentional, as the Aarhus Convention should be interpreted in such a way that it is free of contradictions.

Also the other case mentioned by the communicant in this respect[13], ACCC/C/2009/44, was not about a Parliament Act. The statement of the Compliance Committee in the findings and recommendations to that case that 'the scope of obligations under article 8 relate to any normative acts that may have a significant effect on the environment, which should be considered as including acts dealing with procedural matters'[14], referred to the fact that the party concerned in that case denied the applicability of Art. 8 AC to legal instruments that only concern procedural issues. The reference made in the findings and recommendations to case ACCC/C/2014/120[15] is therefore misleading.

This does not mean that the Federal Republic of Germany questions the fact that 'law' is and can be used as a kind of shorthand for 'other generally applicable legally binding rules' as also argued in in the findings to case ACCC/C/2014/120[16]. However, this can only refer to laws in a solely substantive sense and not to Acts of Parliament. Ministerial directives, for instance, are such laws in the substantive sense, generally applicable and legally binding, without being adopted by Parliament.

The distinction that ministerial directives and the like fall within the scope of Art. 8 AC and thus require public participation, whereas Acts of Parliament do not, is justified as a kind of public participation is guaranteed by the elected representatives of the people in parliament who pass the laws. In addition, it is possible for associations to submit statements to these members of the parliament and expert hearings are regularly held in the parliamentary committees during the legislative process.

In light of this, Art. 8 AC still would not apply in the present case even if it were assumed that Art. 2 (2) sentence 2 AC is not applicable.

2. No infringement of Article 8

Even if Art. 8 AC was applicable, it would not be violated by the Federal Republic of Germany. The complainant misjudges the standard of this provision.

[13] See para. 32 of the communication.
[14] Cf. ACCC/C/ 2009/44 (Belarus), Findings and recommendations, https://unece.org/fileadmin/DAM/env/pp/compliance/CC-33/ece.mp.pp.c.1.2011.6.add.1.e.pdf, para. 61.
[15] Cf. ACCC/C/2014/120 (Slovakia), Findings and recommendations, para. 97.
[16] Cf. ACCC/C/2014/120 (Slovakia), Findings and recommendations, para. 97.

The communicant cites the legal position of the Compliance Committee incorrect.[17] The decision of the Compliance Committee in case ACCC/C/2014/120 is reproduced by the communicant with the omission of important further passages. The Compliance Committee in fact formulates beyond what is quoted by the communicant: 'In concluding that article 8 of the Convention applies also to the preparation of legislation by parliaments, the Committee notes that that article 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 articles 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. In comparison with articles 6 and 7, article 8 gives the Parties greater leeway in deciding how to fulfil this obligation.'[18] The Committee thus reflects the prevailing view that Art. 8 AC is merely an "obligation to make efforts", which, unlike Art. 6 and Art. 7 AC, leaves the contracting party a greater leeway for implementation. The compliance with this 'obligation to make efforts' can only be refuted by a communicant in the case of serious violations.[19] The communicant will not succeed in providing such evidence.

As § 47 GGO and the exemplary statement of the BMUV, referred to by the communicant itself[20], show that the Federal Republic of Germany is making every effort to comply with Art. 8 AC and that the case of the KSG draft amendment is not the alleged evidence for a systemic deficit in the German law and practice. As confirmed by BMUV in 2022 in the cited response to a request for environmental information by the communicant, it is the rule for public participation regarding draft legislation that a comment period of four weeks is provided, which can be shortened to two or three weeks, taking into account the scope and complexity of the respective draft legislation; a further shortening of the participation period is possible in individual cases if there are special reasons for faster processing. The communicant acknowledges correctly that this exemption correspondents to Art. 9 (4) RU Regulation (EC) No 1367/2006 which implements the Aarhus Convention.[21] Circumstances may require certain legislative proposals to be implemented in a very short time, so that it is not possible to stipulate a strict deadline of three or four weeks for the participation of associations, and even a minimum deadline of one or two weeks may not be justifiable in certain cases of particular urgency. In

[17] Para. 31 et seq. of the communication.
[18] ACCC/C/2014/120 (Slovakia), Findings and recommendations, para. 103.
[19] Epiney at al, Aarhus Konvention (Commentary), 2018, Art. 18 AC, margin no. 4.
[20] Cf. para. 19 of the communication.
[21] Cf. para. 19 of the communication.

the last few years for example we have seen a pandemic, the Russian War against Ukraine and an energy crisis. In this respect, the flexibility granted by the GGO is indispensable.

