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ACCC/C/2023/203 Germany

Comments in response to Party concerned's response to communication dated 10.05.2024

I. Introduction

1. On 10th May 2024, the Party concerned submitted its Response to our Communication, ACCC/C/2023/203, which concerns the participation of civil society and interest groups in the legislative process of amending Germany's central climate governance instrument, the Climate Protection Act (*Klimaschutzgesetz, CPA*) and which addresses the systematic failure of the Party concerned to comply with its obligations under article 8 AC.

2. The Party concerned questions the admissibility of the communication as well as the applicability of article 2, 8 AC to the preparation of draft laws by ministries and denies an infringement of article 8 AC.

II. Admissibility of the Communication

3. The Party concerned expresses doubts regarding the admissibility of the communication. This meets with incomprehension on our part. The communication fulfils the criteria set out in para. 20 of the annex to decision I/7[1].

[1] ECE/MP.PP/2/Add.8 (decision I/7), annex, para 20.

4. The communication does not constitute an abuse within the meaning of para 20 b) of the annex to decision I/7. The Party concerned argues that the communication was to be understood as political pressure against the amendment of the CPA.[2] This is not the case. Their statement refers to paragraphs 4, 5 and 24 of the communication. In these paragraphs, we argued that there was no urgency to legislate regarding the CPA. In this context, we have spoken of a "functioning KSG", because in our view the existence of a functioning law is an argument against the urgency of its amendment. This is relevant to the question of sufficient timeframes for effective participation within the meaning of article 8 sentence 1 letter a) AC. Our submission is therefore not an abuse of rights.

5. The communication also does not fall under para 20 d) of the annex to decision I/7. The Party concerned believes that the communication is an inadmissible attempt at an individual legal remedy. This is not the case. We have already clarified this several times:[3] The communication is not concerned with an individual statement relating to a past event, but with eliminating structural deficits in public participation in the context of the ministerial preparation of draft legislation. The communicant took an individual case as an opportunity to report it to the Committee. The individual case concerns the violation of article 8 AC in the ministerial decision on the preparation of the amendment of the CPA in 2023. It is permissible to submit any submission, referral or communication concerning compliance by Parties with their obligations under the Convention to the Committee for consideration. We have done this by reporting a specific case. At the same time, we presented the structural dimension, namely the short deadlines usually set by the ministries and the predominant lack of binding timeframes for public participation in the initiation of legislative amendments. Contrary to the assertion of the Party concerned, the aim of the communication is not an individual decision. We are striving for a structural improvement in the practice of the Party concerned in the context of governmental decisions on the initiation of legislative changes.

6. The absence of an abusive intention (defamation of the draft law) and of the attempt to use an individual remedy is also shown by the press release[4] issued by the communicator two days after the communication was sent. The press release describes the generally too short deadlines for public participation within ministerial preparations of legislative amendments and explains that these - structurally - hinder qualified participation and thus violate the Convention. The aim of the communicant is called: "to oblige the Federal Government to eliminate such short deadlines". The CPA is cited as the "most recent example" of this structural deficit. There is no discussion of the content of the draft bill - let alone any defamation.

7. Insofar as the Party concerned refers to the findings in the case ACCC/2004/7 (Poland)[5] and wishes to derive the inadmissibility of the communication from this, it is not convincing. In that decision, the communicator asked the Committee to recon-

[2] Federal Republic of Germany (Germany), Comments of the Federal Republic of Germany on the communication from Deutsche, case ACCC/C/2023/203, 10th May 2024.
[3] See e.g. DUH, Communication to the Aarhus Convention Compliance Committee, 10th July 2024, para. 12, 13; DUH, comments on Party concerned's statement on premiliminary admissibility, 20th September 2023.
[4] DUH, press release, 12th July 2023 (see annex to this document or https://www.duh.de/presse/pressemitteilungen/pressemitteilung/bundesregierung-blockiert-verbaendebeteiligung-bei-klimaschutzgesetz-deutsche-umwelthilfe-reicht-bes/).
[5] Aarhus Convention Compliance Committee, PRELIMINARY DETERMINATION ON ADMISSIBILITY OF COMMUNICATION CONCERNING WASTE DISPOSAL SITES IN POLAND (Ref. ACCC/C/2004/07), 24th September 2004.

sider a specific dispute. In contrast, we took a case of non-guaranteed public participation as an opportunity and forwarded it to the Committee to highlight a systematic deficit in public participation in the context of ministerial decisions on legislative change initiatives. We want to achieve a future improvement in the efforts of the Party concerned regarding it´s compliance with article 8 AC.

