

BAUMANN RECHTSANWÄLTE - Partnerschaftsgesellschaft mbB  
Annastraße 28 ■ 97072 Würzburg

Ms Fiona Marshall  
Secretary to the Compliance Committee  
Aarhus Convention Secretariat  
Environment Division  
Room 429-2  
United Nations  
Avenue de la Paix  
CH-1211 Geneva 10  
Switzerland

Ihr Zeichen

Unser Zeichen  
95A/05-WB/ts

Datum  
22. Mai 2015

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**Communication to the Aarhus Compliance Committee  
ACCC/C/2015/125**

**Joinder of additional communicants; further reasons in support  
of the communication's admissibility**

Dear Ms Marshall,

1. we are writing to inform you that two additional communicants have now joined Communication ACCC/C/2015/125, and to provide additional reasons in support of the Communication's admissibility.

**I. Joinder of additional communicants**

2. We have been instructed by:  
Brothers Hört Society (*Gebrüder Hört GbR*)  
Messrs Axel and Franz-Jürgen Hört (*Herren Axel und Franz-Jürgen Hört*)  
Am Hochweg 1  
67165 Waldsee  
Germany,

to inform the Committee that Messrs Axel and Franz-Jürgen Hört have joined communication ACCC/C/2015/125 as additional communicants. Messrs Hört are two individuals resident in Germany who form an unincorporated society in accordance with the German Civil Code.

**BAUMANN RECHTSANWÄLTE**  
Partnerschaftsgesellschaft mbB

Partnerschaftsregister Nr. PR 90,  
AG Würzburg

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Thus they are members of the public within the meaning of Article 2, paragraph 4 of the Convention.

3. We feel we should mention at this point that Messrs Hört, like Altrip municipality, are currently involved in domestic litigation about the the planning approval decision for a flood retention scheme on the Upper Rhine. However, the domestic case and the present Communication have different subject matters. The domestic litigation is about the legality under domestic and EU law of the planning approval decision. By contrast the present communication is concerned with the compatibility of German administrative and procedural law with the Convention. For this reason the domestic litigation conducted by Messrs Hört should not be considered an 'effective and sufficient means of redress' within the meaning of paragraph 21 of the Annex to Decision I/7.

## II. Additional reasons in support of the communication's admissibility

4. We take this opportunity to explain in greater detail the role of Altrip municipality in the context of procedures for the approval of projects within the meaning of Article 6, paragraph 1 (a) and Annex I of the Convention, so as to provide additional support for our view that Altrip municipality for purposes of these procedures and of communications relating to these procedures is a member of the public.
5. Firstly, Altrip municipality lacks any decision-making power with regard to Annex I projects. This is because German law allocates the relevant decision-making powers to other public authorities than municipalities. More specifically, the permits regime for projects within the meaning of Nos. 1 – 7, 15, 16, 18 and 19 of Annex I to the Convention is set out in sections 5 et seq. of the Bundes-Immissionsschutzgesetz (Federal Immission Control Act). The Rhineland-Palatinate State Regulations about Administrative Competences in the Area of Immission Control, Law Gazette 2002, p.280 (*Rheinland-Pfälzische Landesverordnung über Zuständigkeiten auf dem Gebiet des Immissionsschutzes*, GVBl. 2002, 280) states that it is the State Directorate for Structure and Permitting (*Struktur- und Genehmigungsdirektion*) which shall have the power to grant permits for installations subject to the Bundes-Immissionsschutzgesetz permits regime. Similarly, the Air Traffic Act (*Luftverkehrsgesetz*), sections 8 et seq., make the construction of airports within the meaning of No. 8(a) of Annex I of the Convention subject to a requirement for planning approval decision. The Rhineland-Palatinate State Regulations about Administrative Competences under the Air Traffic Act and Air Security Act, Law and Ordinance Gazette 1992, p82 (*Landesverordnung über Zuständigkeiten nach dem Luftverkehrsgesetz und dem Luftsicherheitsgesetz*, GVBl. 1992, 82) states that it is the State Agency for Highways and Traffic Matters (*Landesamt für Straßen- und Verkehrswesen*) which shall be the competent authority for the execution of the state's tasks under the Air