The Federal Republic of Germany is firmly convinced that, in principle, a period of some weeks is appropriate to consult the associations on a draft law that and that exceptions on this principle with a deadline with less than two weeks should only be applied in cases of particular urgency in order to ensure that the valuable expertise of the associations can be given serious consideration in the preparation of draft legislation. Accordingly, the mentioned response of the BMUV, together with the provision of § 47 (3) sentence 2 GGO, illustrate all the more that the deadline set by the BMWK as the leading federal ministry in the case of the KSG amendment was an individual – yet permissible – case from which no conclusions can be drawn about the practice of the Federal Government in general and especially not about the practice of participating in draft legislation in the environmental sector, which is predominantly prepared under the lead responsibility of the BMUV.

The details in the communication regarding the participation of associations in the specific case of the KSG amendment – even if they may be correct – are details of just one specific individual case and thus of no evidential value for the allegation of a systemic violation of Art. 8 AC, the finding of which is due to the additional statement[22] the claimed objective of the communication. It might in the first place be questioned whether the BMWK could have given a deeper explanation for the deadline set in this individual case or even could have set a longer deadline, since in this individual case due to the particularities of the political process an imminent decision by the Federal Government with short preceding deadlines was necessary. Irrespectively of the aforementioned, this has no significance for a systemic view of the participation of associations in environmental legislation. Insofar as the communicant additionally refers to few other – not environmental related – individual cases by citing vague press releases to support its unfounded allegation[23], this is not even rudimentarily sufficient to draw the intended conclusions. In the current 20th legislative period, a total of 222 draft laws was submitted by the Federal Government to the Bundestag and Bundesrat by 29 February

[22] Additional statement from the communicant on the preliminary admissibility, 20 September 2023.
[23] Para. 48 and footnote 36 of the communication.

2024[24], at least 85 of those related to the environment[25]. In view of this total number of draft laws, it is incomprehensible how the communicant tries to construct a systemic deficit regarding the Aarhus Convention from the case of the KSG amendment and a few other non-environmental individual cases that were not further looked at. In such individual cases there can be specific reasons that require to shorten the usual deadlines to a minimum which is, as stated above, perfectly in line with the Aarhus Convention.

In this context, it is of course important that the participation of the associations is nonetheless not completely dispensed with, but that, as far as possible under the given circumstances, they are given the opportunity to comment – as happened in the individual case of the KSG amendment, in which the communicant was able to make the most important comments in a substantive statement that could be considered for the draft. In addition, the communicant and other associations were not only free to submit a further statement to the members of parliament responsible for the adoption of the law, as described above under section 1 b. The communicant was also represented at the expert hearing on the amendment to the KSG in the parliamentary committee for climate protection and energy, where its executive director (Bundesgeschäftsführer) was able to make detailed comments[26] that could be taken into account in the detailed consultations of the parliament.

To sum up, even if Art. 8 AC was applicable, it would not be violated in the present case.

III. Conclusion

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

In particular, the German procedure of association participation in the context of preparation of legislation by federal ministries does not violate Art. 8 AC. Apart from the facts that the Aarhus Convention is not intended to examine individual cases and that the case of the amendment of the KSG presented in the communication cannot provide evidence of a systemic deficit in the

[24] See Statistics on legislation - 20th legislative period, published by the Parliamentary Documentation of the German Bundestag, Status of the database: 28 March 2024 (https://www.bundestag.de/resource/blob/870008/3d6c2df3d70936c539acb72e5d61d6c8/gesetzgebung_wp20.pdf).

[25] See information of the Documentation and Information System for Parliamentary Materials of the German Bundestag (Dokumentations- und Informationssystem für Parlamentsmaterialien des Deutschen Bundestages - DIP): https://dip.bundestag.de/suche?f.wahlperiode=20&f.metatyp=Gesetze&f.sachgebiet=Umwelt&rows=25 .

[26] Minutes of the 85th meeting of the Committee on Climate Protection and Energy, Berlin, 8 November 2023 (https://www.bundestag.de/resource/blob/980562/bebe87755f9b0d4ea0ab5bb19554d224/Protokoll_85_Sitzung_oeA.pdf), p. 14, 23, 28 f, 33.

environmental legislation procedure, Art. 8 AC is not applicable on the preparation and tabeling of draft laws by federal ministries. The procedure is part of the legislative process within the meaning of Art. 2 (2) sentence 2 AC – the ministries are acting in a legislative capacity and thus not as a public authority within the meaning of Art. 8 and 2 (2) AC. Nevertheless, the Federal Republic of Germany attaches great importance to the participation of associations in the preparation of legislation - irrespective of the applicability of the Aarhus Convention in this regard.

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