III. Applicability of article 8 AC to the preparation of draft laws by public authorities

8. Article 8 AC is applicable to the preparation of draft laws by public authorities.

9. The Party concerned assumes the opposite. It justifies its - erroneous - view with an incorrect understanding of the term "generally applicable legally binding rules" from article 8 AC, as well as with an incorrect interpretation of the term "bodies or institutions acting in a legislative capacity" from article 2 (2) AC.

III.I. Generally applicable legally binding rules / normative instruments

10. Parliamentary laws fall under the term of "generally applicable legally binding rules" within the meaning of article 8 AC. This follows from the wording of article 8 AC, as well as from the system and the purpose of the Convention.

11. The Party concerned claims that the wording "generally applicable legally binding rules" can only mean "laws in a solely substantive sense not Acts of Parliament".[6] We disagree with this. Why should that be the case? This interpretation is not apparent in view of the broad wording. The choice of words "generally applicable legally binding rules" (in the title of the article: "generally applicable legally binding normative instruments") is deliberately broad and includes any form of legislation - including Acts of Parliament. Article 8 AC addresses the preparation of "generally applicable legally binding rules". Ministries prepare drafts for parliamentary laws.

12. The systematic of the article confirms this understanding. Article 8 AC contains a comparison of "executive regulations" on the one hand and "other generally applicable legally binding rules" or "and/ or generally applicable legally binding normative instruments" on the other. If - as the Party concerned claims - article 8 AC only applied to executive regulations, the second part of the list would be meaningless. In this case, the term "executive regulations" would be sufficient.

13. A systematic examination of the Conventions neighbouring provisions supports our considerations. While article 6 AC covers concrete-individual measures, article 8 AC concerns measures with an abstract-general effect. The preparation of parliamentary Acts constitutes - in the case of the subsequent enactment of legislation - a measure with abstract-general effect.

[6] Germany, ibid., p. 6, para 3.

14. Finally, the meaning and purpose of the Convention as expressed in the recitals and in article 1 AC speak in favour of the presented interpretation. The Convention as a whole and article 8 AC are based on the idea of deliberative democracy according to Habermas.[7] According to this, the correctness and validity of state decisions and legal norms are reviewed by those persons who have knowledge of or an interest in the respective subject matter. This takes place through public participation. It strengthens a sense of ownership, social acceptance, harmonious social coexistence as a whole and community building.[8] In principle, these objectives apply to all government action, including for key elements such as the preparation of legislation. This idea is expressed in article 8 AC.

III.II. Bodies or institutions acting in a legislative capacity

15. Ministries that draw up draft legislation fall under the definition of an authority in article 2 (2) AC. They are not covered by the exception "bodies or institutions acting in a judicial or legislative capacity".

16. Ministries act as part of the government within the meaning of article 2 (2) AC when they prepare drafts for parliamentary laws. They act based on an executive decision and are hierarchically organised within the executive apparatus. Their decisions represent state decision-making procedures on the initiation of a legislative process. Typical state privileges, power relations, procedures and resources are utilised within ministerial decision-making procedures. In such procedures, there is a structural risk of non-transparent state action. This is where the Convention comes in and implements opportunities for public participation. Its purpose is precisely to link government accountability and environmental protection.