Traffic Act, including the issuance of planning approval decisions. Similarly, according to the Rhineland-Palatinate State Regulations about Administrative Competences in the Area of Highways Law, Law and Ordinance Gazette 1998, 426 (*Landesverordnung über Zuständigkeiten auf dem Gebiet des Straßenrechts*, GVBl. 1998, 426), it is the State Enterprise 'Highways and Traffic' (*Landesbetrieb Straßen und Verkehr*) which shall have the power to grant planning approval decisions for highways within the meaning of No. 8(b), (c) of the Convention. As regards major railway lines (No. 8(a) of Annex I of the Convention), it is the Federal Railways Agency (*Eisenbahn-Bundesamt*) which shall have the power to issue the requisite planning approval decisions (s. 3, subsection 1 of the Railway Traffic Administration of the Federation Act, Federal Law Gazette 1993, p2378 – *Gesetz über die Eisenbahnverkehrsverwaltung des Bundes*, BGBl. 1993, 2378). In sum, Altrip municipality lacks any decision-making powers with regard to permits or planning approval decisions for projects within the meaning of Article 6, paragraph 1(a) and Annex I of the Convention.

6. Secondly, any land use and development plans Altrip municipality might adopt under the Building Code (*Baugesetzbuch*) can in the context of Annex I projects be effectively overruled.
7. Section 5, read in combination with section 1, subsections 2 – 3 of the Building Code, authorizes municipalities to adopt a Land Use Plan (*Flächennutzungsplan*). Pursuant to section 7 of the Building Code, other public authorities are required to adapt their own plans to the Land Use Plan, unless they objected to the Land Use Plan prior to its adoption by the municipality. Thus other public authorities such as those charged with granting planning approval decisions for major infrastructure projects can evade any legal effects of a municipal Land Use Plan simply by filing an objection.
8. The Land Use Plan also has relevance for the approval of development outside built-up areas. This is the consequence of section 35 of the Building Code. Subsection 1, clause 4 of this provision states that '*any project which, owing to its specific requirements on its surroundings, to its adverse impact on its surroundings, or to its special purpose, should only be carried out outside built-up areas shall be permissible in the absence of overriding considerations of the public interest.*' Subsection 3, clause 1 states that considerations of the public interest exist, where a project is incompatible with the content of the Land Use Plan.
9. Section 8, read in combination with section 1, subsections 2 – 3 of the Building Code, authorizes municipalities to adopt binding development plans (*Bebauungspläne*). In accordance with section 30 subsection 1 of the Building Code, 'any project complying with the provisions of a Development Plan which regulates the manner and the extent of development shall be permissible within the plan's area of application.'
10. However, any legal effects of municipal Development Plans fail to cover major projects within the meaning of Annex I of the Convention. This is the

result of section 38 of the Building Code which reads:

*'Sections 29 to 37 [of the Building Code] shall not apply to planning approval decisions or other approvals having the legal effect of a planning approval decision for projects of supra-local importance or to permits under the Federal Immission Control Act for publicly accessible waste disposal facilities, provided the municipality has been consulted; aspects of land use and development planning shall be taken into consideration.'*

11. The Federal Administrative Court has held that this provision removes any binding effect of municipal Development Plans otherwise would have had in the context of planning approval decisions. What the administrative agency charged with deciding about planning approval must do, though, is take the municipality's plans into consideration when striking a balance between the various interests affected by the project. However, the agency is free to conclude that considerations in support of the project outweigh the importance of the municipality's plans, provided that this conclusion is not based on a disproportionate balancing of the relevant interests (Federal Administrative Court, judgment of 11 April 1986 – BVerwG 4 C 51.83, 74 BVerwGE 124, 132 et seq.; order of 13 December 2006 – BVerwG 4 B 73.06; judgment of 24 November 2010 – BVerwG 9 A 14.09 –, at para. 34). Thus municipal Land Use Plans and Development Plans can in the context of decisions to approve projects within the meaning of Annex I of the Convention effectively be overruled, provided that the municipality has been heard.
12. For these reasons, municipalities such as Altrip in the context of approval decisions for Annex I – projects and subsequent litigation to challenge such approval decisions are in the same position as any other member of the public. Consequently, for purposes of Articles 6 and Article 9 of the Convention, and for purposes of submitting a Communication claiming infringements of these articles, municipalities should be considered members of the public.
13. For the reasons stated above, we request the Committee to reverse its preliminary decision on the admissibility of Communication ACCC/C/2015/125 and to rule this Communication admissible.

Sincerely



Wolfgang Baumann

Accredited Administrative Law Specialist  
(on behalf of Professor Dr. Christian Heitsch)