Ms. Fiona Marshall

Secretary to the Compliance Committee
of the Aarhus Convention

United Nations Economic Commission for Europe
Environment Division
Palais des Nations
8-14 avenue de la Paix
1211 Geneva 10,
Switzerland

Re: Communicant's comments to the revised draft findings and recommendations with regard to communication ACCC/C/2013/92 concerning compliance by Germany

Dear Ms Marshall,

Thank you for forwarding the revised draft findings and recommendations with regard to communication ACCC/C/2013/92 concerning compliance by Germany. The communicant`s comments are based on Jan Haverkamp as expert and advisor.

1. The ACCC states it took into account new information described in paragraphs 35 and 36. However, from paragraph 91 and 93 it appears that the ACCC also took into account new information that the United Kingdom demanded it could give its development consent by no later than 19 March 2013.

2. This information should have been be irrelevant for the revision of the draft findings as it is not related to the events described in paragraphs 35 and 36. Its relevance is basically refuted by these two paragraphs: the events described there illustrate that potentially affected Parties under Espoo have the right to demand notification irrespective of procedural domestic deadlines in the Party of Origin.

3. The Espoo Convention in itself does not know any restrictions to when a potentially affected Party can invoke art. 3(7) Espoo. Art. 3(7) states: *"When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article [...]"*. It is clear from this formulation that the only criterion is "When a Party considers that it would be affected" - it does not state that this has to happen before any deadline. And indeed, par. 35, 36 and 93 of the ACCC draft findings also confirm that it was legitimate that the affected Party accepted notification and requested participation in the procedure far after the above mentioned deadline of 19 March 2013.

4. It is furthermore beyond doubt that for this possibility of public participation mentioned here above, also art. 6(4) of the Aarhus Convention is valid – that is that all options need to be considered open.

The risk of not notifying other Parties and potential consequences for all related procedures therefore clearly lays with the Party of Origin. In this case, by failing to notify potentially affected Parties of its intention to license construction of an ultra-hazardous activity, the UK took the risk that if another Party would at some moment discover it might be affected, it would have to adapt its procedures and time tables under domestic law, or even risk certain obligatory deadlines not be met with the potential consequence of nullifying earlier steps.

5. For that reason, the deadline of 19 March 2013 that the UK set, should not have been an argument in establishing whether Germany could or could not have reasonably endeavoured to take steps to notify the UK of its desire to be included. Yet, the ACCC states in par. 93: *"[…] and bearing in mind the factual circumstances of the case, in particular the awareness of the Party concerned that the decision on Hinkley Point C NPP was required to be taken in less than three weeks. [...]".* We argue here that this should have been irrelevant to the Party concerned (i.e. Germany) given the fact that art. 3(7) Espoo does not allow for a time limit on the possibility to ask for notification.

6. By bringing in this argument, the onus of being informed about the possibilities for public participation are implicitly laid on the communicant and on the Party concerned, whereas this should be on the shoulders of the Party of Origin. The communicant took steps as soon as she received her information. The Party concerned could and should have reacted on that by endeavouring to facilitate access to public participation, no matter what time-table information it further received from the Party of Origin.

7. When the ACCC would accept the argumentation of time limitation as one of the reasons to accept a negative outcome of the Party's "endeavour", it would introduce the potential to set time-limits under art. 3(7) Espoo implementation that were not intended under that Convention, nor under the Aarhus Convention – and indeed in this case was not accepted as argument by the Espoo Convention Implementation Committee.

8. In this case, if the UK as Party of Origin would have missed a hard deadline enshrined in its domestic legislation because of a request for notification by potential Affected Party (i.e. Germany), and missing this deadline would have nullified the previous procedure and hence would have halted and suspended the start of construction work, the situation would have been clearer than it is now. Now, the Party of Origin was requested by the Espoo Convention Implementation Committee as reported in its 38th session from 20 to 22 February 2017 *"to ask its Chair to write to the United Kingdom inviting it to consider refraining from carrying out works at the proposed activity until it established whether notification was useful. The Committee also decided to recommend to the Meeting of the Parties that if a potentially affected Party requests to be notified, the United Kingdom should suspend works related to the proposed activity until the transboundary EIA procedure is finalized."* Hereby it has to be noted that not all options are open any longer, because of construction work already undertaken (and still ongoing in spite of the Espoo Implementation Committee request).
   For the sake of clarity, we like to argue that the fact that there is no time-limit set for potentially affected Parties – and under Aarhus more importantly for the potentially affected public – to be included in a transboundary public participation procedure in an EIA, is an important instrument i) to prevent sloppy procedures, and ii) to secure the right of the public to request public participation concerning protection and action towards protection no matter other procedural constrains. It is reasonable to lay the

responsibility of proper procedure on the shoulders of the Party of Origin and not on that of the potentially affected public or potentially affected Parties.

9. The Party concerned (Germany) for that reason should in our view:
   i) already have taken the step of requesting notification directly after it became aware that Austria had done so and taking into account the large interest among the public in Germany in the proposed ultra-hazardous activity planned in the UK;
   ii) when not doing so, at least endeavour to translate the request by the communicant towards steps for a request for notification as soon as it was informed about the situation by the communicant, irrespective of any time-limits set by the Party of Origin (the UK), thus endeavouring to secure public participation for its citizens.

10. Because the presumed lack of time is the argument that makes for the ACCC the difference in deciding whether the Party concerned "endeavoured to ensure" public participation, and this argument objectively does not exist, the Party should have endeavoured to obtain notification directly after being informed by the communicant and therefore should be considered at that time in non-compliance with the Aarhus Convention art. 3(2) when failing to do so.

11. It would give a wrong signal when the assumed time limitation until 19 March 2013 would be accepted as argument for the determination whether the endeavouring was strong enough or not.
    We request therefore that the ACCC removes that part of the argumentation and accepts there is no time-limit for potentially affected Parties under the Espoo Convention to invoke art. 3(7) Espoo.

In this context the communicant would like to remind, that the Party concerned told the communicant in its response letter, dated on the 27 March 2013[1] *"Following there has been neither notifying by Britain of the neighbor states of France and Ireland, nor of any other member state of the European Union." (…)* and *"The German Government sees no reason (…)"* The communicant had no other information from the Party concerned than this. It was the reason for the communicant`s complaint.

The Party concerned had more knowledge at this time. *"(…) and bearing in mind the factual circumstances of the case, in particular the awareness of the Party concerned that the decision on Hinkley Point C NPP was required to be taken in less than three weeks,(…)", para 96, and Letters from Austria, para 91.*

The party concerned is not in compliance with art. 3.2 *(shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information…[...]…facilitating participation in decision-making…*), with knowingly giving the communicant less information than it possessed at the time, which was, moreover, incorrect. The Party concerned withheld information that needed public participation and discussion (see 1-11 above). These facts indicate that there truly no such *"endeavour to ensure".*

[1] The letter from the Party concerned to the communicant was annexed to the first communication to the ACCC.

Para 95, art. 4.7. – For clarity: In 2013 Mr Peter Altmeier was the Minister in the German Federal Ministry for the Environment. He was one of the submission-lists` addressees.[2] The others were the United Kingdom and the European Commission.

Kind regards,

Ms. Brigitte Artmann,
Marktredwitz, Germany
12.06.2017

[2] Submission EIA Hinkley Point C - 25.02.2013
URGENTLY SENT TO ALL THREE ADDRESSEES
3. Peter Altmeier, BMU, Stresemannstraße 128 – 130, 10117 Berlin, Telefax: 030 18 305-4375,
service@bmu.bund.de (A submission-list was annexed to the first communication to the ACCC.)