17. Article 2 (2) AC excludes parts of state authority - the legislative and judicial branches - from the definition of public authorities and thus from the scope of public participation. This does not apply to ministries that make decisions on the initiation of legislative amendments. The three powers of the state differ in nature and therefore have different relationships to public participation. The legislature - usually depicted in the parliament - is typically characterised by a more direct democratic legitimacy in comparison to the other state powers. According to the content of the Convention, the democratic decision-making process should take place "undisturbed" and should not necessarily involve the public. It should do so on a voluntary basis.[9] The judiciary should apply the law "undisturbed" by other state powers and political interests. A ministry - on the other hand - acts based on a hierarchical and bureaucratic decision. Its preparatory measures are not binding in the context of parliamentary legislation, but the cornerstones of "whether" a legislative initiative is taken and the direction in which it is steered do have a formative character for the subsequent legislative process. The convention sensibly addresses this hierarchised and bureaucratised - and

[7] Epiney, Aarhus-Konvention Handkommentar, 1. ed. 2018, Vor Artikel 6 – 8, para 1 with reference to: Holder, Environmental Assessment, 194 ff. and Schomerus, EurUP 2014, 196, 167 ff.
[8] Epiney, Vor Artikel 6 - 8 AC para 1 with reference to: Enserin in Public Participation in Environmental Decision-Making, 51 (55) and Arroyo Jiménez, JEEPL 2014, 232 (246 ff.).
[9] Aarhus Convention, Recital no. 11.

often non-transparent - part of government action that precedes the legislative process and provides opportunities for public participation.

18. The article of the German Basic Law cited by the Party concerned[10] cannot change this view. Article 76 (1) of the Basic Law specifies who is authorised to submit draft laws to the German legislature - the Bundestag. However, it is a different matter to *prepare* a *legislative process* by submitting draft laws and *to make law* in the exercise of legislative power. Metaphorically speaking: it is something else to draw up a proposal for building plans and actually realise the construction of a building, from the foundations to the roof. Normatively speaking: it is something else to prepare a criminal offence and actually carry it out. Different methods, resources and powers are used at different stages of these processes. They have different consequences and affect different groups of people. Transferring these ideas back: in a legislative process, executive powers are used at the stage of ministerial preparation of a legislative initiative and legislative powers at the stage of law-making.

19. Furthermore, there is no contradiction between article 2 (2) and article 8 AC. Article 2 (2) refers to which actors fall within the scope of the Convention. The norm excludes actors from the concept of public authorities when they act in the exercise of legislative power. Article 8 does not refer to actors, but to instruments - namely normative instruments. If all acts relating to normative instruments were always to be equated with the exercise of legislative power, there would indeed be a contradiction. Then the scope of application of article 8 would never be open. However, this is not the case. As we have shown, the preparation of a legislative act is qualitatively different from the act of law-making itself. If the preparation of a legislative act is carried out by public authorities - such as ministries - the scope of application of article 8 is open.

20. The comparison drawn by the Party concerned with draft legislation prepared by "the parliament"[11] is unconvincing. Firstly, what is meant by "the parliament"? The parliament itself will not propose a draft. What is meant is probably a proposal "from the centre of the Bundestag", i.e. from a group of MPs. Secondly, when the Party concerned claims that "there is no doubt that this preparatory process already falls under legislative capacity, not just the actual adoption", we disagree. This attribution to a state authority seems absurd to us: MPs are not agencies of the state, and certainly not authorities within the meaning of article 2 (2) AC. They themselves do not have sovereign authority but exercise an independent and free mandate. Only the Bundestag itself exercises legislative state authority as the result of a parliamentary decision-making process. The question of whether drafts "from the centre of the Bundestag" are subject to article 2 (2) AC therefore does not arise. However, just because legislative proposals from MPs are not based on the exercise of state authority, this does not apply to legislative proposals from ministries. Their decisions are part of hierarchised and bureaucratised state executive action and therefore under fall article 2 (2) AC.

[10] Germany, ibid., p. 4.
[11] Germany, ibid., p. 5, para 1.

III.III. Findings of the ACCC and contents of the Implemetation Guide to the Aarhus Convention to be considered in the interpretation of the Convention

21. The findings of the ACCC and the contents of the Implementation Guide to the Aarhus Convention confirm our understanding of the disputed terms. Both sources must be considered when interpreting the Convention.

22. The detailed procedure before the Committee, the comprehensive justification of the results and the MOP's endorsement of the findings allow them to be seen as an authentic interpretation of the Convention and are therefore relevant for its interpretation.[12]

23. The fact that parliamentary acts are to be subsumed under the term "generally applicable legally binding rules" has been determined by the Committee in various decisions. In the decisions on ACCC/C/2009/44[13] (Belarus) and ACCC/C/2011/61[14] (UK), this was done in passing and was not the focus of the discussions. Nevertheless, in the Belarus decision, the Committee already emphasised the broad scope of application of article 8 AC, which covers "any normative acts".[15] It confirmed this in the UK decision by assigning executive regulations or "*acts introducing legislative changes* applicable to all" to the scope of article 8 AC.[16] In the decision ACCC/C/2014/120[17] (Slovakia), the Committee discussed the question of the interpretation of article 8 AC in relation to ministerial preparations for legislative changes in detail. It considered various aspects and found that these preparations fall under article 8 AC.[18] In its decision, it also commented extensively on the question of the interpretation of the term "public authority" and supported the interpretation that we advocate.[19]

24. Article 31 (3) b) VCLT also speaks in favour of the relevance of the findings in the interpretation of the Convention. According to this provision, any subsequent practice in the application of an international treaty which shows the agreement of the parties on its interpretation must be considered in its interpretation. The Commission's findings constitute a subsequent practice in this sense.[20] The cited findings were not expressly rejected by the Contracting Parties. However, this would have been necessary to prevent a subsequent practice within the meaning of article 31 (3) b) VCLT.[21] Moreover, the aforementioned findings concerning Slovakia and the interpretation of article 8 AC set out therein was explicitly confirmed by the MOP7.[22] In

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[12] *Bunge* in Schlacke, Schrader, Bunge, Aarhus-Handbuch, 2. ed. 2019, p. 20.
[13] ECE/MP.PP/C.1/2011/6/Add.1
[14] ECE/MP.PP/C.1/2013/13.
[15] ECE/MP.PP/C.1/2011/6/Add.1, para. 61.
[16] ECE/MP.PP/C.1/2013/13, para. 52.
[17] ECE/MP.PP/C.1/2021/19.
[18] ECE/MP.PP/C.1/2021/19, para. 93 - 97.
[19] ECE/MP.PP/C.1/2021/19, para. 98 - 100.
[20] Epiney, ibid., Einführung, para. 36 with reference to: Treves, Non-Compliance Procedures and Mechanisms, 499 (509) and Jendroska, JEEPL 2012, 71 (75).
[21] Epiney, ibid., Einführung, para. 36 with reference to: Tanzi/ Pitea, The Aarhus Convention at Ten, 367 (380).
[22] ECE/MP.PP/2021/2/Add.1 (Decision VII/8 on general issues of compliance), para. 9.

this respect, we disagree with the submission of the Party concerned, which had claimed the opposite.[23]

25. The Party concerned argues that the findings in case ACCC/C/2014/120 were not adopted by individual Contracting parties.[24] We wonder: so, what? The Guide to the ACCC provides for the adoption of findings and recommendations by the Committee.[25] Adoption by Parties concerned is not envisaged as part of the compliance process: Neither article 14 AC nor the agreement of the Contracting States in Decision I/7[26] requires this. This objection is therefore irrelevant.

26. In addition to findings of the Committee, the Implementation Guide to the Aarhus Convention must be considered for the interpretation of the Convention.

27. Both the first and second edition of the Implementation Guide are clear: the preparation of draft legislation by ministries falls within the scope of article 8 AC. Article 2 (2) AC does not preclude this. This understanding is taken up, repeated and confirmed several times[27] and therefore does not constitute a drafting error. The Guide convincingly summarises as follows:[28]

> **Role of public authorities in the preparation of legislation**
>
> In many UN/ECE countries, the public authorities play a major role in the preparation of legislation that is then submitted to the legislative branch for consideration.
>
> Because the legislative bodies are the institutions competent for final adoption of the legal acts, with subsequent binding effect, the preparation of legislation by the public authorities cannot be considered as acting in a legislative capacity within the meaning of the Convention. Where public authorities drafting legislation will pass it on to a parliament or other legislative body, public participation while the drafts are under the auspices of public authorities does, in fact, constitute participation at an early stage.
>
> The operative principle is similar to the one behind article 6, paragraph 5, in that the early resolution of disagreements and the taking into account of legitimate concerns at a preliminary stage can help to prevent problems later. Once the draft legislation is out of the hands of the public authorities and passes to the legislature, it is no longer in "preparation" by a public authority and article 8 would no longer apply.

28. The background of the document shows its relevance for interpretation: The first edition was drafted for the UNECE in 2000. The document reflects the common understanding of numerous stakeholders on the interpretation of the Convention. Numer-

[23] Germany, ibid., p. 5 para 3.
[24] Germany, ibid., p. 5, para 3.
[25] UNECE, Guide to the Aarhus Convention Compliance Committee, 2nd ed., May 2019, p. 46, para 202, 203.
[26] ECE/MP.PP/2/Add.8 (Decision I/7), annex, para 35 ff.
[27] UNECE, The Aarhus Convention - An Implementation Guide, 1st ed., 2000, pp. 32, 34, 119, 120, 121; UNECE, The Aarhus Convention - An Implementation Guide, 2nd ed. 2014, pp. 49, 181, 182, 183, 184.
[28] UNECE, The Aarhus Convention - An Implementation Guide, ed. 1, p. 120; identical wording in ed. 2, p. 182.

ous individuals - belonging to different Contracting Parties -, NGOs and UN organisations worked together to produce it.[29] This included individuals who had been involved in the drafting process of the Convention.[30] The second edition was produced at the request of the MOP3.[31] The drafting process lasted from 2008 to 2014. National focal points and stakeholders were involved in three rounds of drafting (2010, 2011 and 2012). In short: The document was drafted for the UNECE by experts with the participation of the Contracting Parties. The relevant interpretation of the terms in dispute here is the same in both editions of the guide and the Contracting Parties have expressed their agreement with the content and continuation of the document in the decision at MOP3.

III.IV. Decision of the EJC "Flachgas Torgau" not binding for the interpretation of the Convention

29. The decision of the EJC[32] cited by the Party concerned does not contradict our submission.

30. The ECJ found that ministries were subject to the exception in article 2 No. 2 of Directive 2003/4 when preparing draft legislation, which, according to its wording, is very similar to the exception in article 2 (2) AC. Moreover, regarding article 8 AC, the ECJ rejects the interpretation presented by the Implementation Guide. It considers that the Implementation Guide cannot provide a binding interpretation of the Convention.[33] The findings are partly based on considerations of EU law and are not binding for the interpretation of the Convention. Decisions of member state courts can be considered when interpreting the treaty, but only the expressed will of the Contracting Parties is binding. We therefore address the ECJ's reasoning as follows:

31. They do not address the circumstance that the MOP3 expressed its confidence in the Implementation Guide in 2008 and thereby in fact legitimised it. The ECJ rejects the Guide without a dedicated discussion of its reasoning. This is not convincing.

32. It´s interpretation is not convincing in terms of content either. As the word "law" does not appear in article 8 AC, according to the ECJ parliamentary acts could not be covered.[34] We do not agree. A general term was chosen to do justice to the various legal systems of the Contracting Parties and to prevent an error-prone enumeration of individual legal terms. It is common practice in legal texts to choose general terms to cover generalisable individual cases. The term "law" in the sense of "parliamentary act" falls under the broad concept of "generally applicable legally binding rules".

[29] UNECE, The Aarhus Convention - An Implementation Guide, ed. 1, VII.
[30] UNECE, The Aarhus Convention - An Implementation Guide, ed. 1, IX.
[31] ECE/MP.PP/2008/2/Add.17 (decision III/9), annex I, p. 3.
[32] ECLI:EU:C:2012, "Flachgas Torgau".
[33] ECLI:EU:C:2012, "Flachgas Torgau", para 36.
[34] ECLI:EU:C:2012, "Flachgas Torgau", para 36.

33. Regarding article 2 (2) AC, there is no explicit statement by the ECJ. It refers solely to article 2 no. 2 of Directive 2003/4.[35] The considerations are based on a justification under Union law that is not useful for the interpretation of the Convention: After the ECJ, the Union legislator considers the special nature of legislative bodies. Thus, project approvals in the form of national legislative acts are exempt from the EIA obligation under Council Directive 85/337/EEC of 27 June 1985 (OJ 1985 L 175, p. 40).[36] According to the ECJ, this argues in favour of excluding ministries from the definition of public authorities when they prepare draft legislation. We find this statement not viable for the interpretation of article 2 (2) AC: Firstly, the Convention treats project approvals in the form of national legislative acts as decisions by the authorities.[37] There is no privilege for legislative bodies - in the form propagated by the ECJ - within the scope of the Convention. Secondly, the present case is about ministries, not about legislative bodies. Therefore, the comparison surprises us. Moreover, the ECJ understands "acting in a legislative capacity" as the entire process from a draft´s preparation, to the submission of a draft to parliament, to statements within the parliamentary decision-making process up to the decision of the parliament.[38] In our view, a distinction must be made between the *preparation* of a *draft* - to which article 8 AC refers literally - and the *making* of a parliamentary *law*.[39] Only the binding enactment of a law after the legislative act has been completed - but not preparatory acts by the executive - is to be understood as a legislative act. Ultimately, pursuant to the ECJ, it´s interpretation of the term "bodies or institutions acting in a legislative capacity" is necessary to ensure uniform application of the directive in the Member States.[40] This is not the case. The respective national law clearly defines who is authorised to legislate.

34. The ECJ's interpretation of article 2 and article 8 AC is therefore not to be followed. Moreover, this individual decision has not resulted in a permanent practice of the Contracting Parties. On the contrary: the second edition of the Implementation Guide, the findings in the cases ACCC/C/2011/61 (UK) and ACCC/C/2014/120 (Slovakia) and their confirmations by the MOP date back to the time after the ECJ decision.

IV. Non-compliance with article 8 AC

35. The Party concerned is in non-compliance with article 8 AC.

36. Accord to article 8 AC each Party must promote effective public participation. The Party concerned believes that a violation is only given in cases of serious violations due to the soft wording "promote".[41] This intensity is given.

[35] ECLI:EU:C:2012, "Flachgas Torgau", para 51.
[36] ECLI:EU:C:2012, "Flachgas Torgau", para 44.
[37] ECE/MP.PP/C.1/2013/13, ACCC/C/2011/61 (UK), para 54.
[38] ECLI:EU:C:2012, "Flachgas Torgau", para 49.
[39] See above, para 18.
[40] ECLI:EU:C:2012, "Flachgas Torgau", para. 50.
[41] Germany, ibid, p. 7, para 1.

37. Firstly, there is a lack of promotion of public participation through the adoption of normative measures. Only regarding one of its ministries the Party concerned argues that deadlines for public participation had been set. What about the others?

38. Secondly, effective public participation is not guaranteed in practice. An appropriate timeframe for ensuring effective participation will generally be at least four weeks, unless there is an urgent exceptional case or similar. Article 9 para 4 of EU Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention even provides for a period of eight weeks. The Party concerned indicates that it considers four weeks to be appropriate in principle.[42] Such time frames fall short by the Party concerned in a structural manner. This has been demonstrated by the comprehensive and impressive research carried out by Green Legal Impact[43], for which we would like to express our thanks and to which we refer.

39. Considering the above, we call on the Party concerned to endeavour to ensure effective public participation within the meaning of article 8 AC by setting sufficient timeframes *in all areas* of regulatory preparation and ensuring *compliance with these timeframes*.

V. Supporting documents (copies, not originals)

40. A copy of the following document is supplied in support of the communication:

- Press release from the communicator dated 12th July 2023

Professor Dr. Remo Klinger
Lawyer

[42] See Germany in annex no. 6 to the Communication (10th July 2023).
[43] GLI, statement, 2th May 2024, Amicus Curiare Brief concerning the complaint ACCC/C/2023/203, p. 9 ff.